

original

NO. 34958-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT RICHARD RUDNER, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 04-1-03874-1

AMENDED BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When viewed in the light most favorable to the State, was sufficient evidence presented for the jury to have found the defendant guilty of two counts of assault in the first degree?

(Appellant's Assignment of Error No. 1).

2. Was a unanimity instruction required when the evidence indicated that the defendant was engaged in a continuing course of conduct and the State did not argue in closing that each separate independent act constituted assault in the first degree?

(Appellant's Assignment of Error No. 2).

B. STATEMENT OF THE CASE.

1. Procedure

On December 6, 2005, Robert Richard Rudner, Jr., hereinafter "defendant" was charged by second amended information with two counts of assault in the first degree, burglary in the first degree, robbery in the first degree, unlawful possession of a firearm in the first degree, possession of a stolen firearm, two counts of residential burglary, theft of a firearm, and unlawful possession of a controlled substance. CP 5-9. On January 31, 2006, both parties appeared for trial. RP 1. The State moved to dismiss the charge of theft of a firearm and one count of residential burglary. CP 10-11; RP 994. Those motions were granted. Id.

A CrR 3.5 hearing was conducted, and the court concluded that the defendant's statements to law enforcement were admissible. RP 88-90. The defendant did not have any objections to the State's proposed jury instructions. RP 1000, 1004.

On February 22, 2006, the defendant was convicted of all remaining counts—two counts of assault in the first degree, burglary in the first degree, robbery in the first degree, unlawful possession of a firearm in the first degree, possession of a stolen firearm, residential burglary, and unlawful possession of a controlled substance. **CP 104-115**. The defendant was sentenced to a total of 573 months of confinement. CP 16-30.

2. Facts

a. August 1, 2004¹

Thoni Decker stated that in August 2004, her home was burglarized. RP 282. The only room that had been disturbed was her bedroom. RP 283. The bedroom window had a screen on it which had been bent and the window was open. RP 283. There were muddy footprints on a rug in the room. RP 284. It appeared that the room had been ransacked. RP 284. Included in the items missing were tax records,

¹ The defendant does not challenge any convictions resulting from crimes committed on August 1, 2006. However, because there were multiple witnesses presented at trial and multiple convictions, the State offers a summary of facts from events of April 1, 2006, for the court's convenience.

clothing, jewelry, death certificates, car keys, watches, and cremated pet ashes. RP 285.

Josie Decker testified that she and the defendant were acquaintances and the defendant would supply her with drugs. RP 242-243. She stated that the defendant and Autumn Arnestad were involved in a burglary of Thoni Decker's residence. RP 245. Thoni Decker's car keys were recovered from the defendant's backpack. RP 245. Decker admitted renting a Chevy Cavalier for the defendant. RP 249, 251.

On August 1, 2004, Gregory Griffin pulled in the back part of his residence and observed a vehicle in his driveway that he did not recognize. RP 318. Griffin then met a man at the top of his steps. RP 318. Griffin had never seen the man before. RP 319. He asked the man what he was doing. Id. The man told Griffin that he was visiting some friends. RP 319. Griffin turned around and looked inside the vehicle that was parked in this driveway. RP 319. Griffin saw that his property had been loaded into the car. RP 319. Griffin and the man, whom he later identified as the defendant, then began to fight. RP 320. Griffin slipped and the defendant reached in the window of the car, grabbed a backpack, swung it at Griffin, and then fled. RP 320. Griffin saw paintings, a coin collection, and his underwear drawer in the car. RP 330. He stated that his whole house was torn apart. RP 331. A rifle was also missing. RP 332.

Ian Stead was mowing his lawn when a homeowner across the street was waving his hands and asking for help. RP 302. He observed a

male and female running from his neighbor's house. RP 305. Stead and an officer walked the path that Stead had observed the couple taken. RP 306. Stead pointed out a backpack which was stuck into some shrubbery. RP 306. Josie Decker was shown the backpack by officers at the scene and identified it as belonging to the defendant. RP 254.

On April 1, 2004, Pierce County Sheriff Deputy Michael Rawlins responded to a report of an interrupted burglary at 13313 147th Street East in Puyallup. RP 103-104. Deputy Rawlins spoke to Stead, who gave him a description of the suspect. RP 108. Stead indicated that he had observed a male running into some brush through a yard. RP 110. Deputy Rawlins looked through the bushes and recovered a black backpack. RP 115. Inside the backpack was suspected marijuana, suspected methamphetamine, ammunition, and a cell phone bill in the name of the defendant. RP 115-116. Also in the backpack was a car key that unlocked Thoni Decker's vehicle. RP 145. The defendant had a black backpack with him when he fled the scene. RP 690.

A Chevy Cavalier was located at the Stead residence. RP 126. When the vehicle was searched assorted jewelry and credit cards, a pellet pistol, clothing, a 223-caliber rifle, a Remington 30.6 firearm with a sawed off stock and barrel, two canisters of cremated pet ashes, financial documents, a ski mask, and gloves, were found among other items. RP 151-156.

On April 1, 2004, Angela Oakes heard a “ruckus” next door and received a telephone call from her mother stating that there were police and dogs in the area. RP 469. Oakes lived in the home next to Gregory Griffin. RP 211. Oakes began looking around her home and eventually became convinced that there had been a burglary. RP 470. Among the items missing from the Oakes residence was a firearm from the West Point military academy. RP 474. The gun was in Mr. Oakes’ night stand. RP 493. The firearm was engraved and was loaded. RP 494. Also missing was clothing and a social security card. RP 474. Evidence recovered during the investigation was identified as Oakes’ property. RP 477. Arnestad testified that she participated in the Oakes burglary. RP 663.

Arnestad and the defendant were good friends. RP 655. She knew the defendant for a few months before the burglaries. Id. Arnestad would support herself by committing burglaries and was using methamphetamine every day. RP 656-657. Arnestad indicated that the defendant was with her when she was in the Griffin residence. RP 682. She stated that the Cavalier had property in it from a couple of different burglaries. RP 683-684.

b. August 6, 2004

Desmond Berry asked Arnestad to participate in a robbery of Brian Faranda and Kimberly Riley. RP 666-667. Faranda and Riley were acquainted with Berry, who believed that Faranda owned a Mustang. RP

581, 583. While Faranda actually owned a Thunderbird, Berry was the only person who mistook Faranda's car for a Mustang. RP 583, 610.

Berry and Arnestad wanted to take the keys to Faranda's Ford Mustang. RP 667.

On August 6, 2004, Brian Faranda and his girlfriend, Kimberly Riley, were sleeping on a sofa in the living room of their apartment. RP 580, 585. Faranda was awoken by the sound of the deadbolt opening. RP 586. He then heard Riley telling him to wake up and he realized that there were people standing in his doorway. RP 587. The people were standing four feet from Faranda. RP 587.

Faranda saw a male with a bandana over his nose and mouth and had a hat pulled down over his face. RP 587, 836. Riley identified one of the individuals who entered her apartment as the defendant. RP 825. The defendant was wearing gloves and a coat. RP 727. Arnestad indicated that the defendant was wearing a coat and gloves to "do the robbery." Id.

Arnestad had placed a pillowcase over her face when she got into the apartment. RP 668-669. She was able to go through the sliding glass door of the apartment by scaling a wall of electrical boxes to get to the balcony. RP 669. Arnestad let the defendant and Berry in through the front door. RP 580, 670, 671. Arnestad observed a child sleeping in a bedroom and two people sleeping on a couch. RP 670. She stated that the

gun she had with her was a military issue .9 millimeter Beretta that she had stolen from the Oakes residence. RP 671-672.

Riley saw the defendant walk through her front door and point a gun at her. RP 834. The defendant wanted the keys to the victims' car, which he believed was a Mustang. RP 835. Arnestad handed the firearm off to the defendant. RP 667-668. When Arnestad gave the gun to the defendant, she also gave him the clips with ammunition in them. RP 715. She observed the defendant point the gun toward her and Faranda. RP 719. Arnestad thought the defendant had the gun pointed at Faranda's head. RP 721. Riley was "scared to death" because there was a gun pointed at her head. RP 836, 839. Arnestad ordered Faranda to get on his knees and put his hands behind his head. RP 844. Arnestad went through Faranda's pockets. RP 844. Arnestad told the defendant to watch Riley and Faranda with the gun. Id.

The defendant held the gun to Faranda's head. RP 845. The defendant demanded that Faranada give him the keys to his car. RP 588, 716-717, 823, 835-836. Throughout the entire incident the defendant kept repeating himself, saying, "I want the keys to the motherfucking Mustang." RP 851-852. The defendant was very aggressive. RP 852. Faranda saw the firearm "right away" because it was pointed in his face.

RP 589. Faranda stated the gun looked like a semi-automatic pistol. RP 590.

There was a female with the defendant, later identified as Arnestead. RP 590, 823-825. Arnestead began to check Faranda's pockets. RP 590. Arnestead and the defendant were talking to each other. RP 591. The defendant continued to point the gun at Faranda. RP 591. Faranda was told to get on his knees and to put his hands behind his head. RP 591.

When Faranda was kneeling on the floor he heard a "click" which he believed was either an accidental trigger pull or a "de-cock mechanism" on the pistol. RP 597. Faranda stated that he heard the hammer fall but that the bullet did not travel down the barrel. RP 598. The gun was pointed at Faranda's head when the hammer was being let down. RP 631. Riley heard a "click" when the defendant had the gun pointed at Faranda's head. RP 847. She believed that there was either no bullets in the gun or the gun misfired. RP 847. After the "click," Riley started screaming that they were not going to get killed without a fight. RP 602, 789, 847. Riley stated that she saw the defendant pull the trigger on the gun. RP 853.

Riley jumped off of the couch and got into a confrontation with Arnestad. RP 597, 601. Riley sustained a gash on her right eye. RP 611. Arnestad stated that Riley received the injuries from fighting her. RP 731.

Faranda reached for the gun and the defendant hit him in the face with it. RP 597. The gun struck Faranda across his nose and forehead. RP 603. Faranda subdued the defendant and ordered him to throw the gun on the ground. RP 604-605. The gun used by the defendant was the firearm stolen from the Oakes residence. RP 498, 671-672. Faranda held the defendant down until the police arrived. RP 606-608. Faranda received injuries from his struggle with the defendant. RP 618. The defendant also bit Faranda. RP 814.

Arnestad stated that she did not know if the "click" was the trigger. RP 734. Arnestad indicated that she was not positive of when she saw the clip on the floor. RP 741. She did not know if the clip had been loaded and she did not check to see if there was a bullet in the chamber. RP 768. Arnestad ultimately stole Riley's purse and fled the scene. RP 724-725.

Officer Ryan Lane and Officer Ryan Larson responded to the scene. RP 505, 507-508. Officer Lane observed the defendant detained on the floor inside the apartment. RP 514-515. Officer Lane noticed a gun clip on the floor underneath the defendant's stomach. RP 518. The clip was for a .9 millimeter gun and it was loaded with eight hollow point bullets. RP 519. Inside the defendant's jacket pocket was a second empty gun clip. Id. Two additional bullets were found in a glove in the defendant's pants pocket. RP 520.

Terry Franklin, a forensic scientist with the Washington State Crime Laboratory, examined the gun for operability. RP 892, 898. Franklin test fired the gun nine times and found it to be operative. RP 900. There were two clips that were with the gun, one was for a Beretta, the other would have fit, but was not the same caliber for the gun. RP 901. Franklin used the Beretta clip to test fire the gun. RP 902. It was the Beretta clip that had been loaded with the eight bullets recovered from the scene. RP 518-519, 902. In order for the clip to be released from the gun, the operator would have to manually press a button. RP 907. The clip does not release by an operator running his or her hand over it. Id. Franklin indicated that the gun was of a good quality and the clip or magazine would not fall out by itself. RP 907-908.

C. ARGUMENT.

1. CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO HAVE FOUND THE DEFENDANT GUILTY OF TWO COUNTS OF ASSAULT IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)(citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Anderson, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate

their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial courts factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

A person commits the crime of assault in the first degree when he or she, with intent to inflict great bodily harm, assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011(1)(a). "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c).

To establish first degree assault, intent to inflict great bodily injury must be shown. State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993). "Evidence of intent . . . is to be gathered from all the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats. Ferreira, 69 Wn. App. at 468.

The evidence was sufficient for the jury to find that defendant committed two counts of assault in the first degree. To the extent that credibility played a role in this case, that determination lies with the province of the jury and cannot be reviewed on appeal.

- a. There was sufficient evidence presented for the jury to have found the defendant guilty of assault in the first degree against Faranda.

In this case, the defendant entered the home of Faranda and Riley uninvited. RP 668-670, 823. The defendant was behaving in an aggressive manner and demanding the keys to Faranda and Riley's car. RP 851-852. The defendant pointed the firearm in Faranda's face. RP 589. The defendant then told Faranda to get on his knees and to put his hands behind his head. RP 591. The defendant was behaving in an aggressive manner during the incident. RP 852. The defendant had the gun pointed at Faranda's head when Faranda heard the "click" of the hammer on the gun falling. RP 597-598. Riley stated that she saw the defendant pull the trigger and heard a "click." RP 853. The gun was inches to two feet from Faranda's head. RP 600, 845. After Riley began to fight with Arnestad, Faranda reached for the defendant's gun and the defendant hit him in the face with it. RP 597. Arnestad did not check the gun to see if he was loaded or not, and the clip that was recovered from

the floor of the apartment was loaded with eight hollow point bullets. RP 518-519, 716-718.

While the defendant asserts that Riley's testimony was inconsistent regarding whether she actually observed the defendant pull the trigger on the gun, the jury heard Riley's testimony and clearly determined that she was credible when she asserted that the defendant pulled the trigger of the gun. Other jurisdictions have concluded that pulling the trigger at another individual indicates intent to kill. See, Connecticut v. Hawthorne, 764 A.2d 1278, 1280 (2001); Louisiana v. Holmes, 701 So.2d 752, 757 (1997).

It is clear that the jury in the present case believed that the defendant intended to kill or cause great bodily harm to Faranda, and that but for operator error, a bullet was not shot from the gun. The jury heard testimony that if the trigger was pulled on the gun but no bullet was chambered, the bullet would not fire. RP 913. The jury was given a demonstration of the different sounds that could come from the gun, such as the sound of the hammer dropping and the sound of the clip dropping. RP 914. The jury even requested to see the clips. **CP 100-101**. They believed that the defendant intended to kill or cause great bodily harm to Faranda by pulling the trigger of the gun that was pointed at Faranda's head, after the defendant unlawfully entered the apartment and ordered Faranda on his knees at gunpoint. RP 600, 780, 845. There was sufficient

evidence, when viewed in the light most favorable to the State, for the jury to convict the defendant of assault in the first degree. Based on the totality of all of the circumstances, the defendant had the intent to kill or cause great bodily harm.

- b. There was sufficient evidence presented for the jury to have found the defendant guilty of assault in the first degree against Riley.

Initially, Arnestad pointed the gun at both Riley and Faranda while they slept. RP 718. Once Arnestad let the defendant inside the apartment, Arnestad was giving orders as if she was in charge. RP 846. The defendant was acting as Arnestad's accomplice by assisting her in subduing the victims.² Arnestad then handed the gun to the defendant, who pointed the gun at both victims. RP 719, 845. Riley was "scared to death" because there was a gun pointed at her head. RP 836, 839. In total, both the defendant and Arnestad pointed the gun at Riley and Faranda. RP 718-719, 845. After the defendant pointed the gun at Faranda and pulled the trigger, Riley thought the defendant was trying to kill them, and decided to fight. RP 847. Riley sustained injuries from fighting with Arnestad. RP 731.

² The jury was instructed on accomplice liability. CP 49-97. The defendant does not challenge that instruction.

The jury, based on the verdicts, believed that the defendant was trying to kill Faranda and Riley. The defendant pointed the gun at both victims, then pulled the trigger of the gun he had pointed at Faranda. Riley immediately reacted because she believed the defendant was trying to kill them both. This is similar to an individual killing one victim, then pointing the gun at a second victim but is interrupted before he can commit the second murder. The suspect still had the intent to kill the second victim. Similarly, the jury found that the defendant was trying to inflict great bodily harm on Faranda. They could have believed, based on the evidence presented, that he was going to try to kill or inflict great bodily harm on Riley, but was unable to act on his intent because Riley launched an attack in an effort to defend herself.

Given the totality of the circumstances, Riley saw a gun pointed at her, saw the defendant pull the trigger at Faranda, and believed the defendant was trying to kill them both. It is clear from the fact that the defendant pointed the gun at her and Faranda—and, in fact, tried to shoot Faranda—is clear evidence that the defendant intended to kill or inflict great bodily harm to both victims, but was interrupted from acting further on that intent because of Riley's attack. The jury was able to hear all of the evidence and clearly found Riley's testimony to be credible. Riley presented testimony that she believed the defendant was going to kill

them. There was evidence that Riley was not an unintended victim³, but an intended victim, and that the defendant was stopped only because Riley decided to take action to save herself. There was sufficient evidence that the defendant intended to kill both Faranda and Riley.

2. A UNANIMITY INSTRUCTION WAS NOT REQUIRED BECAUSE THE EVIDENCE INDICATED A CONTINUING COURSE OF CONDUCT AND THE STATE DID NOT ARGUE THAT EACH SEPARATE ACT CONSTITUTED ASSAULT IN THE FIRST DEGREE.

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the facts show two or more criminal acts that could constitute the crime charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). A separate unanimity instruction is not required, however, where the criminal acts are merely part of a continuing course of conduct. Crane, 116 Wn.2d at 330. Evidence tends to indicate a continuing course of conduct if each of the defendant's acts promotes one objective and

³ In State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994), the court held that proof of a specific intent to inflict great bodily harm is necessary to prove the crime of assault in the first degree, but not that the specific intent match a specific victim. Id. at 218-219. In this case, Riley was also likely in the zone of danger created by the defendant when he pulled the trigger at Faranda's head.

occurred at the same time and place. See, State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, review denied, 129 Wn.2d 1016, 917 P.2d 575 (1996). “To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.” State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In Crane, the Supreme Court held that the “continuous course of conduct” exception applied to an assault that occurred during a two-hour span. 116 Wn.2d at 330. Here, consistent with RCW 9A.40.040(1), the trial court’s unchallenged instructions informed the jury that it could find the defendant guilty of assault in the first degree if it found beyond a reasonable doubt that the defendant intended to cause great bodily harm to both Faranda and Riley. All of the defendant’s actions—pointing a gun at Faranda and Riley, pulling the trigger with the gun pointed at Faranda’s head, and hitting Faranda on the head with the gun, all are inextricably linked and were done with the same objective of taking Faranda’s property. Because all of the defendant’s actions were part of an ongoing enterprise with a single objective, no Petrich unanimity instruction was necessary.

Under the standard set out in Handran, the defendant’s series of assaults constitutes a continuing course of conduct. The series of assaults occurred during one evening, between the same aggressor and victims, and at the same location. The entire event took approximately thirty minutes. RP 639. It began when the defendant entered Faranda and Riley’s apartment, and ended with Faranda subduing him.

When spatial and temporal separations between acts are short, they can be said to be a continuing course of conduct. See, Love, 80 Wn. App at 361 (citing Petrich, 101 Wn.2d at 571). When making this inquiry, the court looks to each of the acts that constitute the same course of conduct that make up one criminal charge. Id. Moreover, the defendant's conduct meets the definition set out in Love, supra, because it was a single enterprise with one objective: causing great bodily harm to Faranda and Riley in order to take their car. The defendant's objective did not change during the brief series of events. As such, no Petrich unanimity instruction was necessary.

Moreover, the State presented argument that the entire event constituted assault in the first degree and did not assert that each act alone constituted the crime. The State argued:

This was given to her to use. Remember, it's his weapon. She gave it to him. He gave it to her to use until he gets up there and let him in. Once she let them in, after he had basically got in there, she hands him the weapon. What is the first thing that he does with the weapon, which is reflective of his intent? It was loaded at that point. Why wouldn't it be? He points the gun at Ms. Riley's head. That's the first thing that he did. That's what she told law enforcement as soon as they asked her what happened, and she has maintained that all the way through. He pointed the gun at her. She is the first one up. She wakes up Mr. Faranda, wants Mr. Faranda up, and Ms. Arnestad is in there and in control as well, basically apparently taking over as far as instructions and doing the active search for these keys.

Mr. Faranda is ordered on his knees with his hands behind his head, and the gun is put a few feet away from his head. Now, why does the Defendant do that? Obviously so he won't move, so he won't resist to that. They can accomplish the taking. Why would the gun be unloaded when he did that? Because he was just pretending? He just isn't going to actually use it. No, of course he is going to use it if need be. His intent is to inflict great bodily harm if necessary.

Now, this click, a lot made about the click. The click is only what causes Ms. Riley to fight for her life. Whatever the click is, we probably will never know. Certainly she said on the stand that she saw him pull the trigger. If you believe that, certainly he is guilty. But if you don't believe that, it doesn't really matter because there was a click. There is no doubt, there should be no doubt that there was a click of some sort, and you try to analyze what the click must have been through logic, and you can only come up with really one answer, that it is that he pulled the trigger, because through the display of the forensics person, as well as common sense, why would somebody in the head of a robbery, in an intense situation where he has a gun on somebody's head in order to prevent that person from resisting, why would he de-cock it? Why would he take the clip out at that point. It makes no sense. You cannot take this clip out accidentally.

RP 1024-1025.

Clearly, in the context of arguing the facts to support an assault in the first degree conviction, the State addressed all of the defendant's actions collectively. The State did not present argument that multiple assault in the first degrees occurred, but rather one assault in the first degree on each victim, given the totality of the defendant's actions. It is clear, as the State argued to the jury, that the actions of the defendant were

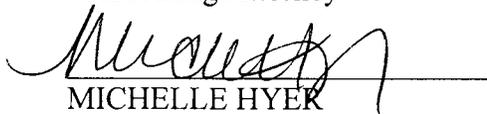
part of a continuing course of conduct. A unanimity instruction was not required.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests that this court affirm the defendant's convictions below.

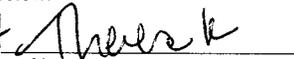
DATED: May 31, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-5-07 
Date Signature