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No. 57738-7-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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

STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant

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COURT OF APPEALS
DIVISION ONE
DEC - 6 2006

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

I. INTRODUCTION 1

II. THE TRIAL COURT ERRED IN FAILING TO GIVE A UNANIMITY INSTRUCTION EVEN THOUGH THE STATE PRESENTED EVIDENCE OF MULTIPLE ACTS AS TO EACH OFFENSE 1

III. THE TRIAL COURT ERRED IN FAILING TO GIVE A UNANIMITY INSTRUCTION WHEN THE STATE PRESENTED EVIDENCE OF TWO MEANS TO COMMIT THE ASSAULT CHARGE 4

IV. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY ON THE LAW OF SELF-DEFENSE 6

A. Mr. Mandanas did not "Waive" this Claim; rather, as in *State v. Bland*, these Flawed Instructions Constitute Manifest Errors Affecting a Constitutional Right 6

B. The Errors in the Court's Self-Defense Instructions Affected the Outcome of this Trial 7

C. The Failure to Instruct on No Duty to Retreat was Prejudicial 11

V. THE TRIAL COURT ERRED IN SENTENCING MR. MANDANAS 12

A. The offenses Encompassed the Same Criminal Conduct 12

B. The Two Weapons Enhancements Should Run Concurrently 13

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Berardi, 675 F.2d 894 (7th Cir. 1982) 3

STATE CASES

Dever v. Fowler, 63 Wn. App. 35 (1991) 12

State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005) 7, 8

State v. Callihan, 120 Wn. App. 620, 85 P.3d 979 (2004) 13

State v. Carter, 127 Wn. App. 713, 112 P.3d 561 (2005) 11

State v. Clausing, 147 Wn. 2d 620, 56 P.3d 550 (2002) 12

State v. Crane, 116 Wn. 2d 315, 804 P.2d 10 (1991), cited by the State 3

State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000 (1988) 1, 2

State v. Handran, 113 Wn. 2d 11, 775 P.2d 453 (1989) 2

State v. Hieb, 107 Wn. 2d 97, 727 P.2d 239 (1986) 6

State v. Hieb, 107 Wn. 2d 97 (1986) 1

State v. Kirkman, 126 Wn. App. 97, 107 P.3d 133 (2005) 6

State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996) 3

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992) 6

State v. Redmond, 150 Wn. 2d 489 (2003) 11

State v. Rodriguez, 61 Wn. App. 812, 812 P.2d 868, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991) 13

State v. Vike, 125 Wn. 2d 407, 885 P.2d 824 (1994) 13

State v. Wanrow, 88 Wn. 2d 221, 559 P.2d 548 (1977) 11

STATE STATUTES

RCW 9.94A.310 13
RCW 9.94A.602 5
RCW 9A.36.021 ..... 4, 5

I. INTRODUCTION

On October 25, 2006, the State filed its responsive brief. *See* Brief of Respondent ("BOR"). This brief is filed by way of reply to the arguments raised in Respondent's brief.

II. THE TRIAL COURT ERRED IN FAILING TO GIVE A UNANIMITY INSTRUCTION EVEN THOUGH THE STATE PRESENTED EVIDENCE OF MULTIPLE ACTS AS TO EACH OFFENSE

The State argues that no *Petrich* instruction was required because the assaults and threats occurred during a "continuous course of conduct." See BOR at 9-13. However, the State agrees that such a course of conduct requires proof of an "ongoing enterprise with a single objective." BOR at 11 (*citing State v. Gooden*, 51 Wn.App. 615, 619-20 (1988)).

The State points to numerous cases where the appellate courts have held that certain acts were properly charged as a continuous course of conduct and a *Petrich* instruction was therefore not required. *See* BOR at 11-13. However, as these cases illustrate, a continuous course of conduct

means more than separate acts occurring over a short period of time.

For example, in *State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989), the State alleged that the defendant committed first degree burglary when he unlawfully entered and assaulted a victim in an apartment. The Washington Supreme Court held that a unanimity instruction was not necessary since, even though there were multiple acts of assault, the defendant's actions evidenced a continuing course of conduct and unified purpose: "to secure sexual relations with the victim." *Id.* at 18.

Similarly, the State cites several cases - none of which are assault cases - where the evidence demonstrated a further objective or overarching enterprise, not present in the instant case. *See, e.g., State v. Gooden*, 51 Wn.App. 615, 620, 754 P.2d 1000 (1988) (no *Petrich* instruction was necessary in prosecution for promoting prostitution in the first degree because the crime itself, as defined, "contemplates a continuing course of conduct; instituting, aiding or

facilitating a prostitution enterprise"); *State v. Love*, 80 Wn.App. 357, 908 P.2d 395 (1996) (in possession with intent to deliver cocaine, court concluded that defendant's "possession of five rocks of cocaine on his person and the 40 rocks in his residence, when considered in conjunction with the other evidence of an ongoing drug trafficking operation found at [defendant's] residence, reflect his single objective to make money by trafficking cocaine"). *See also United States v. Berardi*, 675 F.2d 894 (7th Cir. 1982) (three acts of obstruction of justice designed to further the single objective of intimidating a witness is a single continuing offense).[1]

In the case at hand, there is no proof of such an "overarching goal" and Mr. Mandanas was not charged with assaulting Mr. Padilla in furtherance of any other crime. Instead, the State charged Mr. Mandanas with assault and harassment and then presented evidence of multiple assaults and

[1] *State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10 (1991), cited by the State, was a felony murder prosecution, where 3-year-old victim was assaulted while in the care of one adult,

threats. As such, a *Petrich* instruction was necessary. Without that instruction, the State could secure a conviction on the assault charge simply by alleging, through conflicting and confusing testimony, various acts of assault, and convincing some jurors of one assault and other jurors of a different assault. The same is true of the harassment allegations.

III. THE TRIAL COURT ERRED IN FAILING TO GIVE A UNANIMITY INSTRUCTION WHEN THE STATE PRESENTED EVIDENCE OF TWO MEANS TO COMMIT THE ASSAULT CHARGE

The State argues that a unanimity instruction was not required as to the assault charge because the Appellant had not presented any authority to support a claim that the physical striking of a person with a gun would not constitute assault with a deadly weapon under RCW 9A.36.021(1)(c). See BOR at 13.

Respondent does not cite any Washington case where a conviction for assault with a deadly weapon conviction stems from a physical striking with a

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no *Petrich* instruction was necessary because fatal blows occurred during a "small time frame."

gun, rather than a shooting (battery) or pointing of the gun (placing the victim in reasonable apprehension of an assault). In fact, Respondent cites no case where such "nontraditional" use of a gun - as the prosecutor characterized the use of the gun in this case - has resulted in an assault conviction under RCW 9A.36.021(1)(c).[2]

Appellant does not deny that there was evidence, which if believed, would have supported the claim that Mr. Mandanas committed a common law assault. According to the victim, he was placed in fear and apprehension when Mr. Mandanas pointed the gun at him. However, Appellant denies pointing the gun and maintains that there was insufficient evidence for a conviction under the battery prong of the statute. In enacting RCW 9A.36.021(1)(c), the legislature did not intend to make each and every physical striking with a firearm an assault with a deadly weapon, or class B felony. As such,

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[2] Court's Instruction No. 9 simply defined "deadly weapon" as any firearm. There was no instruction containing the alternative definitions of a deadly weapon. *See* WPIC 2.07 and RCW 9.94A.602: "An . . . instrument, which has the capacity to inflict death and from the manner it is used, is likely . . . to produce death."

there is no means to determine if all or some of the jurors relied on the use of the gun as a club to satisfy the proof requirements of assault in the second degree, which would be an unsustainable verdict.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY ON THE LAW OF SELF-DEFENSE

A. Mr. Mandanas did not "Waive" this Claim; rather, as in *State v. Bland*, these Flawed Instructions Constitute Manifest Errors Affecting a Constitutional Right

Respondent argues that Mr. Mandanas waived any challenge to the court's instructions, or the failure to give other self-defense instructions, by failing to object at trial. *See* BOR at 14-15. However, as Respondent acknowledges, RAP 2.5(a)(3) permits raising these issues for the first time on appeal because they are manifest errors affecting a constitutional right. *See, e.g., State v. Hieb*, 107 Wn.2d 97, 108, 727 P.2d 239 (1986); *State v. Kirkman*, 126 Wn.App. 97, 106, 107 P.3d 133 (2005);

State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

Importantly, in *State v. Bland*, 128 Wn.App. 511, 514, 116 P.3d 428 (2005), this court found that a similar instructional error, although one not nearly as serious, created "a manifest error effecting a constitutional right" which required reversal, even though there were no objections taken below. Appellant has demonstrated that the trial court's instructions in this case were erroneous, misleading and incomplete. These instructions, when taken as a whole, were not harmless in light of the evidence in this case.

B. The Errors in the Court's Self-Defense Instructions Affected the Outcome of this Trial

In analyzing the effect of the erroneous instruction on the outcome of the trial, it must first be recognized that Court's Instruction No. 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[3] 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. *Compare, State v. Bland, supra.*

Contrary to the State's claim of no prejudice, even if the jury had believed Mandanas' testimony that he was attacked and struck first by the

[3] This is found in the second paragraph of Court's Instruction

complainant, it could have nevertheless rejected his self-defense claim and convicted him because the force he used was not "necessary" as that term was erroneously defined in Court's instruction 12. Under this instruction, at the time of the incident the jury would have had to find that "no reasonably effective alternative to the use of force appeared to exist. . ." before self-defense was available.

Certainly, the jury might have found that a reasonable alternative was for Mandanas to retreat after Mr. Padilla assaulted him. Since the jury was not instructed as to the no duty to retreat rule pursuant to WPIC 17.05, the "necessary" instruction was definitely prejudicial. Moreover, during the struggle that ensued following the complainant hitting Mandanas, the jury might have found, pursuant to the court's erroneous Instruction No. 12, that the amount of force used was not necessary to "effect the lawful purpose intended."

No. 11.

Mr. Padilla testified that he ran towards the medical clinic after the first physical interaction with defendant Mandanas. Defendant Mandanas followed him, fearing that Mr. Padilla might be going for a weapon, and another struggle occurred in the clinic. Even though the jury might have found that under Instruction No. 12 this was likewise not "necessary," it was nevertheless reasonable under the correct, although conflicting standard of Instruction No. 11.

If the jury had only been instructed on the correct level of force as set forth in the body of Instruction No. 11, rather than the more limited standard of "necessary" in Instruction No. 12, the jury would have measured the use of force under the following correct standard:

> The person using the force may employ such force and means as a reasonably prudent person would 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 and prior to the incident.

See: Court's Instruction No. 11, paragraph 3; WPIC 17.02.

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) (jury misled by inconsistent instructions telling the jury the defendant had to prove unwitting possession of firearm and prejudice was presumed).

C. The Failure to Instruct on No Duty to Retreat was Prejudicial

Of equal importance was the court's failure to give the no duty to retreat instruction, WPIC 17.05, which had a prejudicial effect on Mandanas' defense. Throughout the whole struggle, the jury could have felt that Mandanas should have broken off the fight and run for cover. Without this instruction, the jury could have improperly found that because he did not retreat, the amount of

force used by defendant was therefore not "necessary." However, if such an instruction had been given, it is likely that the jury would have reached a different verdict. It was also plain error to not give such an instruction. *State v. Redmond*, 150 Wn.2d 489 (2003).

For the foregoing reasons, the instructional deficiencies and errors directly affected the outcome of the trial, were plain error, and require a reversal. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) (instructional error presumed to be prejudicial unless affirmatively shown to be harmless); *Dever v. Fowler*, 63 Wn.App. 35, 41-42 (1991) (inconsistent instructions require reversal).

V. THE TRIAL COURT ERRED IN SENTENCING MR. MANDANAS

A. The Offenses Encompassed the Same Criminal Conduct

Respondent would have this Court conclude that felony harassment and assault do not include the same intent, arguing that the crime of assault with

a deadly weapon "does not include the requirement that Mandanas threatened to cause bodily injury and threaten to kill Padilla." BOR at 23. This is not a persuasive claim.

Because the mental elements for these offenses clearly 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). Since, the facts in this case do support a finding that Mr. Mandanas had the same criminal intent on each count, these counts constitute the same criminal conduct for sentencing purposes. *See State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991).

B. **The Two Weapons Enhancements Should Run Concurrently**

Respondent asks this Court to adopt Division III's decision in *State v. Callihan*, 120 Wn.App. 620, 623, 85 P.3d 979 (2004) - or at least the portion of *Callihan* in which the Court stated that

RCW 9.94A.310 unambiguously requires consecutive sentences for each enhancement. To date, there is no reported decision in which any Court has followed *Callihan*. Moreover, as noted in Appellant's Opening Brief, that court did not seem to face the same issues as presented in this case. *See* AOR at 47-48.

DATED this 6th day of December, 2006.

Respectfully submitted,

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PROOF OF SERVICE

David Allen swears the following is true under penalty of perjury under the laws of the State of Washington:

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DATED at Seattle, Washington this 6th day of December, 2006.

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