

Supreme Court No. 92259-4  
COA No. 45941-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

BRETT EVERETTE,

Petitioner.

**FILED**  
SEP 21 2015  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON *EF*

---

PETITION FOR REVIEW

---

PETER B. TILLER  
Attorney for Petitioner

THE TILLER LAW FIRM  
Rock & Pine  
P. O. Box 58  
Centralia, Washington 98531  
(360) 736-9301

FILED IN COA ON SEPTEMBER 10, 2015

**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER ..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW ..... 1

D. STATEMENT OF THE CASE ..... 2

    1. Procedural facts ..... 2

    2. Proceeding on Appeal..... 3

E. ARGUMENT ..... 3

    1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT EVERETTE COMMITTED ATTEMPTED KIDNAPPING IN THE FIRST DEGREE AND UNLAWFUL POSSESSION OF A FIREARM ..... 3

        a. Attempted first degree kidnapping ..... 5

        b. Unlawful possession of a firearm..... 7

    2. THE COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION ON FELONY HARASSMENT ..... 8

F. CONCLUSION ..... 9

## TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963) .....	8
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) .....	4
<i>State v. Craven</i> , 67 Wn. App. 921, 841 P.2d 774 (1992) .....	4
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	4
<i>State v. Galisia</i> , 63 Wn. App. 833, 822 P.2d 303 (1992) .....	5
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	4, 6
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996) .....	5
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988) .....	8
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	8
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	4, 5
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).....	4
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 435 (2000).....	4
<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
Wash. Const. art. 1, § 3.....	4
Wash. Const. art. 1, §21.....	2
U. S. Const. Amend. V .....	4
U. S. Const. Amend. VI .....	2
U. S. Const. Amend. XIV .....	4
<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 9.941.040(1)(a) .....	7

<b><u>RULES OF APPELLATE PROCEDURE</u></b>	<b><u>Page</u></b>
RAP 13.4(b).....	3
RAP 13.4(b)(3) .....	1, 2
RAP 13.4(b)(4) .....	1, 2, 3

**A. IDENTITY OF PETITIONER**

Your Petitioner for discretionary review is Brett Everette, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

**B. COURT OF APPEALS DECISION**

Everette seeks review of Division Two's Unpublished Opinion in *State v. Everette*, No. 45941-8-II (Slip Op. filed August 11, 2015). No Motion for Reconsideration has been filed in the Court of Appeals. A copy of the opinion is attached.

**C. ISSUES PRESENTED FOR REVIEW**

1. Principles of due process require that the State present sufficient evidence to prove each of the elements of a criminal offense beyond a reasonable doubt. Should this Court grant review and hold that the State has failed to sustain its burden of proving guilt beyond a reasonable doubt that Everette committed attempted kidnapping of as required by due process? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Whether there is sufficient evidence to support a conviction for first degree unlawful possession of a firearm where there is no evidence that the appellant had in his possession or controlled a firearm other than a statement by one witness that she

saw a gun, which was contradicted by another witness who said that he did not see a gun, and where the gun allegedly seen by the first witness was not recovered by law enforcement? RAP 13.4(b)(3); RAP 13.4(b)(4).

3. The jury trial provisions of the Sixth Amendment to the United States Constitution and Article I, section 21 of the Washington Constitution require jury unanimity beyond a reasonable doubt of every essential element of the crime charged. When evidence indicates two distinct acts, either one of which could form the basis of a crime of felony harassment, the jurors must be instructed they all must agree beyond a reasonable doubt on the same act. Did the trial court abuse its discretion in failing to give a unanimity instruction when the prosecution presented evidence of multiple events that could be construed as threatening bodily injury? RAP 13.4(b)(3); RAP 13.4(b)(4).

**D. STATEMENT OF THE CASE**

1. Procedural facts.

A jury convicted Everette of attempted kidnapping in the first degree; felony harassment; and unlawful possession of a firearm in the first degree. Clerk's Papers (CP) 31-33. On October 1, 2014, Everette filed a brief challenging the convictions. The brief set out

facts and law relevant to this petition and are hereby incorporated herein by reference.

2. Proceedings on Appeal. On appeal, Everette argued *inter alia* that the evidence was insufficient to convict the appellant of attempted kidnapping in the first degree, that there is insufficient evidence that he ever owned or possessed a firearm, and that trial court erred in denying the appellant an extension of time in which to file a motion for new trial. Brief of Appellant at 15. The Court rejected all of Everette's arguments. For the reasons set forth below, he seeks review.

**E. ARGUMENT**

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. **THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT EVERETTE COMMITTED ATTEMPTED KIDNAPPING IN THE FIRST DEGREE AND UNLAWFUL POSSESSION OF A FIREARM**

Principles of due process require the State to prove all

essential elements of the crime charged beyond a reasonable doubt. U.S. Const. amends. 5, 14; Const. art, I, § 3; *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and requires it be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928.

Evidence is sufficient if, viewed in the light most favorable to

the State, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192; 201, 829 P.2d 1068 (1992) (citation omitted). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992).

a. **Attempted first degree kidnapping**

In this case, Everette took no step towards restraining Ms. Swanger in a place she was not likely to be found. On the contrary, Everette confronted Ms. Swanger in the bedroom of the house with Mr. Martin present. Other people, including the homeowner Maria Johnson, knew that Mr. Everette was there and knew where Ms. Swanger was located.

The testimony shows that Mr. Everette wanted to know where the "missing" vehicle was located. Although Mr. Everette allegedly forced Ms. Swanger onto the bed and said that she could

not leave, his actions were not "strongly indicative" of an intent to abduct. The evidence indicates that during the alleged incident, Mr. Everette was simultaneously making telephone calls, apparently requesting other people to come to the house, including his girlfriend, allegedly for the purpose of beating up Ms. Swanger.

In *State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980) the Court specifically held that incidental restraint and movement of a victim, standing alone, are not indicative of a true kidnapping. In *Green*, the Supreme Court held that there is insufficient evidence to prove kidnapping as an aggravator of murder beyond a reasonable doubt where the restraint and movement of the victim was merely "incidental" to and not "an integral part of and was independent of the underlying homicide." *Green*, 94 Wn.2d at 227.

[T]he mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, *indicia* of a true kidnaping.

*Green*, 94 Wn.2d at 227. In *Green*, an eyewitness saw a man snatch a child from a public sidewalk and take her behind a nearby apartment building out of view, where he killed her. *State v. Green*, 94 Wn.2d at 222-23. Another witness also saw the victim being grabbed and taken around the building. *Green*, 94 Wn.2d at 224.

**b. Unlawful possession of a firearm.**

Former RCW 9.941.040(1)(a) provides that a person is guilty of unlawful possession of a firearm in the first degree: "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously convicted . . . of any serious offense."

Here, there is no uncontradicted testimony whatsoever to support actual possession of a gun. In this case, the only direct testimony about the gun was that Ms. Swanger testified that Mr. Everett waved a gun that she identified as a 9 mm handgun owned by Joey Sanchez. 12/18/13RP at 68. Her testimony is directly contradicted, however, by Mr. Martin, who said that he *thought* Mr. Everett had a gun during the incident, but did not actually see him with a gun and certainly did not see him wave or brandish a gun. 12/19/13RP at 31, 32, 38. Ms. Johnson also stated that she did not see Mr. Everett with a gun when he came into her house, and that if she had seen him enter her house with a gun, she could have called the police. Because there is insufficient evidence that Mr. Everett possessed the gun, his conviction for unlawful possession must be reversed.

The Court of Appeals' affirmance of Everett's convictions for attempted kidnapping and possession of a firearm was based

on a cursory assessment of the facts and merits review by this Court.

2. **THE COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION ON FELONY HARASSMENT.**

When the evidence indicates multiple distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt; *Kitchen*, 110 Wn.2d at 411; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Where neither alternative is elected, there a constitutional error stemming from the possibility some jurors may have relied on one act while other jurors relied on another. *Kitchen*, 110 Wn.2d at 409; *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963).

Here, the prosecution offered at least three acts describing potentially threatening conduct by Mr. Everette or alleged accomplice Joey Sanchez toward Ms. Swanger, The State alleged that when Mr. Everette was in the bedroom with Ms. Swanger and Mr. Martin, he threatened to kill Ms. Swanger, threatened to “put new holes in her head,” and according to Ms. Swanger, “flashed” or waved a 9mm handgun.

No other witnesses, however, corroborated her claim that he had a gun, although Mr. Martin said that he thought that Mr. Everette had a gun. Later, Mr. Everette's accomplices allegedly pushed Ms. Swanger to the ground while in the alley and then attempted to drag her to the Pathfinder.

Mr. Cochran said that Joey Sanchez pointed a shotgun at Ms. Swanger while he was in the Pathfinder. The prosecution, however, did not unambiguously elect any particular threat that must serve as the basis of felony harassment. The State argued in closing that Mr. Everette threatened to kill Ms. Swanger in the bedroom and that she was placed in fear. RP (12/20/13) at 67, 68. Yet the prosecution did not limit the jury's consideration to only a particular act or threat; the prosecutor also referred in closing to the shotgun allegedly possessed by Mr. Everette's accomplices in the Pathfinder, which Mr. Cochran said was pointed at Ms. Swanger. RP (12/20/13) at 71.

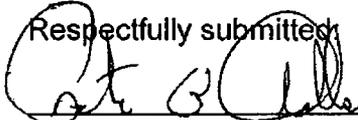
**F. CONCLUSION**

This court should accept review for the reasons indicated in Part E and reverse Brett Everette's convictions consistent with the arguments presented herein.

/ / /

/ / /

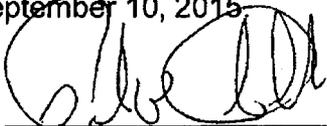
DATED this 10th day of September, 2015.

Respectfully submitted  
  
PETER B. TILLER, WSBA #20835  
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on September 10, 2015, that this Petition for Review was filed by JIS to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid to Mr. Ryan Jurvakainen, Cowlitz Co. Prosecutor's Office, 312 SW 1<sup>st</sup> Ave., Kelso, WA 98626 and to Mr. Brett C. Everette, DOC #847512, Clallam Bay Correction Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, LEGAL MAIL/SPECIAL MAIL.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 10, 2015.

  
PETER B. TILLER

**ATTACHMENT**



On August 12, 2013, Everette came to Maria Johnson's house looking for Swanger and Bradley Martin, Swanger's boyfriend. Johnson told him that they were not in her house. In fact, Swanger and Martin were in a back bedroom of Johnson's house with the door closed. Swanger eventually let Everette into the room. Everette asked Swanger where Sanchez-Juarez's car was, and she replied that she did not know. Everette became angry, grabbed Swanger's hair and neck, and threw her onto the bed.

According to Swanger, Everette flashed a gun and pointed the gun at her head and body.<sup>1</sup> Everette stated that he was not afraid of smashing in Swanger's face, killing her, putting "some new holes in her head" with his friend's shotgun, or going back to prison. Report of Proceedings (RP) (Dec. 19, 2013) at 17. In addition, Everette told everyone in the room that they could not leave. Swanger did not feel free to leave. Everette made several phone calls, in one instructing someone to tell Sanchez-Juarez to come to Johnson's house.

When Everette briefly left the room, Martin jammed a skateboard underneath the bedroom door and he and Swanger jumped out the bedroom window. Swanger ran from Johnson's house into an alley. Sanchez-Juarez drove up the alley, pulled up to Swanger, pointed a shotgun at her, and asked where his car was. Sanchez-Juarez then jumped out of the car, pulled Swanger to the ground, and kicked her. Sanchez-Juarez and another person in the car started dragging Swanger back to the car before letting her go and driving off.

---

<sup>1</sup> Martin did not see a gun, but testified that he observed Everette grabbing at the front of his pants, which gave Martin the impression that Everette was keeping a weapon in his pants. Martin testified he believed Everette had a gun.

The State charged Everett with attempted first degree kidnapping with a firearm enhancement, first degree unlawful possession of a firearm, and felony harassment with a firearm enhancement. The case proceeded to trial, and the jury found Everett guilty on all charges on December 20, 2013. On February 10, 2014, the trial court sentenced Everett to life without the possibility of early release on the attempted first degree kidnapping and first degree unlawful possession of a firearm convictions, and a standard range of 116 months for the felony harassment conviction.

On February 12, 2014, Everett filed a pro se motion for a new trial. He argued that he had unsuccessfully tried to contact his trial attorney during preparations for trial and that newly discovered information demonstrated that there were no phone records supporting witness testimony that Everett had made calls to Sanchez-Juarez. Everett filed a notice of appeal on February 14, 2014. On February 25, 2014, Everett submitted additional pro se motions in support of his motion for a new trial. CP 150-63. Because Everett claimed ineffective assistance of counsel, the trial court appointed new counsel, who filed a second notice of appeal on March 10, 2014. Everett's new counsel also submitted a memorandum in support of his motions for a new trial, which seemed to argue that counsel required additional time to investigate Everett's claims.

The trial court denied Everett's motion for a new trial because (1) it was not filed within the time limits specified by CrR 7.5(b) and there was no basis to extend the time for filing, and (2) CrR 7.5(a)(3) did not apply because Everett did not produce newly discovered evidence and the evidence would not have changed the outcome of the trial. CP 189. In addition, the trial court concluded that it did not have jurisdiction to address the issues Everett raised in his motions because he already had filed a notice of appeal and therefore the trial court was not

permitted to rule on motions without receiving permission from the Court of Appeals under RAP 7.2(e).

Everette appeals his convictions and the trial court's denial of his motion for a new trial.

## ANALYSIS

### A. SUFFICIENT EVIDENCE

Everette challenges whether the State presented sufficient evidence for a reasonable jury to find him guilty of the charges of attempted first degree kidnapping and first degree unlawful possession of a firearm. We hold that there was sufficient evidence for a reasonable jury to convict Everette of both charges.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. Credibility determinations are made by the trier of fact and are not subject to our review. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). Circumstantial and direct evidence are equally reliable. *Id.*

#### 1. Attempted First Degree Kidnapping

Everette challenges the sufficiency of the State's evidence on one element of attempted first degree kidnapping: whether Everette made a substantial step toward intentionally "abducting" Swanger. We hold that the State presented sufficient evidence to prove this element.

Under RCW 9A.40.020(1), a person is guilty of kidnapping in the first degree if he or she "intentionally abducts another person with intent: . . . (c) To inflict bodily injury on him or her;

or (d) To inflict extreme mental distress on him, her, or a third person.” RCW 9A.40.010(1) defines “abduct” as restraining 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.”<sup>2</sup> A person is guilty of criminal 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).

Everette concedes that the State presented evidence that he restrained Swanger, but he argues that the State failed to present evidence that he attempted to hold Swanger in a place that she was not likely to be found because the bedroom in Johnson’s house was not such a place. However, this argument ignores the fact that RCW 9A.40.010(1) allows the State to prove abduction by establishing that the defendant restrained a person using or threatening to use deadly force.

Here, the evidence showed that Everette threatened to use deadly force on Swanger. Both Swanger and Martin testified that Everette made several threats involving deadly force, including threatening to kill Swanger and threatening to put “some new holes in her head,” while restraining her in Johnson’s bedroom. RP (Dec. 19, 2013) at 17. We hold that this evidence was sufficient for a reasonable jury to find that Everette restrained Swanger by threatening her with deadly force, and therefore that sufficient evidence was presented for a reasonable jury to find that he “abducted” her.

---

<sup>2</sup> RCW 9A.40.010 was recently amended. See LAWS OF 2014, ch. 52, § 2. The amendment did not impact the subsection that we rely on for our analysis.

2. Unlawful Possession of a Firearm

Everette argues that the State failed to present sufficient evidence of his unlawful possession of a firearm because only Swanger testified to actually seeing him in possession of a firearm. We hold that the State presented sufficient evidence of Everette's unlawful possession of a firearm.

Under RCW 9.41.040(1)(a), a person "is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted" of any serious offense.<sup>3</sup> The State must prove that the defendant knowingly owned, possessed, or controlled the firearm. *State v. Williams*, 158 Wn.2d 904, 909-10, 148 P.3d 993 (2006). Everette stipulated at trial that he had previously been convicted of a serious offense. Therefore, the issue is whether there was sufficient evidence to establish that he knowingly owned, possessed, or controlled a firearm.

The State presented evidence that Swanger saw Everette possessing a handgun. Martin did not see Everette in possession of a gun, but he testified that he believed Everette possessed a handgun because he frequently reached down into the top of his pants.

Everette argues that Swanger's testimony was inconsistent with Johnson's and Martin's testimony. Johnson testified that she did not see Everette with a gun when he came into her house, RP (Dec. 18, 2013) at 156, and Martin testified that he did not see a gun. However, we defer to the trier of fact on decisions resolving conflicting testimony and the credibility of witnesses. *Miller*, 179 Wn. App. at 105. We hold that based on Swanger's testimony, the State

---

<sup>3</sup> RCW 9.41.040 was recently amended. See LAWS OF 2014, ch. 111, § 1. The amendments did not add to or subtract from the language of RCW 9.41.040(1)(a).

presented sufficient evidence for a reasonable jury to find beyond a reasonable doubt that Everett possessed a firearm.

B. UNANIMITY INSTRUCTION – FELONY HARASSMENT

Everette argues that his conviction of felony harassment violated his right to a unanimous verdict because the jury could have convicted him based on multiple purported threats. We hold that these acts were part of a continuing course of conduct and therefore there was no need for a unanimity instruction.

We review de novo whether a unanimity instruction is required. *See State v. Furseth*, 156 Wn. App. 516, 520, 233 P.3d 902 (2010). Because the failure to give a unanimity instruction is an error of constitutional magnitude, a defendant may raise the issue for the first time on appeal. *State v. Locke*, 175 Wn. App. 779, 802, 307 P.3d 771 (2013), *review denied*, 179 Wn.2d 1021 (2014).

To convict Everett for felony harassment, one of the elements that the State had to prove beyond a reasonable doubt was that Everett knowingly threatened to kill Swanger. RCW 9A.46.020(1)(a)(i), (2)(b); *State v. Mills*, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005). Everett argues that there was evidence of three possible threats: (1) his threat to kill Swanger, (2) his threat to shoot Swanger in the head, (3) and his gesturing with the handgun.<sup>4</sup> He, therefore, argues that a unanimity instruction was required.

---

<sup>4</sup> Everett also argues that the jury could have convicted him of felony harassment based on Sanchez-Juarez pushing Swanger to the ground and attempting to drag her to the car, and Sanchez-Juarez's implied threat to shoot Swanger when he pointed a shotgun at her. However, the jury instructions regarding felony harassment did not allow the jury to convict based on an accomplice liability theory. We presume the jury followed the trial court's instructions unless demonstrated otherwise. *State v. Curtiss*, 161 Wn. App. 673, 698, 250 P.3d 496 (2011). Therefore, we reject this claim.

For a conviction to be constitutionally valid, a unanimous jury must conclude that the accused committed the criminal act charged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), *abrogated on other grounds, In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). When multiple incidents are alleged, any one of which could constitute the crime charged; the jury must unanimously agree on which incident constitutes the crime. *Id.* Under these circumstances, unless the State elects which incident it will rely on for the conviction, a trial court must instruct the jury that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Id.*

However, the defendant is not entitled to a unanimity instruction if the evidence shows that multiple acts constitute a continuing course of conduct. *Locke*, 175 Wn. App. at 803. A continuing course of conduct involves an ongoing enterprise with a single objective. *Id.* We evaluate the facts in a common sense manner to determine whether a defendant's multiple acts constitute a continuing course of conduct. *Id.*

A continuing course of conduct exists where "multiple acts of the charged crime were committed with a single purpose against one victim in a short period of time." *Id.* In *State v. Crane*, the Supreme Court applied the continuing course of conduct exception to multiple acts of assault against a victim over a two-hour period. 116 Wn.2d 315, 330, 804 P.2d 10 (1991), *overruled on other grounds In Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). Similarly, in *State v. Marko*, we held that a defendant's statements to two different people over 90 minutes constituted a continuing course of conduct for the crime of intimidating a witness. 107 Wn. App. 215, 221, 27 P.3d 228 (2001).

Here, Everette's threats occurred over a short period of time, against the same person, and in the same place. Therefore, we hold that the threats constituted a continuing course of

conduct and that no unanimity instruction was required. Accordingly, we hold that the trial court did not err when it did not give a unanimity instruction for the felony harassment charge.

C. DENIAL OF NEW TRIAL MOTION

Everette argues that the trial court erred in denying his motion for a new trial on the grounds that the motion was untimely. Everette argues the trial court erred by not extending the time for filing his motion. We disagree.

We review for an abuse of discretion a trial court's denial of a motion for a new trial. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). A trial court abuses its discretion by reaching a conclusion no reasonable judge would reach. *Id.* We will reverse a trial court's denial of a new trial motion only where the moving party clearly shows that the trial court abused its discretion. *See id.*

CrR 7.5(b) provides that a motion for a new trial must be served and filed within 10 days after the verdict. The rule also provides that the court "*in its discretion*" may extend this time. CR 7.5(b) (emphasis added).

Here, Everette's motion for a new trial was untimely; he filed his first pro se motion for a new trial several weeks after the jury's guilty verdict. The trial court had the discretion under CrR 7.5(b) to extend the time for filing the motion, but the trial court chose not to extend the time. Everette provides no explanation for why the trial court should have considered the untimely motion. Therefore, we hold that the trial court did not abuse its discretion in denying the motion on the basis of untimeliness.<sup>5</sup>

---

<sup>5</sup> Everette also argues the trial court erred when it found that it had lost jurisdiction to decide his motion for a new trial because Everette already had filed a notice of appeal. We agree. *See* RAP 7.2. However, because the trial court also denied the motion based on untimeliness, this error is harmless.

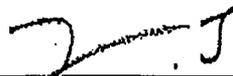
Everette also assigns error to the trial court's conclusions that (1) CrR 7.5(a)(3) did not apply because Everette did not present newly discovered evidence and (2) even if Everette's attorney had presented the evidence, it would not have changed the outcome of the trial. However, Everette fails to provide any argument showing that these conclusions are erroneous in any material respect. Therefore, these assignments of error are waived. RAP 10.3(a)(6), *Ames v. Ames*, 184 Wn. App. 826, 850, 340 P.3d 232 (2014), *review denied*, No. 91511-3 (Wash. July 8, 2015).

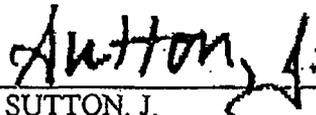
We affirm Everette's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
MAXA, P.J.

We concur:

  
\_\_\_\_\_  
LEE, J.

  
\_\_\_\_\_  
SUTTON, J.

**TILLER LAW OFFICE**

**September 10, 2015 - 3:40 PM**

**Transmittal Letter**

Document Uploaded: 2-459418-Petition for Review.pdf

Case Name: State v. Brett Everette

Court of Appeals Case Number: 45941-8

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: \_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Shirleen K Long - Email: [slong@tillerlaw.com](mailto:slong@tillerlaw.com)

A copy of this document has been emailed to the following addresses:

[appeals@co.cowlitz.wa.us](mailto:appeals@co.cowlitz.wa.us)