NO. 45941-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRETT EVERETTE,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Everette's convictions and the trial court's decision regarding his motion for a new trial should be affirmed because:

(1) There was sufficient evidence for the jury to find he was guilty of attempted kidnapping in the first degree both as an accomplice and as the principal;

(2) His conviction for felony harassment did not require a unanimity instruction because his threats to the victim were part of a continuing course of conduct;

(3) There was sufficient evidence presented for Everett to be convicted of unlawful possession of a firearm in the first degree; and

(4) The trial court did not abuse its discretion when it found his motion for a new trial that was filed after the 10-day limit specified by CrR 7.5(b) was untimely.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

A. Was there sufficient evidence to find Everette guilty of attempted kidnapping in the first degree when he located the victim on behalf on his accomplices, forcibly restrained her in a bedroom, displayed a gun, threatened her with deadly force, called his accomplices on the phone to notify them he had located her, then after she exited through a window, notified his accomplices she had escaped and ordered them to get her before she contacted the police and take her to Rainier Beach just before they assaulted her and attempted to drag her into a vehicle to take her to a secluded location?

B. Was a unanimity instruction required for felony harassment when Everette's threats to the victim were part of a continuing course of conduct?

C. Was there sufficient evidence to find Everette guilty of unlawful possession of a firearm in the first degree when two witnesses observed him the same black handgun on or about the date in

question, and while having the gun in his possession he also threatened to put holes in the victim's head?

D. Did the trial court abuse its discretion when it found Everette's motion for a new trial was untimely because it was filed after the 10-day time limit specified by CrR 7.5(b) and it did not provide any applicable grounds for relief under CrR 7.5(a)?

III. STATEMENT OF THE CASE

Kendra Swanger was a 21-year-old woman who used heroin. RP 12/18/13 at 52. Joey Sanchez-Juarez and his brother, David Sanchez-Juarez, would provide heroin to Swanger. RP 12/18/13 at 55, 56. Swanger temporarily broke up with her boyfriend, Brad Martin in late July and into August of 2013. RP 12/18/13 at 54-55. During this time, Swanger had a relationship with Joey. RP 12/18/13 at 56. Unlike Martin, who she loved, Swanger considered Joey someone she just "got high with." RP 12/18/13 at 56. Swanger maintained a friendship with Martin. RP 12/18/13 at 56.

Martin's stepfather, Nate Hart, agreed to trade his car to Joey for methamphetamine. RP 12/18/13 at 56-57. Although he took possession of the car, Joey did not provide methamphetamine to Hart as had been agreed. RP 12/18/13 at 57. As a result, Hart asked Swanger to get the car back from Joey. RP 12/18/13 at 57. About five days before August 12, 2013, Swanger waited until Joey had "nodded out from doin' too much heroin" and returned the car to Hart at Maria Johnson's house at 2716

Colorado Street. RP 12/18/13 at 57-58. Johnson's house is also near Douglas Street. RP 12/18/13 at 46-47. Hart left with the car, and Swanger hid at Maria Johnson's house for five days, avoiding contact with Joey, who was angry with Swanger for taking the car. RP 12/18/13 at 58-59, RP 12/19/13 at 150. Martin eventually joined Swanger at Johnson's house. RP 12/18/13 at 60.

Joey was angry that Swanger had taken the car. RP 12/19/13 at 150. Around August 9, 2013, Joey, David, Marcus Cochran, and Brett Everette met to discuss what to do about Swanger. RP 12/19/13 at 150-51. During this conversation, Everette said he had people looking for Swanger. RP 12/19/13 at 151. Everette had a black semi-automatic handgun in his holster, and this gun had previously been in Joey's possession. RP 12/19/13 at 152-54. The group devised a plan to "do what it takes" to get Joey's car back, to include using violence against Swanger. RP 12/19/13 at 154-55.

At night on August 12, 2013, Cochran and his girlfriend were walking to the store to buy cigarettes when Joey, David, and another man known as "Botto" drove up to Cochran in a Nissan Pathfinder. RP 12/19/13 at 155-56. Cochrane got into the Pathfinder, but his girlfriend did not. RP 12/19/13 at 156. David drove the Pathfinder, Joey sat in the front passenger seat, Botto sat in the backseat on the passenger side, and

Cochran sat in the backseat behind the driver. RP 12/19/13 at 157. While in the Pathfinder, Joey received a call from Everette saying that he had located Swanger at a house on Douglas Street. RP 12/19/13 at 157. After going to the store, David drove Joey, Botto, and Cochran in the Pathfinder toward Johnson's house. RP 12/19/13 at 157-58.

Meanwhile, Swanger and Martin were in the back bedroom of Johnson's house. RP 12/18/13 at 59-60. Accompanied by a female, Everette came to the house, knocked on a window, and flagged Johnson over to the door. RP 12/18/13 at 142-43. Johnson met them at the door, but did not recognize either Everette or the female, as she had not seen them before. RP 12/18/13 at 143. Everette told the female he was "gonna take this one on his own, go ahead and take the car and go." RP 12/18/13 at 143. The female then left. RP 12/18/13 at 143. Johnson's boyfriend, Dwayne Washington, was in jail at the time. RP 12/18/13 at 142. Everette told Johnson that he was a friend of Washington's and had come to check up on her. RP 12/18/13 at 143. Johnson allowed Everette to enter the house. RP 12/18/13 at 144.

Once inside the house, Everette began asking Johnson about the whereabouts of Swanger and Martin. RP 12/18/13 at 144. Everette appeared to be angry and told Johnson he wanted to find "that effin' bitch Kendra" because Swanger had taken the car of a cousin. RP 12/18/13 at

144-45. Fearing "turmoil" in her home, Johnson told Everette that she had no idea where Swanger and Martin were. RP 12/18/13 at 145. Johnson spoke with Everette for roughly 20 minutes to a half hour. RP 12/18/13 at 146. When he spoke with Johnson, Everett focused on finding Swanger and Martin and what was going on in the house, rather than Johnson's well-being. RP 12/18/13 at 146. During this conversation, Everette would talk to another person on the phone in a "hushed" voice. RP 12/18/13 at 147. Although Johnson could not hear most of what Everette was saying, she did hear that he was trying to get someone to come to the house "ASAP." RP 12/18/13 at 147. After their conversation ended, Johnson went to the bathroom and then to the kitchen. RP 12/18/13 at 148.

While Swanger and Martin were in the bedroom, Hart entered and provided them with heroin, which both Swanger and Martin used. RP 12/18/13 at 62-63. After Hart warned Martin that someone was looking for Swanger and him, Martin closed and locked the bedroom door. RP 12/19/13 at 14-15. Daniel Iverson and Mike Aldridge also came to the house, as Swanger had been waiting for Iverson to stop by. RP 12/18/13 at 63. At some point after Iverson and Aldridge arrived, the bedroom door was opened and Everette entered the room. RP 12/18/13 at 64; RP 12/19/13 at 15.

Everette spoke with Martin about knowing Hart. RP 12/19/13 at 16. Everette then asked Martin, "Is this your bitch, Kendra?" RP 12/18/13 at 65. Everette became "real threatening and aggressive." RP at 12/19/13 at 16. He asked Swanger, "So, what's up with my homey's car?" RP 12/18/13 at 65. Swanger told Everette that she did not know, that she was not afraid of him, and attempted to leave the room. RP 12/18/13 at 65. Everette responded by grabbing Swanger by her hair and neck, throwing her down onto a bed, and holding her down. RP 12/18/13 at 65-67. Everette said "nobody was leaving." RP 12/18/13 at 65. Everette told Swanger he was not afraid to go back to prison, to smash her face in, or to kill her. RP 12/18/13 at 66. Swanger feared she would die. RP 12/18/13 at 96-97. Everette repeatedly told Martin, "You need to get your bitch to tell me where Joey's car is at." RP 12/18/13 at 69. Swanger looked at Martin, who appeared frightened, was looking in the opposite direction, and was avoiding eye contact with her and Everette. RP 12/18/13 at 67-68.

Everette told Swanger he was "gonna put some new holes" in her head and also said that his "homies" had a "Mossberg" in the car.[1] RP 12/19/13 at 17. Due to observing Everette gesturing and reaching for the belt line of his pants under his loose shirt, Martin believed Everette had a

[1] "Mossberg" is a reference to a shotgun. RP 12/19/13 at 17.

gun on his person. RP 12/19/13 at 20, 28, 30-31. However, Martin who chose to use heroin while this was occurring, did not personally observe the gun. RP at 12/19/13 at 31, 44, 48. Everette "flashed" a black nine millimeter handgun at Swanger. RP 12/18/13 at 68. Swanger was familiar with this gun, as it looked like the black handgun she had previously seen Joey with. RP 12/18/13 at 68.

While in the bedroom, Everette used a cell phone to call his girlfriend "Sarah" to come over and beat up Swanger. RP 12/18/13 at 69; RP 12/19/13 at 20-21. Everette also called Dillon Payne, and instructed him to "go find David and Joey and get them over to where [Swanger] was at" and provided the location saying "Hurry up, I have 'em, I know where they're at. We're on Colorado Street." RP 12/18/13 at 70; RP 12/19/13 at 21. Everette continued to intimidate Swanger saying, "This isn't a game bitch" and told her she was "fucking his homies" and that "he wasn't gonna fall for her little game that she was playing." RP 12/19/13 at 22. Everette held Swanger and Martin in the room for approximately 30 minutes. RP 12/19/13 at 25. Because Swanger was aware that Everette, David, and Joey all carried guns, she became extremely afraid and began to cry and hyperventilate. RP 12/18/13 at 70-71. Johnson entered the room and Swanger exited the bedroom with her. RP 12/18/13 at 71. Everette followed them. RP 12/18/13 at 71. Everette continued to ask

where Joey's vehicle was and told Swanger that money, drugs, and jewelry were inside the vehicle. RP 12/18/13 at 71.

Eventually, Everette took Swanger back into the bedroom, and left her there with Martin. RP 12/18/13 at 71. Martin turned a skateboard upside down and shoved it underneath the door to the bedroom to prevent it from opening. RP 12/18/13 at 71. Martin then removed the screen from the bedroom window, and he and Swanger exited the house. RP 12/18/13 at 71. A garbage can was under the window outside; Swanger and Martin jumped onto the garbage can and then down to the ground. RP 12/18/13 at 72, 75. Swanger and Martin ran through a gate in Johnson's backyard onto gravel. RP 12/18/13 at 75-76. Swanger tripped and fell on the gravel, scraping herself. RP 12/18/13 at 76. Martin continued to run. RP 12/18/13 at 76. As Martin ran, he heard the sound of Swanger screaming. RP 12/19/13 at 26.

As the men in the Pathfinder approached Johnson's house, Joey received another phone call from Everette, which he placed on speaker. RP 12/19/13 at 158. Everette said, "She got out of the house. Get her before she gets to the cops." RP 12/19/13 at 158. Everette then instructed the men in the car on where to take Swanger, saying, "Finish up with the plans and get her to Rainier Beach." RP 12/19/13 at 158. The men sought

to take Swanger to a "secluded" location, so they would not be seen with her in a location that was in the "open." RP 12/19/13 at 165.

The men in the Pathfinder drove down an alley, and observed Swanger picking herself up off the ground. RP 12/19/13 at 159. Joey told Botto and Cochran to get up so he could grab a shotgun from under the backseat. RP 12/19/13 at 159. The shotgun appeared to Cochran to be a Mossberg. RP 12/19/13 at 160. Joey pointed the shotgun out the window at Swanger and yelled, "Where the fuck's my car?" RP 12/19/13 at 161. David accelerated in the Pathfinder to catch up to Swanger. RP 12/19/13 at 161-62. Joey, Botto, and Cochran exited the Pathfinder. RP 12/19/13 at 162. Joey pulled Swanger by the shoulder backwards onto the ground. RP 12/18/13 at 77-78. After being pulled down by the shoulder, Swanger observed a shotgun that had fallen from where Joey had been sitting in the Pathfinder. RP 12/18/13 at 77. Joey began kicking Swanger on the ground. RP 12/19/13 at 162. Because the alley was visible to others, it was not feasible to beat Swanger further in the alley. RP 12/19/13 at 165. Rather, "they tried to get her into the truck to take her to a secluded area, a place." RP 12/19/13 at 165. Joey and Cochran took hold of Swanger and dragged her between 10 and 20 feet toward the Pathfinder. RP 12/18/13 at 78; RP 12/19/13 at 163. Swanger was terrified for her life; she screamed for them to stop. RP 12/18/13 at 78-79; RP 12/19/13 at 163. As they

approached the Pathfinder, Swanger again observed the shotgun having fallen from the front passenger side of the vehicle. RP 12/18/13 at 79.

Robert Ross lived in a house nearby Johnson's. RP at 12/18/13 at 43-44. He heard the sound of the Pathfinder skidding to a stop. RP at 12/18/13 at 44, 46. He then heard Swanger screaming. RP at 12/18/13 at 44-45. His wife called 911. RP at 12/18/13 at 45. Cochran became aware of the presence of Ross and others. RP at 163-34. Cochran told Joey, "Let's go, the cops are coming." RP at 12/19/13 at 163-64. Joey and Cochran released Swanger, then the men returned to the Pathfinder. RP at 12/18/13 at 79. Ross saw at least three men enter the Pathfinder and speed off. RP at 12/18/13 at 45-46. Ross observed Swanger to be "very frightened, scared, [and] shaken up." RP at 12/18/13 at 47. Ross observed scrapes on Swanger's legs and asked if she needed help. RP at 12/18/13 at 47. Swanger told him she had warrants and walked toward Douglas Street. RP at 12/18/13 at 47.

Police arrived and contacted Swanger, who was trembling and crying. RP at 12/18/13 at 80; RP 12/19/13 at 59. Because she had a warrant, Swanger initially claimed to be her sister. RP 12/18/13 at 80. When police questioned Swanger about whether she believed Everette was going to kill her she responded, "I truly believed this was it for me." RP at 12/19/13 at 84. Police located the Pathfinder backed into a parking stall in

the alley between Dorothy Street and 33rd Avenue. RP at 12/19/13 at 87. Police obtained permission to search the vehicle. RP at 12/19/13 at 88. A search of the vehicle revealed a white powdery substance, needles, a scale, multiple electronic items, tools, two baseball bats, and three cell phones. RP at 12/19/13 at 89-90. 96, 100. Police also located a blue tarp and a 12-gauge shotgun inside the Pathfinder.[2] RP at 12/19/13 at 90.

Everette was eventually located on September 5, 2013. RP at 12/19/13 at 133. Upon being contacted by police Everette ran. RP at 12/19/13 at 134-35. After being tackled to the ground, Everette struggled to get away as two officers attempted to handcuff him. RP at 12/19/13 at 135-36. Finally, he was secured and taken to jail. RP at 12/19/13 at 136. Later, after Everette was apprehended, both he and Swanger were in the jail together. RP 12/18/13 at 80-81, 90. From the other side of her cell wall, Swanger heard Everette yelling that she was a "rat." RP 12/18/13 at 91.

Everette was not permitted to possess a firearm by virtue of having been convicted of a serious offense on October 10, 2002, and at that time he was informed, in writing, that his right to possess or control firearms had been lost due to this conviction. RP 12/19/13 at 206; CP at 34. Everette was charged with attempted kidnapping in the first degree and

[2] The shotgun recovered was an Ithaca Model 37. RP 12/19/13 at 90.

felony harassment. CP at 31-33. Both of these charges included two firearm enhancements for the shotgun and the handgun. CP at 31-33. Everette was also charged with unlawful possession of a firearm in the first degree for possessing the handgun. CP at 31-33. The case proceeded to trial, and the jury found Everette guilty of all three charges. RP 12/20/13 at 132. The jury also found a firearm enhancement applied for both the attempted kidnapping and felony harassment charges. RP 12/20/13 at 133-34. The verdicts were received on December 20, 2014. RP at 138.

Because Everettte's convictions of attempted kidnapping in the first degree with the firearm enhancement and felony harassment with a firearm enhancement qualified as most serious offenses under RCW 9.94A.030, and he had two prior convictions for most serious offenses, he qualified as a persistent offender and was sentenced to a life term on each of these convictions pursuant to RCW 9.94A.570. RP 2/10/2014 at 145-47. On his conviction of unlawful possession of a firearm in the first degree, Everette received a high end standard range sentence of 116 months. RP 2/10/2014 at 145. After being sentenced, Everette filed a notice of appeal. CP at 148.

Without his attorney's assistance, Everette filed a handwritten "Motion for a New Trial." RP 2/10/14 at 139. Everette's handwritten

motion was signed on January 29, 2014 and was received by the State on January 31, 2014. RP 2/10/14 at 139. At his sentencing hearing on February 10, 2014, Everette's attorney asked that new counsel be appointed to look into whether he had failed to exercise due diligence with regard to whether Joey Sanchez should have been called as a witness to testify that there were no cell phones in the Pathfinder. RP 2/10/2014 at 140-41. The trial court appointed a new attorney to assist Everette with his motion for a new trial. RP 2/10/2014 at 143-44, 147-48.

On March 12, 2014, Everette appeared before the court with his new attorney on his motion for a new trial. RP 3/12/2014 at 168-190. At this hearing, Everette was given the opportunity to argue for that his motion for a new trial should be heard, even though it was filed after the deadline. RP 3/12/14 at 169-189. Everette's attorney represented to the court that his claims were for ineffective assistance of counsel. RP 3/12/14 at 176. The only complaints articulated were a failure to interview the Sanchez brothers (Joey and David) and a reference to "telephone calls that were not of record[.]" RP 3/12/14 at 176, 179.

The court noted that Everette's verdicts had been received on December 20, 2013, and that his pro se motions for a new trial were filed on January 31, 2014 and on February 25, 2014. RP 3/12/2014 at 181-82. The court explained that under CrR 7.5(b), the time limit for filing a

motion for a new trial was within 10 days after the verdict. RP 3/12/2014 at 183. The court also explained that the rule permitted the court discretion to extend this time limit. RP 3/12/2014 at 183. The court ruled that Everette's motion was untimely pursuant to CrR 7.5(b). RP 3/12/2014 at 183. The court held that Everette had not presented a sufficient basis for extending this time limit, because the alleged evidence was known at the time of trial, and the decision was made by Everette's attorney not to submit this evidence at trial. RP 3/12/2014 at 183-84. The court explained that there were not grounds presented for a new trial under CrR 7.5(a)(3), because there was no claim regarding evidence that could not have been discovered with reasonable diligence. RP 3/12/14 at 183. The court also found that had this evidence been presented at trial, it would not have changed the outcome of the trial. RP 3/12/2014 at 184. Further, the court found that under RAP 7.2(e), because the case had been appealed, it was required to obtain the Court of Appeals' permission, and no such permission had been sought or obtained. RP 3/12/2014 at 184-85. The court noted that the issue raised was ineffective assistance of counsel, and without the Court of Appeal's permission it was not permitted to rule on this issue. RP 3/12/14 at 185.

IV. ARGUMENT

A. There was sufficient evidence to find Everette guilty of attempted kidnapping in the first degree as an accomplice and as the principal.

There was sufficient evidence for the jury to find Everette guilty of attempted kidnapping in the first degree as both an accomplice and as the principal. The Washington Supreme Court has stated:

> 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. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977); *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). Everette argues that there was insufficient evidence of abduction to prove attempted kidnapping in the first degree. However, when all reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against him, there was sufficient evidence for the jury to find Everette guilty. First, there was sufficient evidence for the jury to find Everette was an accomplice to taking a substantial step toward restraining Swanger by secreting her in a place she was not likely to be found. Second, there was sufficient evidence for the jury to find

Everette took a substantial step toward restraining Swanger by threatening her with deadly force.

When determining the sufficiency of evidence the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn.App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn.App. at 707-08. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in the State's favor and interpreted most

strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

The crime of kidnapping in the first degree, as is applicable in this case, is defined as follows: "A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent...(c) [t]o inflict bodily injury on him or her; or (d) [t]o inflict extreme mental distress on [her]." RCW 9A.40.020(1)(c)(d). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Thus, in convicting Everette of attempted kidnapping in the first degree, the jury found that Everette took a substantial step toward intentionally abducting Swanger with intent to inflict bodily injury upon her or to inflict extreme mental distress. According to RCW 9A.40.010(1), "Abudct" means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.

Although Everette concedes restraining Swanger, he claims there was insufficient evidence of abduction. Specifically Everette argues that he "took no step towards restraining [Ms.] Swanger in a place she was not likely to be found." *Appellant's Brief* at 19. The flaw in Everette's argument is two-fold: First, he fails to consider the fact that as an

accomplice to the crime of attempted kidnapping in the first degree, Everette was legally accountable not only for his conduct, but also the conduct of his accomplices. Because the evidence showed that Everette knowingly assisted his accomplices in attempting to secret Swanger in a place she was unlikely to be found, there was sufficient evidence for the jury to find Everette guilty as an accomplice to the crime. Second, Everette fails to address the second part of the definition of "abduct." *See generally,* RCW 9A.40.010(1)(b). Because the evidence showed Everette restrained Swanger by threatening to use deadly force, there was also sufficient evidence for the jury to find him guilty as the principal to the crime.

1. Sufficient evidence was presented for the jury to find Everette guilty as an accomplice to the crime of attempted kidnapping in the first degree.

When all reasonable inferences are drawn in favor of the State and against the Everette, there was sufficient evidence for the jury to find Everette guilty as an accomplice to attempted kidnapping in first degree. The law regarding accomplice liability is well-established: "The complicity rule in Washington is that any person who participates in the commission of the crime is guilty of the crime and is charged as a principal." *State v. Silva-Baltazar*, 125 Wn.2d 472, 480, 886 P.2d 138

(1994). Thus, when a person knowingly participates in a crime, that person is guilty of the crime, regardless of whether the crime was committed alone or with the assistance of others. Because there was sufficient evidence for the jury to find Everette knowingly assisted the principals in attempting to abduct Swanger, he is legally accountable for their conduct. Therefore, sufficient evidence was presented for the jury to find that Everette was guilty as an accomplice to the crime of attempted kidnapping in the first degree.

"Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation." *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991) (citing *State v. Randle*, 47 Wn.App. 232, 237, 734 P.2d 51 (1987), *review denied*, 110 Wn.2d 1008 (1988)). The legislature defines accomplice liability in RCW 9A.08.020. "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable." RCW 9A.08.020(1). The statute explains that "[a] person is legally accountable for the conduct of another person when...[h]e or she is an accomplice of such other person in the commission of the crime." RCW 9A.08.020(2)(c). The statute then defines accomplice: "A person is an accomplice of another person in the commission of a crime if: (a) [w]ith knowledge that it will promote or facilitate the commission of the

crime, he or she: (i) [s]olicits, commands, encourages, or requests such other person to commit it; or (ii) [a]ids or agrees to aid such other person in planning or committing it[.]" RCW 9A.08.020(3)(a).

As the a plain reading of the statute reveals, complicity is broadly defined and represents a legislative attempt to deter any person from participating in a crime. "Accomplice liability is not a separate crime—it is predicated on aid to another 'in the commission of a crime' and is in essence liability for that crime." *State v. Peterson*, 54 Wn.App. 75, 78, 772 P.2d 513 (1989) (citing RCW 9A.08.020(3); *State v. Toomey*, 38 Wn.App. 831, 840, 690 P.2d 1175 (1984)). "[A]n accomplice 'need not be physically present at the commission of the crime... if the accomplice did something in association with the principal to accomplish the crime.'" *State v. Jackson*, 137 Wn.2d 712, 731, 976 P.2d 1229 (1999) (quoting *State v. Boast*, 87 Wn.2d 447, 455-56, 53 P.2d 1322 (1976)). A participant in a crime may be held responsible for another's conduct, "so long as both participated in the crime." *See Hoffman*, 116, Wn.2d at 105. Jurors need not be "unanimous as to the accomplice's and the principal's participation as long as all agree that they did participate in the crime." *Id.* at 104.

Accomplice liability attaches when the defendant has knowledge that his actions will promote or facilitate the commission of the particular

crime at issue. *State v. Bauer*, 180 Wn.2d 929, 943, 329 P.3d 67 (2014) (citing *State v. Stein*, 144 Wn.2d 236, 245 27 P.3d 184 (2001)). "While the State must prove actual knowledge, it may do so through circumstantial evidence." *State v. Allen*, --- Wn.2d ---, --- P.3d ---, 2015 WL 196496 (2015). An accomplice is not required to share the same mental state as the principal. *State v. Whitaker*, 133 Wn.App. 199, 230, 135 P.3d 923 (2006), *review denied*, 159 Wn.2d 1017, 157 P.3d 404 (2007), *cert. denied*, 128 S.Ct. 375, 552 U.S. 948, 169 L.Ed.2d 260 (2007). "Where criminal liability is predicated on accomplice liability, the State must prove only that the accomplice had general knowledge of his coparticipant's crime substantive crime, not that the accomplice had specific knowledge of the elements of the coparticipant's crime." *State v. Truong*, 168 Wn.App. 529, 540, 277 P.3d 74 (2012), *review denied*, 175 Wn.2d 1020, 290 P.3d 994 (2012) (citing *State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984)). Unlike conspiracy which requires an agreement between the participants in a crime, accomplice liability does not. *State v. Markham*, 40 Wn.App. 75, 88, 697 P.2d 263 (1985) (citing *Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 1289-90 n.10, 43 L.Ed.2d 616 (1975)). However, while no prior agreement between the parties is necessary for complicity, "an accomplice, having agreed to participate in the criminal act, runs the risk of having the primary actor

exceed the scope of the preplanned illegality." *State v. Davis*, 101 Wn.2d 654, 658, 682 P.2d 883 (1984) (citing *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974)).

"Complicity is neither an element of a crime, nor an alternative method for committing a crime." *State v. Teal*, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004) (citing *Carothers*, 84 Wn.2d at 261). The State need not charge the defendant as an accomplice to pursue liability on this basis, so long as the court instructs the jury on accomplice liability. *State v. Davenport*, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). Because complicity is not an element of a crime, it need not be included in the "to convict" instruction, as "[t]he rule requiring all elements of a crime be listed in a single instruction is not violated when accomplice liability is described in a separate instruction." *Teal* 152 Wn.2d at 339 (citing *State v. Emanual*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

Here, there was sufficient evidence presented at trial for the jury to find that an attempt was made to secret Swanger in a place where she was unlikely to be found. During the trial, the jury heard testimony that a few days prior to August 12, 2013, David, Joey, Cochran, and Everette met to discuss Swanger, and the group devised a plan to "do what it takes" to get Joey's car back, to include using violence against Swanger. On August 12, 2013, after being held in the bedroom and threatened by Everette,

Swanger escaped out the window. Everette called Joey, David, Cochran, and Botto and informed them that Swanger had fled. The men in the Pathfinder drove to Swanger's location. Upon seeing Swanger, Joey pointed a shotgun at her and yelled, "Where the fuck's my car?" After exiting the Pathfinder Joey pulled Swanger to the ground and began kicking her. Joey and Cochran dragged Swanger 10-20 feet toward the Pathfinder. The purpose of getting her into the Pathfinder was to take her to a secluded location. This was sufficient evidence for the jury to have found that an attempt was made to restrain Swanger by secreting or holding her in a place she was unlikely to be found.

There was also sufficient evidence for the jury to find that Everette acted as an accomplice to this attempted kidnapping. The jury was instructed on accomplice liability. To find Everette was an accomplice the jury was required to find that with knowledge that it would promote or facilitate the crime, he either solicited, commanded, encouraged, or requested another person commit the crime or aided or agreed to aid another person in planning or committing the crime.[3] CP at 94. The jury

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[3] Jury instruction No. 8 read as follows: A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

heard evidence that Everette met with the Joey, David, and Cochran around August 9, 2013. At this time, Everette, who was armed with Joey's handgun, said he had people looking for Swanger. The group also decided they would do "whatever it takes" to get Joey's car back from Swanger, and this included using violence against her. When Everette first entered the house, Johnson heard him call someone, telling that person to get to the house "ASAP." Joey received a call from Everette saying that he had located Swanger in a house on Douglas Street. In the bedroom Everette confronted Swanger about Joey's car, refused to let her leave the bedroom, assaulted her, threatened to shoot her, and showed her a handgun. After Swanger escaped, Everette urged Joey and other men in the Pathfinder to come quickly by calling him a second time and saying, "She got out of the house. Get her before she gets to the cops."

Thus, the evidence showed Everette was involved with the initial search for Swanger and plan to use violence against her. Everette found Swanger and provided Joey and the others with her location. Everette threatened Swanger, placing her in such fear that she exited the house

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(2) aids or agrees to aid another person in planning or committing the crime. The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than the mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. CP at 94.

through a window and ran. Everette then informed Joey and the other men that she had escaped, and ordered them to restrain Swanger before she could contact the police. Finally, Everette instructed the men in the Pathfinder to, "Finish up with the plans and get her to Rainier Beach," a secluded location. This demonstrated that with knowledge it would promote or facilitate the crime of attempted kidnapping he solicited, commanded, encouraged, or requested another to commit a crime. Further, by planning violence against Swanger, finding her and providing her location, threatening her, and then informing Joey and the other men of her escape, he aided or agreed to aid another in committing the crime. For these reasons, there was sufficient evidence for the jury to find Everette was an accomplice to attempting to restrain Swanger by secreting or holding her in a place she was not likely to be found. Therefore, there was sufficient evidence for the jury to find Everette guilty of attempted kidnapping the first degree.

2. Because Everette threatened the use of deadly force to restrain Swanger, there was sufficient evidence to find Everette guilty as the principal to the crime of attempted kidnapping in the first degree.

Because Everette restrained Swanger by threatening the use of deadly force, sufficient evidence was presented for the jury to convict him as the principal to the crime of attempted kidnapping in the first degree.

With regard to kidnapping, "[t]he abduction element of the crime may be established by proving the defendant restrained a person by 'using or threating to use deadly force.'" *State v. Majors*, 82 Wn.App. 843, 846, 919 P.2d 1258 (1996); *See also*, RCW 9A.40.010(1). Everette concedes that when he held Swanger in the room, he restrained her. *Appellant's Brief* at 18. He argues that during this restraint he did not secret her in a place she was not likely to be found. However, he fails to consider the second part of the statutory definition of abduction: "Abduct means to restrain a person by ... using or threatening to use deadly force. RCW 9A.40.010(1)(b). Thus, in addition to evidence of Everette's complicity in the attempt to abduct Swanger by secreting her in a place she was unlikely to be found, the jury also heard sufficient evidence to find that Everette, acting as principal, took a substantial step toward abducting Swanger when he restrained her by threatening to use deadly force against her.

When sufficient evidence is presented at trial, a jury may find a defendant guilty through complicity theory or directly as the principal. *See, e.g., State v. Collins*, 76 Wn.App. 496, 502, 886 P.2d 243 (1995). Of course, the standard for reviewing the sufficiency of the evidence remains as previously stated, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *Green*, 94

Wn.2d at 216. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ... A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

In *Majors*, the defendant was convicted of attempted kidnapping in the first degree. 82 Wn.App. at 843. At issue on appeal was whether abduction could be proved by the use or threatened use of deadly force, when the defendant had pointed a BB gun at the victim and threatened to shoot her. *Id.* at 845. The victim suspected that the defendant was using a BB gun. *Id.* The Court of Appeals held that "attempted kidnapping may be established by proof of a threat to use deadly force, intended to accomplish abduction of the victim, whether or not the defendant had the actual capability of inflicting deadly force." *Id.* The victim's doubts about whether or not the defendant had the ability to exert deadly force with the weapon displayed did not prevent the conviction. *Id.* The court noted that because the crime was an attempt, the evidence only needed to show that the defendant took a substantial step toward the crime. *Id.* at 874. Further, the court explained that it was unnecessary to have the "actual capability to inflict deadly force in order to *threaten* to use it within the meaning of abduction." *Id.* (emphasis in original).

Here, Everette concedes that the State established that he restrained Swanger. *Appellant's Brief* at 18. Considering the evidence was that after entering the bedroom where Swanger was he stated, "nobody was leaving," assaulted her by throwing her down and holding her down on the bed, and kept her in the room for approximately 30 minutes by threatening her, then after she left the room, escorted her back to the bedroom, causing her so much fear that she attempted to escape by exiting the house through a window, this concession was warranted. However, as in *Majors*, there was also sufficient evidence for the jury to find Everette restrained her by threatening to use deadly force.

After forcing Swanger onto the bed, holding her down, and saying nobody could leave, Everette told Swanger he was not afraid to go back to prison, smash her face in, or kill her. He said that his "homies," had a "Mossberg" down in the car, referring to the shotgun. Everette threatened to shoot Swanger, saying that he was "gonna put some new holes" in her head. Finally, he then produced a black nine millimeter handgun as she stood over Swanger. Cochran testified that he had seen Everette with Joey's gun a few days earlier when they were talking about looking for Swanger. Swanger testified that the gun looked like the gun she had seen Joey with. Thus, the display of the gun in conjunction the threat to shoot Swanger was a threat to use deadly force. And, Everette used the threat of

deadly force to restrain her. As in *Majors*, regardless of whether or not he had the actual capability to inflict deadly force, there was sufficient evidence for the jury to find Everette took a substantial step toward kidnapping in the first degree when he restrained her by threatening to use deadly force against her.[4]

B. Because Everette's threats toward Swanger were part of a continuing course of conduct, there was no need for a unanimity instruction.

Because Everette's threats to Swanger were a continuing course of conduct, a unanimity instruction as not required. "A multiple acts unanimity instruction is not required when the State presents evidence of multiple acts that indicate a 'continuing course of conduct.'" *State v. Locke*, 175, Wn.App. 779, 803, 307 P.3d 771 (2013) (citing *State v. Crane*, 116 Wn.2d 315, 326, 804 P.2d 10 (1991); *State v. Love*, 80 Wn.App. 357, 361, 908 P.2d 395 (1996)). Everette maintains that there were three acts that constituted threats to kill by Everette in the bedroom: threatening to kill her, threatening to put holes in her head, and flashing the handgun. Though Everette does not specifically argue this, his brief appears to suggest that there was potentially another threat to kill when Joey pointed the shotgun at Swanger. Everette argues that these acts were distinct and required a unanimity instruction. However, because the

[4] It is also noteworthy that in Everette's brief he asserts there was sufficient evidence to show Everette threatened to kill Swanger. *See Appellant's Brief* at 22.

threats were part of a continuing course of conduct, a unanimity instruction was unnecessary.

When the State charges one count of criminal conduct and presents evidence of more than one criminal act that would prove this charge, there is a concern that a jury verdict may not be unanimous. *See Love*, 80 Wn.App. at 360-61 (citing *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). The State may elect to either to rely on a single act for the conviction or for the jury be instructed that all 12 jurors must agree as to which act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 570, 572 683 P.2d 173 (1984). The *Petrich* rule, requiring a unanimity instruction, applies to multiple act cases. *See Crane*, 116 Wn.2d at 325 (citing as examples *Kitchen*, 110 Wn.2d 403 (one count of rape stemming from several separate sexual acts occurring between July and October of 1983); *Workman*, 66 Wn.App. 292, 119 P. 751 (1911) (one count of statutory rape stemming from evidence of three distinct sexual acts occurring at different times and places); *State v. Gitchel*, 41 Wn.App. 820, 822, 706 P.2d 1091 (1985) (one count of statutory rape arising out of two separate sexual acts which occurred 'on or about June to July 1983')). Multiple acts tend to be shown by evidence of acts that occur at different times, in different places, or against different victims. *Locke*, 175, Wn.App. at 802 (citing *Love*, 80 Wn.App. at 361).

However, the unanimity requirement announced in *Petrich* was never intended to require a unanimity instruction where "a continuing course of conduct may form the basis of one charge in an information." *Petrich*, 101 Wn.2d at 571. As an example of a continuing offense, the *Petrich* Court cited to *People v. Mota*, 115 Cal.App.3d 227, 171 Cal.Rptr. 212 (1981), where a repeated gang rape of a victim over a several hour period was held to be a continuing offense as to each defendant. *Id.* When the State presents evidence of multiple acts that indicate a continuing course of conduct, a unanimity instruction is not required. *Id.* at 803 (citing *Crane*, 116 Wn.2d at 326; *Love*, 80 Wn.App. at 361). The jury must simply agree that the conduct occurred. *State v. Marko*, 107 Wn.App. 215, 220, 27 P.3d 228 (2001). "'A continuing course of conduct requires an ongoing enterprise with a single objective.'" *Locke*, 175 Wn.App. at 803 (quoting *Love*, 80 Wn.App. at 361). "The defendant's actions must be evaluated in a 'commonsense manner' to determine whether it forms one continuing offense." *Marko*, 107 Wn.App. at 220 (citing *Petrich*, 101 Wn.2d at 571). Courts must distinguish whether the evidence was of one continuous offense or several distinct acts. *Locke*, 175 Wn.App. at 802-03 (citing Love, 80 Wn.App. at 361).

"Washington courts have found a continuing course of conduct in cases where multiple acts of the charged crime were committed with a

single purpose against one victim in a short period of time." *Id.* at 803-04. In *Love* the court explained:

> The continuing course of conduct exception has been applied to multiple acts of assault over a two-hour time period resulting in a fatal injury, *Crane*, 116 Wn.2d at 330; to acts of assault occurring in one place, during a short period of time, by the same aggressor upon a single victim, in an attempt to secure sexual relations, *State v. Handran*, 113 Wn.2d 11, 17, 77e P.2d 453 (1989); to acts taken collectively to promote prostitution *State v. Gooden*, 51 Wn.App. 615, 620, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988) and to acts of assault for the purposes of intimidating a witness, *United States v. Berardi*, 675 F.2d 894 (7th Cir.1982).

Love, 80 Wn.App. at 361. In *Love*, the court found that cocaine found on the defendant's person when arrested just outside his residence, and then additional cocaine found during the subsequent execution of a search warrant on the Defendant's residence could be considered as evidence of the continuing offense of possession of a controlled substance with intent to deliver. *Id.* at 358-360, 363. Thus, when acts are close in time and place and involve a single victim, courts generally find a continuing course of conduct. When events occur on different dates, at different locations, and involve multiple victims, then they are most often considered separate and distinct acts.

Here, the threatening conduct occurred within a short period of time, at the same location, involved a single victim, and was part of an

ongoing enterprise with a single objective. Accordingly, evidence of the threats to kill Swanger constituted a continuing course of conduct. To prove felony harassment, the State must not only prove that the defendant threatened to kill the victim, but also that by words and conduct he placed her in reasonable fear that the threat to kill would be carried out. *See* RCW 9A.46.020. Here, when Everette was in the room, he told Swanger he was not afraid to kill her, flashed a handgun at her, told her he would put holes in her head. He also told her his "homies" had a "Mossberg" down in the car, referencing the shotgun. All of this threatening conduct occurred within a period of 30 minutes or less, in the same bedroom, and Swanger was the lone victim. Further, they were all directed toward the singular objective of forcing Swanger to provide information about the missing vehicle. As such, they easily fit within the continuing course of conduct exception.

Everette's suggestion that Joey's pointing the shotgun at Swanger constituted an additional threat sufficient to prove felony harassment is

flawed.[5] For this threat to be sufficient to prove felony harassment, it would have been necessary for the State to present evidence that Swanger was aware that Joey had pointed the shotgun at her. However, no evidence was presented at trial that Swanger observed or was aware that Joey point the shotgun at her. Swanger's only testimony to observing the shotgun was after Joey had pulled her down outside the Pathinder, when she saw it had fallen from where Joey had been sitting. RP 12/18/13 at 77-79. Because there was no evidence that Swanger was aware Joey had pointed the shotgun at her, standing alone this evidence would have been insufficient to prove felony harassment.

Further, even if Swanger had observed the shotgun being pointed at her, by yelling "Where the fuck's my car?" when he pointed the shotgun at her, Joey demonstrated a singular objective consistent with Everette's, doing "whatever it takes" to get Swanger to tell them where the car was. And Everette himself connected the shotgun with the other threats when he said his "homies" had a "Mossberg" down in the car. As in *Mota*, acts of multiple defendants connected in time and place against the same

[5] Everette's claim that the pointing of the gun was argued by the prosecutor to support the elements of the felony harassment charge is incorrect. When arguing the elements of felony harassment the prosecutor referenced Everette's threat regarding the "Mossberg" in the car but did not reference Joey pointing the gun at Swanger. RP 12/20/13 at 67-68. The prosecutor's argument regarding the shotgun was with regard to the firearm enhancement for the shotgun that was attached to the felony harassment charge. RP 12/20/13 at 71.

victim with the singular objective constitute a continuing course of conduct. Because the threats involved were close in time, place, involved a single victim, and shared a singular objective, they were part of a continuing offense, and a unanimity instruction was not required.

C. There was sufficient evidence to find Everette guilty of unlawful possession of a firearm in the first degree, because he had previously been convicted of a serious offense, multiple witnesses directly observed him in possession of a black handgun, and this was also supported by circumstantial evidence.

When considered in the light most favorable to the State and interpreted most strongly against Everette, there was sufficient evidence for the jury to find Everette unlawfully possessed a firearm in the first degree. As previously stated: "A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom." *Salinas*, 119 Wn.2d at 201; *See supra*, Section IV-A. Everette argues that there was insufficient evidence to prove he unlawfully possessed the handgun. However, when the State's evidence is considered true, and all inferences are drawn in favor of the State, Everette's claim of insufficient evidence fails.

"In reviewing the sufficiency of the evidence...'the relevant question 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. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005) (quoting *Green*, 94 Wn.2d at 221 (quoting *Jackson v. Virgina*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)) (emphasis in original). When evaluating the sufficiency of the evidence, circumstantial evidence is not to be considered less reliable than direct evidence. *Delmarter*, 94 Wn.2d at 638. "'Determinations of credibility are for the fact finder and are not reviewable on appeal.'" *State v. Brockob*, 159 Wn.2d 311, 336 150 P.3d 59 (2006) (quoting *Hughes*, 154 Wn.2d at 152). The reviewing court will "defer to the trier of fact on decisions resolving conflicting testimony and the credibility of witnesses." *State v. Monschke*, 133 Wn.App. 313, 333, 135 P.3d 966 (2006) (citing *State v. Thomas*, 150 Wn.2d 821, 874-75, 83. P.3d 970 (2006)).

Here, there was sufficient evidence to prove that Everette unlawfully possessed a firearm. At trial, the parties stipulated that Everette had previously been convicted of a serious offense that prohibited him from possessing a firearm. CP at 34. Thus, in examining the sufficiency of the evidence, the only issue is whether or not Everette possessed a firearm on or about the date charged. The jury heard testimony from Cochran that a few days prior to the August 12, 2013, he

observed Everette with a black .45 caliber or 9-millimeter handgun that had previously belonged to Joey. Everette possessed this gun when he discussed looking for Swanger. Swanger observed Everette display a 9-millimeter handgun that she had previously seen in Joey's possession. Further, at the time Swanger observed the gun, Everette was threatening to kill her and put holes in her head. If the jury found Swanger or Cochran's testimony regarding direct observation of Everette in possession of the handgun to be credible, this evidence was sufficient to find Everette guilty. Further, the circumstantial evidence surrounding this event also supported this conclusion.

Everette incorrectly asserts that because Martin did not personally see the gun, his testimony contradicted Swanger's. However, rather than contradict Swanger's testimony, Martin's testimony provided additional circumstantial evidence that Everette possessed the hangun. It should be noted that Swanger described Evertte as having briefly "flashed" the gun at her. Although they were in the same room, Martin was using heroin at the time and was also observed attempting to look in the opposite direction of Swanger and Everette. Therefore, it was possible for Swanger to have observed the handgun without Martin doing so. Martin did observe Everette gesturing and reaching for the belt line of his pants, as he was threatening Swanger. This caused Martin to believe that Everette had a

gun. Because the jury heard testimony from multiple witnesses that Everette possessed the handgun, and the jury is the sole judge of witness credibility, there was sufficient evidence for the jury to find Everette guilty of unlawfully possessing a firearm in the first degree.

D. The trial court did not abuse its discretion when it declined to grant Everette an extension to file his motion for a new trial when he failed to file it within the 10-day limit required by CrR 7.5(b).

The trial court did not abuse its discretion when it found Everette's motion for a new trial was untimely, because it was filed well after the 10-day time limit set forth by CrR 7.5(b) and did not provide a sufficient basis under CrR 7.5(a).[6] CrR 7.5(b) states: "A motion for a new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time." Everette filed his motion for a new trial 42 days after the verdict was entered. After reviewing the substance of Everette's claims, appointing an attorney to assist him with his motion, the trial court judge, who presided over the trial, chose not to extend the time

[6] Everette also argues in his brief, that the trial court abused its discretion by finding that upon the filing of an appeal it no longer had jurisdiction under RAP 7.2(e). If the trial court misinterpreted the rule, it seems odd to characterize this as an abuse of discretion. Because the trial court did not abuse its discretion in denying the motion as untimely under CrR 7.5(b), the jurisdictional issue is not addressed in the State's response. The State defers to the Court of Appeals' interpretation of RAP 7.2(e) as to when jurisdiction belongs to the Court of Appeals rather than the trial court.

for filing and denied the motion as untimely. In doing so, the trial court did not abuse its discretion.

"The trial court is invested with broad discretion in granting motions for a new trial, and the trial court's determination will not be disturbed on appeal absent an abuse of discretion." *State v. Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). "A trial court abuses its discretion when it bases its decision on untenable grounds or reasons." *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). "An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

Here, Everette's brief does not provide any substantive argument as to why the court should have extended the time for filing his motion for a new trial after he failed to file it within the time limit specified by CrR 7.5(b). His argument is merely that because CrR 7.5(b) permits a court to extend the time for filing a motion for a new trial beyond the 10-day limit, it is an abuse of discretion to deny a motion as untimely.[7] *Appellant's*

[7] In his brief, Everette states: "CrR 7.5 clearly contemplates that a motion to extend time could, in the court's discretion, be granted. Therefore the fact that the motion is untimely cannot alone be a sufficient grounds for denying the motion." *Appellant's Brief* at 26.

Brief at 26. If it was a *per se* abuse of discretion for the court not to extend the time for filing when an untimely motion was made, then the 10-day time limit mandated by the first part of the rule would be meaningless. It is difficult to see how this circular logic demonstrates that no reasonable judge would have reached the conclusion of the trial court. Therefore, Everette fails to show the trial court abused its discretion.

Moreover, the record demonstrates that the trial court did thoughtfully consider whether or not to allow Everette to file his motion after the deadline provided by CrR 7.5(b). Prior to ruling on the motion, because Everette's complaints were against his attorney, the court appointed a new attorney to assist Everette with his claims. On March 12, 2014, the court held a hearing where Everette was given the opportunity to argue for an extension of the time for filing. After hearing from the parties, the court denied Everette's motion as untimely. The court reached this decision based on the fact that Everette's complaints of evidence not being submitted involved evidence that was known or could have been discovered with reasonable diligence at the time of trial. Accordingly, because this evidence was available, the court reasoned that Everette's attorney chose not to submit it as part of his trial strategy. If this was an unreasonable tactical decision, then Everette's claim was ineffective assistance of counsel. The court also found that had this evidence been

submitted, it would not have changed the outcome of the trial, and that because Everette had filed his notice of appeal, jurisdiction over this issue properly belonged with the Court of Appeals.

The trial court did not abuse its discretion in declining to grant Everette additional time for filing his motion for a new trial. There was no claim provided of newly discovered evidence that could not have been discovered with reasonable diligence. Therefore, none of the grounds for a new trial under CrR 7.5(a) applied. CrR 7.5(a) does not list ineffective assistance of counsel as a basis for a motion for a new trial, and this is precisely what Everette was claiming. *See* CrR 7.5(a). Such a claim is more appropriately brought, as it is routinely, on appeal. Unlike trial counsel, an appellate attorney has the benefit of reviewing the verbatim report of proceedings to discern whether there is a basis for an ineffective assistance of counsel claim. It is also noteworthy, that even with the opportunity to review the full trial transcript, Everette has not argued for ineffective assistance of counsel in his appeal.

The substantive reasons for this are obvious. As accomplices, Joey and David, both of which were convicted as a result of this incident, were unlikely to impress a jury when testifying on Everette's behalf. Further, phone records or non-existent phone records would have had no impact on the outcome of the trial. In addition to four witnesses testifying to

Everette having been on the phone; the evidence of the men in the Pathfinder finding Swanger shortly after she jumped out the window, strongly corroborated the evidence that Everette called Joey with Swanger's location. The trial court judge, being familiar with the evidence from having presiding over the trial, concluded that even if such evidence was produced, it would not have impacted the outcome of the trial. Because Everettte's claim was ineffective assistance of counsel and this was not grounds for a motion for a new trial under CrR 7.5(a), the trial court did not abuse its discretion when it declined to give Everette additional time to file his motion for a new trial when it was filed after the 10-day time limit required by the rule.

V. CONCLUSION

For the above stated reasons, Everettes's convictions and the trial court's denial of an extension of time to file a motion for a new trial should be affirmed.

Respectfully submitted this 30th day of January, 2015.

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By: _____

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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 30th, 2015.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 30, 2015 - 3:15 PM

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