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STATE OF WASHINGTON  
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NO. \_\_\_\_\_

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 57738-7-I)

STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 JUL 19 AM 10:57

PETITION FOR DISCRETIONARY REVIEW

TO THE SUPREME COURT OF WASHINGTON

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**A. IDENTITY OF PETITIONER**

Bayani John Mandanas petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 (a)(1) and RAP 13.4(b).

**B. COURT OF APPEALS DECISION**

Mr. Mandanas seeks review of the Court of Appeals' decision dated June 18, 2007, affirming his conviction for one count of Assault in the Second Degree and one count of Felony Harassment, with deadly weapon enhancements as to each count.<sup>1</sup> A copy of the decision is attached as Appendix A.

**C. ISSUES PRESENTED FOR REVIEW**

1. Did the court err in concluding that the two gun enhancements that were returned by the jury based on related offenses involving the "same criminal conduct" must run consecutively?

2. Did the trial court commit plain error by utilizing a generalized instruction that did not adequately, or accurately, describe the law of self-defense?

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<sup>1</sup> The Court of Appeals remanded the case for resentencing after concluding that the two counts of conviction constituted the "same criminal conduct" under RCW 9.94A.589(1)(a).

3. 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?

4. Did the trial court commit plain error by failing to instruct the jury that a person, such as the Petitioner, (a) may defend himself against an apparent injury or danger even if mistaken and (b) has no duty to retreat before using force in self-defense?

5. Did the trial court violate Appellant's right to a unanimous verdict by failing to utilize a unanimity instruction as required by *State v. Petrich*?

**D. STATEMENT OF THE CASE<sup>2</sup>**

Petitioner, Bayani John Mandanas, was charged by information, filed on 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.

These charges stemmed from a December 2004 altercation between Mr. Mandanas and Carlos

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<sup>2</sup> The facts are further set forth in the Court of Appeals opinion, pages 1-4, Appellant's Opening Brief, pages 5-14. The facts as outlined in each of these

Padilla. The parties presented sharply conflicting descriptions of this confrontation. According to Mr. Mandanas, Mr. Padilla attacked him as Mr. Mandanas was returning from the bank. Mr. Mandanas claimed that he had no ill-will towards Mr. Padilla, that he never threatened him and that he was only attempting to protect himself due to Mr. Padilla's assaultive conduct. According to Mr. Padilla, Mr. Mandanas initiated this confrontation by punching Mr. Padilla, without provocation, assaulting him and threatening him with a gun.

At trial, Mr. Mandanas attempted to raise a claim of self defense. For some unknown reason, defense counsel failed to prepare any jury instructions. Without counsel's assistance,<sup>3</sup> the Court ultimately gave two generalized self-defense instructions. See CP 73-74. The Court did not give any instruction pursuant to *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

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pleadings is incorporated by reference herein.

<sup>3</sup> The State presented instructions, but none in regards to the right to self-defense. See CP 77.

After trial, the jury returned verdicts of guilty as to both counts and rendered a finding that Mr. Mandanas was armed with a firearm during the commission of these offenses. See CP 78-81. The trial court sentenced Mandanas to three months on each count, enhancements 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.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**1. The Lower Courts Erroneously Ruled that Additional Sentence for Each Weapon Enhancement Must Run Consecutive to Each Other, Even though it Was Clear that the Underlying Offenses Constitute the "Same Criminal Conduct"**

**a. Statutory Construction**

RCW 9.94A.533 provides that, as a general matter, all firearm enhancements are mandatory and consecutive "for all offenses sentenced under this chapter." In *State v. DeSantiago*, 149 Wn.2d 402, 423, 68 P.3d 1065 (2003), this Court concluded that a previous version of this statute

allowed the same offense to be enhanced more than once for each weapon used. See *id.*

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 amount to the "same criminal conduct" under RCW 9.94A.589(1)(a). The Court of Appeals concluded that all enhancements require consecutive sentences, "even with a finding of same criminal conduct." App. A at 20.

The lower courts ignored the cardinal principle that a statute should not be given an interpretation which would make it an absurdity when it is susceptible to 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). Under CrR 4.3, the State is permitted to charge a defendant with multiple offenses - and

multiple alternative offenses - based upon the same transaction and occurrence.

Here, by way of example, the State could have charged Mr. Mandanas with numerous counts of assault - attempting to obtain a guilty verdict for each blow and each threatening gesture. Due to the limitations regarding "same criminal conduct," the judge could not impose an increased sentence based on each particular count of conviction. Yet, if this Court was to acquiesce to the lower courts' interpretation of RCW 9.94A.533, a sentencing judge would be required to impose consecutive, mandatory terms for each firearm enhancement that is associated with each one of these numerous counts.

Another example helps to further illustrate the absurdity of this position. If a defendant fires a single gunshot and seriously injures another person during the course of an argument, the State could charge a defendant with numerous alternative offenses: assault in the first

degree (with intent to kill), assault in the second degree (with a firearm), assault in the third degree (reckless conduct), assault in the fourth degree, felony harassment, harassment, unlawful display/discharge of a weapon, reckless endangerment and perhaps other offenses. In addition, the State could "stack" firearms enhancements and allege that the defendant was armed with a firearm during everyone of these named offenses. Assuming that neither party requests a lesser-included offense instruction (as in WPIC 4.10), the jury could return verdicts on each of the alternative charges. Clearly, the legislature did not intend for the imposition of consecutive terms for every firearm enhancement that could conceivably be charged due to a single event or episode.

Minimally, this Court should conclude that this provision is ambiguous in these circumstances. The rule of lenity applies to resolve ambiguities in favor of the defendant,

absent clear legislative intent to the contrary. See, e.g., *State v. Lewis (In re Charles)*, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998).

Petitioner has located 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, 85 P.3d 979 (2004). The *Callihan* court provided little in the way of analysis to support its conclusion. Instead, it simply announced that RCW 9.94A.310 (a previous version of this same statute) unambiguously requires consecutive sentences for each enhancement.<sup>4</sup>

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<sup>4</sup> 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).

**b. Constitutional Concerns**

The jeopardy clauses of the federal state constitutions 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 Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). In *State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981), this Court concluded that the imposition of multiple enhancements would not constitute double jeopardy where "the two enhanced crimes are quite different both physically and chronologically." *Id.* at 636.

Here, by contrast, the assault and harassment occurred during the same "segment of time" and, as noted above, these offenses were inextricably intertwined. Moreover, the evidence required to support conviction of the assault offense would most certainly have been sufficient to support a conviction for felony harassment.

2. The Trial Court Failed to Adequately Instruct the Jury as to the Elements of Self-Defense.

a. Instruction 11 (WPIC 17.02)

WPIC 17.02, based upon RCW 9A.16.020, is the prototypical self-defense instruction used "for any charge other than homicide, or attempted homicide." In *State v. Bland*, 128 Wn.App. 511, 116 P.3d 428 (2005), the Court of Appeals recognized 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.<sup>5</sup>

Here, however, the Court of Appeals concluded that *Bland* would not apply and reasoned that in *Bland* the defendant claimed defense of property, whereas here Mandanas claimed defense of self, which requires fear of injury to oneself. See App. A at 12. According to the

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<sup>5</sup> The WPIC Committee is in the process of modifying WPIC 17.02 in order to address the concerns raised in *Bland*.

Court of Appeals, if the word "or" was inserted, Mandanas could have invoked self-defense when preventing or attempting to prevent harm without a reasonable belief of injury. See *id.* at 13.

**b. Instruction 12 (WPIC 16.05)**

The Court of Appeals also concluded: "In non-homicide cases, a defendant cannot use more force than necessary in defense of self." App. A at 13. Thus, the court determined that the trial court properly used the instruction found at WPIC 16.05 (defining "necessary").

The Court is mistaken. This instruction is based upon RCW 9A.16.020 and it is clear that the term "necessary" modifies only that portion of the statute relating to malicious trespasses or malicious interference with real or personal property. This makes sense in that the legislature intended to impose additional requirements and limitations when a citizen is protecting his property, as opposed to defending his person from an offense or injury.

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 there is no duty to retreat. See WPIC 17.05. Moreover, in the context of WPIC 17.02, the State is free to argue, or the jury to find, that a "reasonably effective alternative" would be to "turn the other cheek," or to take a beating instead of using reasonable force. Or perhaps the victim must attempt another alternative before employing force, such as calling 911.<sup>6</sup>

WPIC 16.05 also includes the vague and incongruous requirement that "the amount of force used was reasonable to effect the lawful purpose intended." This provision conflicts with the third paragraph in WPIC 17.02. Finally, the instruction fails to explain that the State has the burden to

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<sup>6</sup> 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.

prove the force was not necessary.

**c. Failure to Give Instructions**

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.* Such an instruction is required by *State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977).

Similarly, the trial court clearly erred in failing to instruct the jury that a person has absolutely no duty to retreat before using force. See, e.g., WPIC 17.05; *State v. Redmond*, 150 Wn.2d 489, 494, 78 P.3d 1001 (2003); *State v. Williams*, 81 Wn.App. 738, 916 P.2d 445 (1996).

**d. Prejudice**

Where instructions are inconsistent and such inconsistency is a misstatement of law, "the misstatement must be presumed to have misled the

jury in a manner prejudicial to the defendant.”  
*State v. Wanrow*, 88 Wn.2d 221, 238, 559 P.2d 548  
(1977). See also *State v. Carter*, 127 Wn.App.  
713, 718, 112 P.3d 561 (2005). Here, Mr.  
Mandanas’ defense was undermined by the trial  
court’s instructions, and its failure to properly  
instruct the jury on these core principles.

In analyzing the effect of the erroneous  
instruction on the outcome of the trial, it must  
first be recognized that Instruction 11 told the  
jury that lawful force required a person to  
reasonably believe “that he [was] about to be  
injured in preventing or attempting to prevent an  
offense against the person and when the force  
[was] not more than necessary.” This erroneously  
required the jury to find two elements, in  
conjunction with each other, in order to find  
self defense:

1. A person reasonably believing that  
he is about to be injured “in”  
preventing or attempting to  
prevent an offense against his  
person; and,

2. That the force used was not more than necessary.

The first requirement<sup>7</sup> would be totally incomprehensible to the average juror given the lack of the conjunction "or" and lack of punctuation. Instead of giving the jury different criteria when force could be used, depending on the facts of the case, the criteria were lumped together into one so that Mandanas had to show much more to establish self-defense than if a correct instruction had been given.

Moreover, even if the jury had believed Mr. Mandanas' testimony that he was attacked by Mr. Padilla, it could have nevertheless rejected his self-defense claim and convicted him by finding that the force he used was not "necessary" as that term was erroneously defined in Court's instruction 12.

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<sup>7</sup> This is found in the second paragraph of Court's Instruction No. 11.

3. **The Trial Court Clearly Erred in Failing to Give any Petrich Instruction**

In Washington, an accused has the constitutional right to a unanimous jury verdict. See *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). 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).

a. **Multiple Acts**

Here, the State charged Mr. Mandanas with two separate offenses in regards to the incidents: assault in the second degree and felony harassment. Although the State presented evidence regarding multiple acts - each of which could have supported conviction on the charged

offenses - 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.<sup>8</sup>

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<sup>8</sup> Likewise, Mr. Mandanas testified as to two distinct

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.

Under these circumstances, the trial court clearly erred in failing to give any *Petrich* instruction. See, e.g., *State v. Hanson*, 59 Wn.App. 651, 659, 800 P.2d 1124 (1990).

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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.

**b. Alternative Offenses**

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). Here, the trial court instructed the jury on two different prongs of the assault statute - battery and common law assault - but gave no *Petrich* instruction.

Petitioner maintains that there was insufficient evidence for a conviction under the battery prong of the statute. Although there is evidence that Mr. Mandanas struck Mr. Padilla with a gun, 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

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to make every physical striking with a firearm - what the prosecutor euphemistically described as a "nontraditional" use<sup>9</sup> - a Class B felony.

**F. CONCLUSION**

For the foregoing reasons, this Court should accept review under RAP 13.4(b).

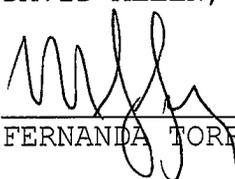
DATED this 11<sup>th</sup> day of July, 2007.

Respectfully submitted,

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<sup>9</sup> 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.

**PROOF OF SERVICE**

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

On the 12<sup>th</sup> day of July, 2007, I deposited for mailing, postage prepaid, first class, one true copy of Petition for Discretionary Review directed to:

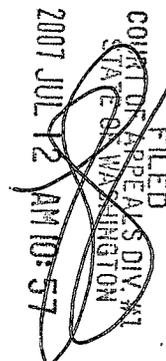
Lee Yates, DPA  
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And to Petitioner:

John Mandanas  
15866 36<sup>th</sup> Ave. NE  
Lake Forest Park, WA 98155

DATED at Seattle, Washington this 12<sup>th</sup> day of July, 2007.

  
\_\_\_\_\_  
Todd Maybrowm, WSBA #18557  
Attorney for Petitioner



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

No. 57738-7-1

**DIVISION ONE**

UNPUBLISHED OPINION

FILED: June 18, 2007

**APPELWICK, C.J.** — Bayani John Mandanas was charged with one count of second degree assault and one count of felony harassment, both with a deadly weapon enhancement. Mandanas assigns error to the trial court's failure to use a unanimity instruction on the multiple acts supporting the convictions and its failure to give a unanimity instruction on the two alternative means the State used to support the second degree assault charge. He argues that the self-defense instructions were inaccurate and inconsistent. Finally, he contends that the convictions for assault and harassment were same criminal conduct for purposes of sentencing, that the gun enhancements cannot run consecutively, and that his sentence for two separate gun enhancements violated double

**APPENDIX A**

jeopardy. We affirm Mandanas' convictions, but remand to the trial court for resentencing based on same criminal conduct.

### FACTS

Carlos Padilla had been involved in a romantic relationship with Bayani John Mandanas' wife, Eleanor. This relationship took place while Mandanas and his wife were in divorce proceedings, but still living together. Mandanas learned about the relationship from his friends. In July or August of 2004, Mandanas met with Padilla and Eleanor and asked them to avoid publicizing their relationship until the divorce was final. Padilla told Mandanas that he would stop seeing Eleanor, but their relationship continued until they mutually ended it around December 8, 2004.

On December 20, 2004, Mandanas and Padilla encountered each other outside the Southgate Medical Clinic, and a confrontation ensued. The parties gave conflicting testimony describing the assault. Although three witnesses could not testify as to who struck first, the rest of their testimonies corroborated Padilla's version of the events. Padilla testified that when he stepped outside the clinic, Mandanas confronted him and punched him in the mouth and threatened to kill him. Padilla punched back, hitting Mandanas in the face, and blocked another punch. He felt a metal object hit his head, and then saw that Mandanas was pointing a gun at him. Padilla testified that Mandanas again threatened to kill him. Padilla said that he begged for his life and tried to explain that he and Eleanor had broken up. And Mandanas replied that he was "going to bring me down" while continuing to point the gun at him. Padilla backed into the clinic and

sat in a chair. Mandanas followed him and again struck him with the gun, above Padilla's ear. Padilla continued to tell Mandanas that his relationship with Eleanor was over. He then asked people in the clinic to call 9-1-1. Mandanas left when he heard that police were being called.

Three witnesses in and around the clinic testified about these events. Each witness testified that they saw Mandanas pull a gun from his pants and point it at Padilla. The witnesses that understood Tagalog, the language the two men were speaking, testified that Mandanas said "I will kill you." All three witnesses testified that they saw Mandanas hit Padilla in the head; one witness saw Mandanas use his gun to deliver the blow. All accounts indicate that Padilla took no defensive action toward Mandanas once they were inside the clinic. One witness believed that the entire incident took place over the course of about two minutes.

Mandanas presented a very different scenario during his testimony. He said that on December 20, 2004, he was returning from making a bank deposit. When he made deposits he usually carried a gun, for which he had a permit. He claimed that he stopped near the clinic to make a telephone call and was on the phone when Padilla approached him and punched him. He said that this punch knocked the gun out of his belt. Concerned that Padilla might try to grab the gun, Mandanas struggled with Padilla and admitted that he hit Padilla with the gun after he picked it up. Mandanas testified that he thought that Padilla was heading towards the clinic to get a weapon, so he followed him inside and pushed him down because he did not want him to leave the clinic. Once they

were both in the clinic, they struggled again. Mandanas said that he could not recall if he hit Padilla with the gun a second time, or even if he was still holding the gun at the time—he thinks it may have been in his pocket when he exited the clinic.

The day after the assault, Mandanas, accompanied by his lawyer, turned himself in to the police. He turned over a .38 caliber revolver and five bullets. The gun was later found to be in working condition.

### ANALYSIS

#### I. Unanimity Instruction

Mandanas argues that the trial court erred because it did not give the jury a Petrich instruction. When evidence supports several criminal acts which would support a conviction on the count charged, a Petrich instruction requires jury unanimity as to which act constituted the conviction. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). The State counters that Mandanas' acts were not separate and distinct, but instead, a "continuing course of conduct."

Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. Petrich, 101 Wn.2d at 570-71. However, this rule applies only where the State presents evidence of "several distinct acts," i.e. where the evidence involves conduct at different times and places. See State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911); Petrich, at 571. The Petrich rule does not apply where the evidence indicates a "continuing course of conduct." Petrich, 101 Wn.2d at 571. Acts are considered

“continuing course of conduct” when they occur within a short time frame and are an ongoing enterprise with a single objective. State v. Gooden, 51 Wn. App. 615, 619-20, 754 P.2d 1000 (1988). To determine whether criminal conduct constitutes a continuing course of conduct, the facts must be evaluated in a commonsense manner. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citing Petrich, 101 Wn.2d at 571).

Continuing course of conduct analysis has been applied to multiple acts of assault over a two-hour time period that resulted in the unintentional death of a child. See State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991). It has also been applied to two acts of assault (kissing and hitting) that occurred within a short period of time in the same place, against the same victim, in an effort to secure sexual relations, Handran, 113 Wn.2d at 12, and two acts of assault for the purpose of intimidating a witness. See United States v. Berardi, 675 F.2d 894 (7th Cir. 1982). The same analysis has been applied to charges other than assault. See Gooden, 51 Wn. App. at 619-20, (two acts taken collectively which promote prostitution); State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996) (drugs found on the defendant’s person and drugs found later during a search of his residence were part of a continuing course of conduct supporting possession of cocaine with intent to sell).

Here, the jury was given two separate instructions: one defining assault, the other defining felony harassment. Further, the jury was told that a “separate crime [was] charged on each count” and that “[they] must decide each count separately.” When the facts in this case are evaluated in a commonsense

manner, Mandanas' acts constituting assault (striking Padilla inside and outside the clinic) and his acts constituting felony harassment (threatening to kill him inside and outside the clinic) meet the criteria to be considered a continuing course of conduct. The acts occurred over a short period of time (certainly less than two hours), against the same person, and in substantially the same place. The jury did not need unanimity instructions when it came to determining which acts constituted the assault, nor did they need unanimity instructions when it came to determining which acts constituted the felony harassment. The trial court did not err when it did not give unanimity instructions.

## II. Alternative Means Analysis

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. See State v. Arndt, 87 Wn.2d 374, 384, 553 P.2d 1328 (1976). In order to safeguard the defendant's constitutional right to a unanimous jury verdict as to the alleged crimes, substantial evidence of each of the relied-on alternatives must be presented. State v. Smith, 159 Wn.2d 778, 155 P.3d 873 (2007) (citing Kitchen, 110 Wn.2d at 410-11). As long as there is substantial evidence to support each means charged, a unanimity instruction is not needed. Arndt, 87 Wn.2d at 377.

Here, the State argued two alternative means of second degree assault with a deadly weapon. The jury was instructed that "[a] person commits the crime of assault in the second degree when he or she assaults another with a

deadly weapon.” In addition, the jury was given a separate instruction that set forth the common law definitions of assault:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Mandanas concedes that the evidence is sufficient to support the second definition of common law assault, i.e. creating fear and apprehension of bodily injury. However, he believes that there is insufficient evidence to prove second degree assault with a deadly weapon, because the legislature did not intend the crime to apply to “nontraditional” use of a gun, i.e. hitting a victim rather than shooting a victim. Believing that he is entitled to a unanimous jury determination as to the alleged means used to carry out the assault, Mandanas maintains that the jury’s general verdict cannot stand unless this court can find that the evidence is sufficient to show that Mandanas fired a shot from the gun.

However, since the parties submitted their briefs, a new opinion by the Washington State Supreme Court noted that the reach of the alternative means doctrine has not been extended to encompass a mere common law definitional instruction. Smith, 159 Wn.2d 778 (citing State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002)). Instead, the alternative means of committing criminal assault are provided in the statutes delineating the degree of assault. Id. (citing Linehan, 147 Wn.2d at 647). Noting that previous appellate cases have held that

common law definitions of assault, when submitted as a jury instruction, do create alternative means of committing the crime charged, the court explicitly disapproved of these decisions to the extent that they could “be read as endorsing a hard and fast rule that the common law definitions of assault constitute alternative means of committing assault, thereby requiring substantial evidence to support each of the alternative means charged or instructed.” Id. at 787 (disapproving of State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), overruled in part on other grounds by Smith, 159 Wn.2d 778; State v. Nicholson, 119 Wn. App. 855, 84 P.3d 877 (2003); State v. Rivas, 97 Wn. App. 349, 352, 984 P.2d 432 (1999), and State v. Hupe, 50 Wn. App. 277, 748 P.2d 263 (1988)). Because the jury in Smith was instructed on only one means of committing second degree assault with a deadly weapon, based on RCW 9A.36.021(1)(c), the court concluded that it was not an alternative means case, and the duty to determine whether sufficient evidence exists to support each separate means presented to the jury was not triggered. Smith at 792.

The circumstances here are the same. The jury was instructed on only one means of committing second degree assault with a deadly weapon. While they were given the common law definitions of assault, under Smith, the alternative means doctrine does not apply to these definitions. As such, our duty to determine whether sufficient evidence exists to support both common law definitions of assault is not triggered. Mandanas’ right to a unanimous jury verdict was not compromised. The court did not err when it did not give a unanimity instruction.

Even if our duty to determine whether sufficient evidence exists to support both definitions of assault is triggered, we conclude there was no error. The inquiry on review of the sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The legislature has defined the term “deadly weapon:”

“Deadly weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, 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.

RCW 9A.04.110. A pistol is a deadly weapon as a matter of law whether loaded or unloaded. See State v. Rahier, 37 Wn. App. 571, 681 P.2d 1299 (1984). A firearm, whether loaded or unloaded, is a deadly weapon regardless of whether, under circumstances in which it is used, attempted to be used, or threatened to be used, it is readily capable of causing death or serious bodily injury. State v. Beaton, 34 Wn. App. 125, 659 P.2d 1129 (1983). Additionally, Washington courts have found blunt objects other than guns to be “deadly weapons.” See e.g. In re Pers. Restraint of Tran, 154 Wn.2d 323, 111 P.3d 1168 (2005) (admission of use of a baseball bat led to charges of first degree assault with a

deadly weapon); State v. Ross, 20 Wn. App. 448, 450, 580 P.2d 1110 (1978) (finding that “[t]he words ‘deadly weapon,’ as used in this section include, but are not limited to, any instrument known as a . . . sand club. . . metal knuckles. . . pistol, revolver, or any other firearm. . . and any metal pipe or bar used or intended to be used as a club, any explosive”).

Substantial evidence shows that while he did not fire a shot, Mandanas committed second degree assault with a deadly weapon when he used the gun to strike Padilla in the head. The standard WPIC instruction given to the jury defines the term “deadly weapon” as any firearm, whether loaded or not. Regardless of whether his gun was loaded or that he did not fire it, Mandanas wielded the gun as a deadly weapon similar to metal knuckles, metal pipe and bars, baseball bats etc. His method of use caused serious bodily injury. As a matter of law, use of a gun to strike a person is assault with a deadly weapon. At least two witnesses observed Mandanas striking Padilla on the head with a handgun. Padilla testified that he felt metal hit his head. The amount of blood described by the police at the scene, and the injuries sustained by Padilla indicate that he was hit with a blunt, heavy object. Mandanas’ argument directly contravenes authority. The evidence was sufficient to support the battery definition of assault; the State correctly argued alternative means for second degree assault with a deadly weapon. The trial court did not err when it did not require a unanimity instruction.

### III. Self-Defense Instructions

At trial, Mandanas raised the claim of self-defense. Because “[a] defendant’s testimony alone is sufficient to raise the issue of self-defense,” the trial court gave two generalized self-defense instructions. State v. Adams, 31 Wn. App. 393, 395-96, 641 P.2d 1207 (1982). “Each party is entitled to have his theory of the case presented to the jury by proper instructions, if there is any evidence to support the theory.” Id. at 395 (emphasis added).

Mandanas did not propose the self-defense instructions, nor did he object to the court’s instructions. “[D]efects in instructions not called to the trial court’s attention will not be considered when raised for the first time on appeal.” State v. Theroff, 95 Wn.2d 385, 391, 622 P.2d 1240 (1980). Under RAP 2.5(a)(3), a party may not raise a claim of error on appeal that was not raised in the trial court unless it was a “manifest error affecting a constitutional right.” An error is “manifest” if the defendant can show, in the context of the trial, how the error actually prejudiced him. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). “A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Consequently, we review the self-defense instructions to determine whether they misstated the law.

#### A. Instruction No. 11

Instruction No. 11 reads:

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.

(emphasis added).

This is the typical self-defense instruction used for any charge other than homicide or attempted homicide, and is based on RCW 9A.16.020(3).<sup>1</sup> WPIC 17.02 Note on Use (2005 Supp.). Mandanas cites State v. Bland to argue that this instruction is incorrect. State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005). However, in Bland, the defendant claimed defense of property, not defense of self. The jury instruction was the same as above. This court found error because the conjunction “or” should have been inserted between the word “injured” and the phrase “in preventing.” Without that conjunction, the instruction “could be understood to require a finding that a defendant reasonably believed that he was about to be injured in preventing a malicious trespass.” Bland, 128 Wn. App. at 514 (emphasis added). Because such a belief is not a requirement for defense of property, this court held that the instruction confused the distinction between self-defense and defense of property, and was reversible error.

Bland does not apply. Here, Mandanas’ claim is defense of self, which requires fear of injury to oneself. The instructions given allowed him two

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<sup>1</sup> “The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

.....  
(3) Whenever 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 the force is not more than is necessary.”  
RCW 9A.16.020 (emphasis added).

justifications for use of force: If he reasonably believed that (1) he was about to be injured in preventing Padilla's attack, or (2) he was about to be injured in by attempting to prevent Padilla's attack. In both situations, the force used could not be more than is necessary. If the word "or" was inserted in this instruction, it would read:

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 or in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

Including the word "or" gives the defendant three justifications to claim use of force: (1) if he reasonably believed that he was about to be injured, or (2) in preventing Padilla's attack, or (3) in attempting to prevent Padilla's attack. Addition of the word "or" would allow a defendant to invoke self-defense when preventing or attempting to prevent harm without a reasonable belief of imminent injury. In non-homicide cases, a defendant cannot use more force than necessary in defense of self. "It can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm." State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856 (2006) rev. denied 149 P.3d 377 (2006). The instruction given was not erroneous.

**B. Instruction No. 12**

The Washington Pattern Instruction Committee recommends that the definition of "necessary" should be given in non-homicide cases when it is used

in the self-defense instructions. As noted above jury instruction 11 required the jury to find that the force used by Mandanas was “not more than is necessary” in order to find that he was excused by acting in self-defense. Again, instruction 11 was based on RCW 9A.16.020(3).

Mandanas assigns error to the trial court’s inclusion of the definition of “necessary,” as a supplement to the self-defense instruction. He claims the term only modifies the portion of RCW 9A.16.020(3) that relates to malicious trespass or malicious interference with real or personal property, not injury to person. He argues that the use of the definition was prejudicial because it made “necessary” apply to “injury to person” and if the jury believed that Padilla did indeed attack first, and that Mandanas acted in self-defense but used more force than “necessary,” they could still find him guilty.

“RCW 9A.16.020(3) establishes that the use of force is lawful when the person is about to be injured, so long as the force used is not more than necessary.” State v. Brightman, 155 Wn.2d 506, 525, 122 P.3d 150 (2005) (emphasis added). Further, a plain reading of RCW 9A.16.020(3) shows that the requirement that force “not be more than necessary” modifies every defense in that section. If “necessary” only modifies trespass or interference with property, then a person using defense of self could use any amount of force—even unnecessary force—in self-defense. However, “[i]t can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm.” Ferguson, 131 Wn. App. at 855.

Unlike RCW 9A.16.020(3) the legislature did not include the phrase “not be more than is necessary” in the justifiable homicide statute. See RCW 9A.16.050. “[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005) (quoting Roberts, 117 Wn.2d 576, 817 P.2d 855 (1991)). Accordingly, when the legislature included “not be more than is necessary” in defining defense of self against assault, its intent was different than justifiable homicide—it intended to limit the amount of force a person can use when they reasonably believe that they are about to be injured.

Here, Mandanas did not show that he had reasonable grounds to fear death or great personal injury by Padilla, or that there was imminent danger of that occurring. Accordingly, he was not entitled to use an amount of force that was greater than necessary. Including the term “necessary” in the instructions correctly modified the amount of force to which Mandanas may have been entitled had Padilla attacked first. If the jury had believed Mandanas, they were correctly instructed by instruction 11, not by instruction 12, to determine whether the amount of force that he used was necessary for his self-defense. Including the definition of “necessary” was not prejudicial and was not error—it is in fact, recommended. Mandanas’ perfunctory assertions that the definition itself is erroneous are not adequately briefed. Consequently, we do not reach those arguments.

C. Mistaken Belief and No Duty to Retreat

Mandanas assigns error to the trial court's omission of "mistaken belief" and "no duty to retreat" instructions. The State argues that Mandanas never requested these instructions, and because they are discretionary, the court was not required to give them sua sponte. The State points out that Mandanas never claimed that he was mistaken in defending himself or another against Padilla. The State also notes it did not argue that Mandanas had the duty to retreat. In his reply brief, Mandanas foregoes his "mistaken belief" argument. He maintains that without the "no duty to retreat" instructions, the jury may have believed that Mandanas should have run for cover and would have improperly found that the amount of force he used was excessive because he did not retreat.

"No duty to retreat exists when one is feloniously assaulted in a place where [he or] she has a right to be." State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). However, the "no duty to retreat" instruction is not automatically given. The instruction

is required where . . . a jury may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense. The trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by the evidence in the case. Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it. Failure to provide such instructions constitutes prejudicial error.

State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003) (emphasis added)

(internal citation omitted).

Here, Mandanas did not request a “no duty to retreat” instruction or include the argument that he was under no duty to retreat in his case theory. Conversely, the State never argued that he was under a duty to retreat. If the testimony indicated that Mandanas had considered retreating, and if he had argued as his theory of self-defense that his failure to retreat did not constitute excessive force, failure to give the instructions would have been prejudicial error. However, no such argument was made, so omitting the instruction did not deprive Mandanas of his theory of the case. The trial court did not err.

Even if Mandanas does bear his burden of showing that the lack of instructions was manifest error, harmless error analysis still applies. “[A]n error can be considered harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result despite the error.” State v. Williams, 81 Wn. App. 738, 744, 916 P.2d 445 (1996) (finding reversible error when the trial court refused to give “no duty to retreat” instructions, despite the defendant’s request). “An instructional error is harmless if it is trivial, formal or merely academic and in no way affected the outcome of the case.” Id.

Here, a reasonable juror would have reached the same result even with a “no duty to retreat” instruction: if a juror believed that Padilla, an unarmed individual, threw the first punch, such an instruction would have assured the juror that Mandanas was justified in not retreating. This would have been important had Mandanas returned the blow with his own fists. However, instead of acting in self-defense with force that is “not more than is necessary,” Mandanas began beating Padilla with his gun, causing him to bleed severely. The jury was entitled

to find that using a blunt metal object to strike the head of an unarmed man who had retreated and was seated was itself excessive force beyond lawful self-defense. In light of the overwhelming evidence against Mandanas, any error was harmless.

#### IV. Same Criminal Conduct

Mandanas argues that the trial court erred when it concluded that his second degree assault and felony harassment acts involved “[d]ifferent levels of intent,” and were not same criminal conduct for purposes of sentencing.

“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 9.94A.589(1)(a). When determining if two crimes share the same criminal intent, we ask whether the defendant’s intent, viewed objectively, changed from one crime to the next, and whether commission of one crime furthered the other. State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) aff’d, 153 Wn.2d 765, 108 P.3d 753 (2005). Under the test set forth in State v. Dunaway, “if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the offenses encompass the same criminal conduct.” State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)).

“An appellate court reviewing a trial court’s sentencing under the act will not reverse a sentence unless it finds a clear abuse of discretion or misapplication of the law.” State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440

(1990). Abuse of discretion is possible if the trial court arbitrarily counted the convictions separately. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Here, there is no question that Mandanas committed assault and harassment at the same time and place, and against the same victim. The question is whether his intent, when viewed objectively, changed between the crimes, and whether the commission of one crime furthers the other. Second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 711, 887 P.2d 396 (1995). Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened. RCW 9A.46.020(1)(a)(i). Crimes that Mandanas objectively intended to commit include causing bodily harm and threatening to commit bodily injury, which created an apprehension of bodily harm. There was no discernible change in intent between the crimes. Moreover, inflicting bodily harm and threatening to kill Padilla furthered the crime of creating apprehension of more bodily harm. Because one crime furthered another, and because Mandanas's criminal intent did not change from one crime to another, his actions encompass same criminal conduct. We conclude that the trial court abused its discretion in finding otherwise, vacate the sentence and remand for resentencing based on same criminal conduct.

V. Firearm Enhancements

A. Consecutive Sentences

By statute, firearm enhancements for each count must be served consecutively, regardless of whether or not the underlying crimes involve the same criminal conduct. “Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory. . . and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.” RCW 9.94A.533. Washington courts have followed the plain language of this statute. See State v. Callihan, 120 Wn. App. 620, 85 P.3d 979 (2004) (finding that although a defendant’s actions were same criminal conduct RCW 9.94A.533 was clear on its face and required consecutive sentences); State v. Gugsu, 130 Wn. App. 1021 (2005) rev. denied, 2007 Wash. LEXIS 165 (2007); Jacobs, 154 Wn.2d at 603, (“the legislature has chosen to specify that in the case of deadly weapon and firearm sentence enhancements, sentencing courts must apply them consecutively”). Case law and the statute are clear—Mandanans’ deadly weapon enhancements require consecutive sentences, even with a finding of same criminal conduct.

B. Double Jeopardy

Washington courts have repeatedly rejected arguments that weapon enhancements violate double jeopardy. *Id.* (citing State v. Claborn, 95 Wn.2d 629, 636-638, 628 P.2d 467 (1981)); see also, State v. Nguyen, 134 Wn. App.

863, 868, 142 P.3d 1117 (2006) rev. pending, 2007 Wash. LEXIS 102 (2007). The "statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement." State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). Husted controls: the Legislature clearly intended to impose multiple enhancements based on the single act of possessing a weapon. Sentence enhancements on offenses committed with weapons do not violate double jeopardy. Mandanas had two qualifying offenses, so he is eligible for two consecutive firearm enhancements.

We affirm Mandanas' convictions for second degree assault with a deadly weapon and for felony harassment. However, we remand for resentencing based on same criminal conduct, with consecutive firearm enhancements.

Appelwick, C.J.

WE CONCUR:

Denz, J.

Becker, J.