Supreme Court No. I02809-I
(Court of Appeals No. 83837-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RENE MAYA ESTRADA,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Rene Maya Estrada, petitioner here and appellant below, asks this Court to review the opinion of the Court of Appeals filed February 5, 2024, attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

When the prosecution presents evidence of more than one act that could form the basis of a single count charged, either the State must tell the jury which act to rely on or the court must provide a *Petrich*[1] instruction telling the jury it must unanimously agree that the defendant committed a specific act. Where there is neither an election by the State nor a *Petrich* instruction from the judge, the defendant's constitutional right to a unanimous jury is violated.

The prosecution charged Mr. Maya Estrada with a single count of rape but presented evidence of two rapes—one in a

[1] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); *see* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 (5th Ed).

third floor apartment and one in a ground floor communal laundry room. Where the prosecution did not elect one act and the court did not instruct the jury on unanimity, did the resulting conviction violate Mr. Maya Estrada's constitutional right to a unanimous jury? And does the Court of Appeals' opinion affirming conflict with its opinion in *State v. Aguilar*, 27 Wn. App. 2d 904, 534 P.3d 360 (2023)? RAP 13.4(b)(2), (3).

C. STATEMENT OF THE CASE

Rene Maya Estrada was born in rural Mexico and lived with his grandparents until he was about 13 years old. RP 311, 313, 408. He was then sent to live with his father in California. RP 409. Mr. Maya Estrada failed most of his high school classes because he did not understand English, and he was bullied for the same reason. RP 409-11.

After dropping out of high school, Mr. Maya Estrada worked in California for about a year and then worked in Colorado for another six months before being deported. RP

416-17. About three years ago, he came back to the United States to work, and he got a job in Washington. RP 417.

Though he had a job, Mr. Maya Estrada struggled to survive. He could not afford housing, so one of his co-workers and her husband invited Mr. Maya Estrada to stay in their living room. RP 1301-02, 1353-54.

After he had stayed there for only a night or two, his hosts' 17-year-old daughter accused Mr. Maya Estrada of raping her. She said that after she got home from work, Mr. Maya Estrada came into her bedroom with a kitchen knife, took off her clothes, kissed her, and forced her to perform oral sex. RP 1391-96, 1545.

When the two heard noises outside, Mr. Maya Estrada got dressed and went outside to see what was happening. RP 1398. After he went back inside, he ordered the girl to get dressed. RP 1398. According to the girl, Mr. Maya Estrada then took her outside and dragged her down two flights of stairs to the communal laundry room. RP 1399.

The girl stated that once the two were in the laundry room, Mr. Maya Estrada "took his clothes off again," forced her to the floor, hit her in the chest, smoked some illicit substance, and again put his penis in her mouth. RP 1399-1401, 1417, 1420, 1539. While he was again forcing her to perform oral sex, a car arrived and parked near the laundry room, shining its lights into the room. RP 1419. Mr. Maya Estrada got dressed and went upstairs, and the girl went to a neighbor's apartment and requested help. RP 1419-21.

The State charged Mr. Maya Estrada with one count of first-degree rape with a deadly weapon enhancement. CP 139. Mr. Maya Estrada denied the allegations. RP 1768-90.

At trial, the prosecutor elicited evidence about both the alleged incident in the bedroom and the alleged incident in the laundry room. RP 1398-1401, 1417-21. The jury entered a verdict of guilty on the rape but did not find that Mr. Maya Estrada used a deadly weapon. CP 160-63.

Mr. Maya Estrada moved for a new trial on the ground that the court had not instructed the jury on the unanimity requirement. CP 164-70; RP 1824-32. In other words, the court did not instruct the jury that all 12 jurors had to agree that Mr. Maya Estrada raped the girl in her bedroom or all 12 had to agree that he raped her in the laundry room, or both. Absent such an instruction, some jurors may have found sufficient evidence for the bedroom but not the laundry room, and vice versa. Such a split verdict violates the constitutional right to a unanimous jury. CP 164-70; RP 1824-32.

The court denied the motion, concluding that the two alleged rapes three floors apart with an intervening change in clothes was actually a continuing course of conduct. CP 356-59. The court imposed a life sentence with a minimum term of 114 months. CP 380.

Mr. Maya Estrada appealed, again arguing that the absence of a *Petrich* instruction violated his constitutional right to a unanimous jury.[2] The Court of Appeals affirmed. App. A.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A defendant has a constitutional right to a unanimous jury finding that he committed a particular criminal act. Here, the court did not instruct the jury on this requirement, resulting in the possibility of an impermissible split verdict.

The Court of Appeals ruled that the alleged rape in the apartment and the alleged rape in the communal laundry room, where both parties got dressed and left the apartment in between the two acts, was actually one continuing rape. This ruling is contrary to case law and common sense. This Court should grant review.

[2] Mr. Maya Estrada also raised evidentiary issues he does not present in this petition.

The absence of a Petrich instruction violated Mr. Maya Estrada's constitutional right to a unanimous jury.

1. *A defendant has a constitutional right to a unanimous jury regarding which of multiple alleged acts the State proved beyond a reasonable doubt.*

Article I, sections 21 and 22 guarantee the right to a jury trial. Const. art. I, §§ 21, 22; *City of Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). This includes the right to have a jury find unanimously that a particular act occurred. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

When the prosecution presents evidence of more than one act that could form the basis of a single count 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 specific criminal act." *Id.* (citing *Petrich*, 101 Wn.2d at 570). Absent election, "a unanimous verdict on one criminal act will be assured" only if "the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt." *Petrich*, 101 Wn.2d at 572.

The pattern "*Petrich* instruction," named for the seminal case, provides:

> The State alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime).

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 (5th Ed). A court must give this instruction "when the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct." *Id.*, Note on Use.

2. *The absence of a Petrich instruction, requiring the jury to agree the State proved the alleged act in the apartment or the alleged act in the communal laundry room, violated Mr. Maya Estrada's constitutional right to unanimity.*

Here, the State charged Mr. Maya Estrada with only one count of rape, but it presented evidence of two distinct acts—one in the bedroom in the third-floor apartment, and one in the

public laundry room on the ground floor. Yet, the court did not provide a *Petrich* instruction to the jury. CP 140-59. Mr. Maya Estrada moved for a new trial on this basis, but the trial court denied the motion, ruling the two alleged acts were actually one continuing course of conduct. CP 164-70, 356-59; RP 1824-32. This ruling was incorrect and violated Mr. Maya Estrada's constitutional right to a unanimous jury.

To determine whether the State has presented evidence of multiple acts requiring a *Petrich* instruction, a court asks three questions. *State v. Hanson*, 59 Wn. App. 651, 656, 800 P.2d 1124 (1990). "First, what must be proven under the applicable statute" or "to convict" jury instruction? *Id.* "With most criminal statutes, this will be a single event, such as a burglary, robbery or assault. With some, though, it will be a continuing course of conduct, such as operating a prostitution enterprise." *Id.* at 656.

"Second, what does the evidence disclose," viewed in the light most favorable to the party requesting the instruction?

Hanson, 59 Wn. App. at 656. If the evidence is such that jurors could find more than one event sufficient to convict, this weighs in favor of requiring an instruction. *Id.* at 657 n.6. Somewhat perversely, then, in this context, "to view the evidence in the light most favorable to the defendant, it is necessary to view it in the light most favorable to the State." *Id.*

"Third, does the evidence disclose more than one violation of the statute?" *Id.* at 657. If the evidence shows only one violation, then the court need not issue a *Petrich* instruction. *Id.* However, "if the evidence discloses two or more violations, then a *Petrich* instruction will be required, for without it some jurors might convict on the basis of one violation while others convict on the basis of a different violation." *Id.* This lack of unanimity violates the constitutional right to a jury trial. *Id.*

Here, answering these three questions demonstrates that the State presented evidence of two distinct acts and a *Petrich* instruction was required.

First, the statute and "to convict" instruction require proof of a single event, not a "continuing course of conduct, such as operating a prostitution enterprise." *Hanson*, 59 Wn. App. at 656. *See* RCW 9A.44.040(1)(a) (first-degree rape); CP 152 ("to convict" instruction).

Second, viewing the evidence in the light most favorable to the instruction, jurors could have found sufficient evidence to support a conviction for rape in the bedroom and sufficient evidence to support a separate conviction for rape in the communal laundry room. The girl testified that Mr. Maya Estrada forced her to perform oral sex at knifepoint in the bedroom. RP 1393-95. This evidence was sufficient to support a conviction for rape in the bedroom. RCW 9A.44.040(1)(a); CP 152.

The girl stated that after this rape, Mr. Maya Estrada then got dressed and went outside to check the source of noises they'd heard. RP 1398. Then, he came back in and told her to get dressed. RP 1440-41. Then, he forced her out the door and

down multiple flights of stairs and into the laundry room. RP 1399. Then, he took his clothes off again, hit her in the chest, smoked something, and forced her to perform oral sex in the laundry room. RP 1108, 1202-03, 1399-1400, 1417. This evidence was sufficient to support a conviction for rape in the laundry room. RCW 9A.44.040(1)(a); CP 152.

Third, the evidence discloses more than one violation of the statute. Viewed in the light most favorable to the State, the jury could have convicted Mr. Maya Estrada of one count of rape in the bedroom, and could have convicted him of another count of rape in the laundry room. Thus, a *Petrich* instruction was required. *Hanson*, 59 Wn. App. at 658.

The trial court's ruling on an evidentiary objection further demonstrates that these alleged incidents were separate acts. When Mr. Maya Estrada objected to the State's repeated elicitation of how the girl felt, on the grounds that it was cumulative, the court overruled the objection because "it was different times and different locations." RP 1404.

The court's observation was correct. The girl testified to two different acts of rape at different times in different places—one in the apartment and one in the communal laundry room. RP 1393-1401, 1417. Detective Novak testified that the apartment was on the third level and the laundry room was in the basement. RP 973, 975, 986. In closing argument, the prosecutor described two separate rapes, stating, "You've heard her talk about being in the laundry room, where he *again* pulled off his shorts and put his penis in her mouth." RP 1757.

A *Petrich* instruction was required. The failure to give such an instruction violated Mr. Maya Estrada's constitutional right to a unanimous jury. *Hanson*, 59 Wn. App. at 659.

3. *The opinion of the Court of Appeals conflicts with its own opinion in Aguilar.*

The Court of Appeals nevertheless affirmed the denial of a *Petrich* instruction, ruling the two alleged acts of rape constituted a single course of conduct. App. A. This opinion conflicts with the Court of Appeals' opinion in *Aguilar*, 27 Wn. App. 2d at 923.

In *Aguilar*, the court held the State presented evidence of two rapes, rather than a continuing course of conduct, where the defendant attacked the victim in her apartment, raped her on the couch while stabbing the couch and pillows, then got up and used drugs and forced her to drink wine, and then dragged her into the bedroom and raped her again there. *Id.* at 913, 923, 925-27. The court reversed because of the absence of a *Petrich* instruction, even though the court affirmed in Mr. Maya Estrada's case.

To be sure, there may have been a longer period of time between the two alleged rapes in *Aguilar*, during which the defendant found and used drugs and forced the woman to drink wine. But in *Aguilar*, the whole incident occurred in one apartment. Here, one of the alleged rapes occurred inside the apartment and the other alleged rape happened several floors away from the apartment in a communal laundry room. Moreover, in *Aguilar*, the defendant himself "testified that the sexual intercourse on the couch and [in] the bedroom were part

of one continuous act." *Id.* at 926 n.10. Yet, the Court of Appeals reversed in *Aguilar* but not in this case.

Both this case and *Aguilar* have several facts that indicate two separate alleged rapes occurred and some facts that indicate there was one continuing alleged rape. In both cases, viewing the facts in a commonsense manner, the State presented evidence of two separate alleged rapes, requiring the court to provide a *Petrich* instruction to protect the constitutional right to a unanimous jury. It defies common sense to say a person committed one continuous rape where he got dressed and left the apartment between the two alleged rapes.

The different results between this case and *Aguilar* is manifestly unfair, and the failure to reverse here violates Mr. Maya Estrada's constitutional rights. This Court should grant review pursuant to RAP 13.4(b)(2) and (3).

E. CONCLUSION

This Court should grant review because the absence of a *Petrich* instruction violated Mr. Maya Estrada's constitutional

right to a unanimous jury, and the Court of Appeals' opinion in this case conflicts with its opinion in *Aguilar*.

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains approximately 2592 words (word count by Microsoft Word).

Respectfully submitted this 20th day of February, 2024.

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APPENDIX A

FILED
2/5/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RENE MAYA ESTRADA, Appellant.	No. 83837-7-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Rene Maya Estrada[1] was convicted of first degree rape. He appeals and argues that the (1) the lack of a Petrich[2] instruction violated his constitutional right to a unanimous jury, and (2) the admission of multiple hearsay statements violated Evidence Rule (ER) 802 and his constitutional right to a jury trial. We affirm.

I

In October 2019, 17-year-old B.S.G.'s[3] parents allowed Maya Estrada, who was homeless at the time, to stay in the living room of their apartment. Shortly after Maya

[1] The trial court caption and record sets out the defendant's last name with a hyphen. Defendant's appellate brief omits the hyphen. As hyphens are not associated with traditional naming conventions in Spanish-speaking communities, we refer to him by his complete unhyphenated last name.

[2] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), abrogated on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

[3] We use the victim's initials to protect her privacy and dignity. RCW 7.69.010.

Estrada came to stay, B.S.G. came home from work and was alone with Maya Estrada in the apartment. While B.S.G. was in her bedroom, Maya Estrada approached her from behind with a knife. Maya Estrada instructed B.S.G. to do what he said or he would kill her. Maya Estrada then covered B.S.G.'s mouth and held the knife to her stomach. Maya Estrada removed B.S.G.'s shirt, bra, pants, and underwear. He then told her not to shout and threw her on the bed while he continued to hold the knife. Maya Estrada then got on top of B.S.G. and covered her face with a pillow so that she couldn't scream. Maya Estrada told B.S.G. to do as he said then put his penis in B.S.G.'s mouth, kissed her, and touched her body with his mouth and hands. These events took about 30 to 45 minutes.

After Maya Estrada heard sounds coming from the stairs outside the apartment, he left the bedroom to take a look. Maya Estrada then returned to B.S.G.'s bedroom, tossed some clothes at her, and demanded that she get dressed and come with him. In fear for her life, B.S.G. put on a shirt and shorts but no bra or underwear and went with Maya Estrada to the laundry room located downstairs from the apartment. In the laundry room, Maya Estrada took out his penis; B.S.G. started to cry and said no. Maya Estrada then hit B.S.G. in the chest and put his penis in her mouth.

When the headlights of a car parking at the apartment building shone into the laundry room, Maya Estrada left and went upstairs. B.S.G. ran from the laundry room and approached a woman nearby, later identified as Martha Ramirez, asking for help. Ramirez testified that B.S.G. was running and crying and appeared "all stressed out, like in shock." B.S.G. was wearing only one sock and no shoes. Ramirez took B.S.G. to her apartment where B.S.G. asked to use the bathroom because she wanted to throw

up and was feeling very nauseous. Ramirez testified that B.S.G. was trying to throw up, but couldn't so instead rinsed her mouth out with water. Ramirez and her son then called 911 and reported that there was a girl there that said someone is going to kill her. The caller told the 911 operator that the girl reported that the person was touching her breast and had a knife. B.S.G. talked to the responding police officers and was then taken to the hospital where she had a sexual assault examination.

A few days later, Maya Estrada approached B.S.G. while she was at work. B.S.G. called 911 and Federal Way Police officers responded and arrested Maya Estrada.

Maya Estrada was charged with rape in the first degree under RCW 9A.44.040(1). Maya Estrada was also charged under RCW 9.94A.825 and 9.94A.533(4) with being armed with a deadly weapon, a knife, at the time of the rape.

A jury trial was held over nine days in the fall of 2021. The jury heard testimony from the responding police officers and Federal Way Police Detective Mathew Novack. The sexual assault nurse, Chelsea Reed, testified about her examination of B.S.G. on the night of the rape. She testified that B.S.G. answered a battery of question. B.S.G. told her that Maya Estrada put a knife on her stomach and put his penis in her mouth in the bedroom, and then, after dragging her down to the laundry room, threatened her again with the knife and again put his penis in her mouth. Reed testified that B.S.G. answered "no" as to whether she had washed her mouth out or vomited since the incident.

The neighbor, Ramirez, testified about her encounter with B.S.G. and calling 911. Ramirez testified that B.S.G. told her that when she got home there was a man inside

her house, and that he threatened her and forced her with a knife to the laundry room and forced her to perform oral sex.

B.S.G. testified to the following events. She explained that when she arrived home she went to her bedroom and felt Maya Estrada come up behind her with a kitchen knife and then covered her mouth and put the knife toward her stomach. He then undressed her and threw her onto the bed while holding the knife, climbed on top of her, and then put his penis in her mouth and that it tasted salty. B.S.G. testified that after hearing noises outside, Maya Estrada got up and left to go look. After he came back, he threw some clothes at her and told her to get dressed. B.S.G. testified that she was still scared he was going to kill her, but didn't remember if she saw a knife. B.S.G. testified that she could not remember how she got to the laundry room, but once there he hit her in the chest and put his penis in her mouth again. B.S.G. testified that she did not remember too well the events that took place in Ramirez's apartment and said, "The thing is that I don't remember well. I remember that I threw up in her bathroom, but I don't remember if she was or not with me."

Maya Estrada did not testify or present witnesses. He instead denied the allegations and focused on B.S.G.'s credibility.

The jury was instructed that "to convict" Maya Estrada for first degree rape under RCW 9A.44.040(1) each of the following must be proved beyond a reasonable doubt:

> (1) That on or about October 12, 2019, the defendant engaged in sexual intercourse with B.S.G.;
> (2) That the sexual intercourse was by forcible compulsion;
> (3) That the defendant used or threatened to use a deadly weapon or what appeared to be a deadly weapon; and
> (4) That any of these acts occurred in the State of Washington.

> If you find from the evidence that elements (1), (2), (3), and (4), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

The jury instructions did not include a Petrich unanimity instruction.

The jury found Maya Estrada guilty of rape in the first degree. The jury did not decide the deadly weapon enhancement special verdict.

Maya Estrada moved for a new trial first arguing that a Petrich instruction was required because a reasonable juror could have believed the rape happened at one location, but not the other, and in believing so they may not have been unanimous about which incident met the first degree rape requirements. Maya Estrada also argued that his due process rights were violated because the jury did not decide the deadly weapon enhancement special verdict thus proving he was not convicted beyond a reasonable doubt of every element of the crime charged.

The trial court denied Maya Estrada's motion for a new trial. Maya Estrada appeals.

II

Maya Estrada was charged with one count of rape. He asserts that because the State presented evidence of two distinct acts, the State should have elected which act they were relying on or, the jury should have been instructed to agree on a specific criminal act. Maya Estrada argues that his constitutional right to a unanimous jury was violated by the lack of a Petrich instruction. We disagree.

A

Criminal defendants have a right to a unanimous jury verdict. WASH. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of multiple acts that could constitute the crime charged, it generally must either tell the jury which act to rely on in its deliberations, or the court must instruct the jury that it has to unanimously agree on which specific act supports the conviction. State v. Kitchen, 110 Wn.2d 403, 409-11, 756 P.2d 105 (1988). The former is known as an "election" and the latter is known as a Petrich instruction after the case in which the instruction originated. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), abrogated on other grounds by Kitchen, 110 Wn.2d at 403. Whether a Petrich instruction was required is reviewed de novo. State v. Boyd, 137 Wn. App. 910, 922, 155 P.3d 188 (2007).

Failure to make an election or give a Petrich instruction can be constitutional error because of "the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411. Neither an election by the State nor a Petrich instruction is required where multiple acts form a continuing course of criminal conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

To determine whether criminal acts are a continuing course of conduct, facts are evaluated using common sense. Handran, 113 Wn.2d at 17. We consider "whether the evidence shows conduct occurring at one place or at many places, within a brief or long period of time, and to one or multiple different victims, and whether the conduct was intended to achieve a single or multiple different objectives." State v. Lee, 12 Wn. App.

2d 378, 393, 460 P.3d 701 (2020). Typically, a continuing course of conduct is "an ongoing enterprise with a single objective." State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). On the other hand, different times, locations, and parties suggest multiple acts. State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

In Handran, for example, Handran was seen climbing in the window of his ex-wife's apartment. 113 Wn.2d at 13. The victim woke to find Handran leaning over her, nude, and kissing her. Handran, 113 Wn.2d at 13. After she demanded he leave, he pinned her down, offered her money, and hit her in the face. Handran, 113 Wn.2d at 13. Handran argued on appeal that the trial court erred in failing to give a unanimity instruction because the jury could have found that the assault was his kissing the victim or his hitting her. Handran, 113 Wn.2d at 17. Our Supreme Court disagreed, explaining:

> Handran's alleged criminal conduct occurred in one place during a short period of time between the same aggressor and victim. Under a commonsense evaluation of these facts, the actions evidence a continuing course of conduct to secure sexual relations with his ex-wife, whether she consented or not, rather than several distinct acts.

Handran, 113 Wn.2d at 17.

This court has recently addressed the need for a Petrich instruction in two opinions. In Lee, the defendant Lee strangled the victim in the kitchen while verbally threatening her. Lee then stopped only to continue the same actions in the living room then again in the bedroom where the defendant penetrated the victim digitally and with his penis. 12 Wn. App. 2d at 384-85. Lee argued that because there were multiple distinct acts of penetration and the prosecution did not make an election at trial, there

should have been a Petrich instruction. Lee, 12 Wn. App. 2d at 396. This court disagreed, explaining,

> Lee's acts of sexual penetration involved the same victim, K.H., occurred in one place, K.H.'s bed, occurred within a brief period of time, less than 10 minutes, and occurred for the single purpose of Lee's sexual gratification. Lee's acts were plainly a continuing course of conduct, and no election or unanimity instruction was required.

Lee, 12 Wn. App. 2d at 397.

In contrast, in State v. Aguilar, 27 Wn. App. 2d 904, 911-13, 534 P.3d 360 (2023), Aguilar broke into his ex-girlfriend's apartment and embarked on an overnight binge of emotional, physical, and sexual violence. On appeal, Aguilar argued that the testimony described two distinct incidents of rape—his sexual assault of the victim on the couch, and the later sexual intercourse in the bedroom—but the jury was not given a unanimity instruction. Aguilar, 27 Wn. App. 2d at 922. This court agreed, explaining:

> We conclude that the facts here are consistent with multiple acts rather than a continuing course of conduct. The relevant conduct occurred in A.B.'s apartment and A.B. was the only victim, facts that admittedly indicate a continuing course of conduct rather than multiple acts. But the timeline of events, although uncertain, indicates that numerous activities may have intervened between the events on the couch and in the bedroom. Some of these activities—searching for and doing drugs, pretending to sip wine—appear to have been somewhat prolonged endeavors. And Aguilar's state of mind does not demonstrate the existence of "an ongoing enterprise with a single objective." [State v. Garman, 100 Wn. App. 307, 313, 984 P.2d 453 (1999)]. Instead he acted erratically under the influence of intoxicants, his focus shifting rapidly from one thing to another.

Aguilar, 27 Wn. App. 2d at 926.

The facts here appear more like Lee and Handran than Aguilar. The events occurred between the same defendant and victim, in the same general vicinity, and over a length of time. While, like Aguilar, there was an intervening event where Maya

Estrada became worried about getting caught and forced B.S.G. to dress and move downstairs to the laundry facility; unlike Aguilar, the intervening event was short and there was no change in activity. Maya Estrada simply stopped what he was doing, forced B.S.G. to change locations, and then continued the same activity previously interrupted. Under a commonsense evaluation of the facts, Maya Estrada's actions evidence a continuing course of conduct to threaten B.S.G. with a knife and forcibly secure oral sex without her consent.

III

Maya Estrada also challenges the trial court's admission of three hearsay statements made by responding officers testifying at trial. First, he argues that the trial court erred by admitting the statements because the purpose for which the statements were admitted was irrelevant. He also contends that the statements were improperly admitted because they spoke to the ultimate issue of guilt and invaded the province of the jury. While we agree that the statements were both hearsay and irrelevant, any error was harmless beyond a reasonable doubt.

A

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). "Where an out-of-court statement is offered for the truth of what someone told a witness, the statement is hearsay." State v. Rocha, 21 Wn. App. 2d 26, 31, 504 P.3d 233 (2022). Hearsay statements not offered for their truth but for another relevant purpose may be admitted. State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). That said, hearsay statements not offered for their truth are inadmissible if the purpose for which they are offered is irrelevant. Rocha, 21 Wn. App. 2d at 31-32.

Whether a statement is hearsay is reviewed de novo. State v. Heutink, 12 Wn. App. 2d 336, 356, 458 P.3d 796 (2020). Whether the admission of hearsay violates a constitutional right is reviewed de novo. State v. Price, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006).

B

Officer Nicholas Wong was asked what information he had "from dispatch as to what had occurred?" Maya Estrada objected based on hearsay. After the State argued that the statement was not offered for the truth, the trial court instructed the jury that they could not consider the response for the truth of the matter:

> The answer to this question is going to be hearsay, so it's not substantive evidence. You can't consider it for the truth of the matter. You can only consider it for the impact on the here or the person that heard it.

Officer Wong then responded: "I believe the dispatcher had spoken of a sexual assault involving a knife." (Emphasis added.)

Officer Christopher Cabrera was asked how he got involved in the incident. He responded:

> A dispatch basically to the sector vehicles as a—it originally came out, I believe, as a suspicious subject, and eventually a little bit more information started coming out due to the language barrier, they had to translate over to a Spanish translation and to be able to get any more information that's coming out.
>
> So, sometimes any type of information that comes out towards us and dispatch is not always up to date and current until they get that extra translation when it comes out to that. So, once the translation came out where it came of an incident that occurred the night prior and it was matching the same subject as that incident, that's when multiple units throughout the whole city actually started responding to that location, because of the seriousness of the offense that occurred the night prior.

(Emphasis added.)

After Maya Estrada objected and moved to strike Officer Cabrera's last comment, the trial court again instructed the jury that it could not consider the statement for the truth of the matter asserted:

> So, I'll instruct the jurors that you can only consider it for that basis as to why the police responded the way they did, and not for the truth of the matter asserted.

Officer Hilary Mariana was then asked how her involvement started. She responded that "the call came out as a sexual assault with a weapon." (Emphasis added.) In response to Maya Estrada's objection, the trial court again instructed the jury:

> Any reference by this officer to what she heard from some other person, at least in this answer, is hearsay and is not substantive evidence. You cannot consider it as evidence. You can only consider it for what this officer did next.

C

Maya Estrada first relies on Rocha and argues that why officers did what they did was irrelevant and thus the statements were improperly admitted hearsay testimony. In Rocha, the trial court allowed officers to testify about information received from dispatch and that their response to the location was based on a "domestic situation." 21 Wn. App. 2d at 30. On appeal, the court concluded that the statements were irrelevant and allowed in error because why officers went to the gas station was of no consequence at trial and could only be relevant to support that the defendant fought with the victim thus he acted with malice which was an element of the crime. Rocha, 21 Wn. App. 2d at 32.

Here, the trial court similarly allowed police officer statements that they responded to a "sexual assault" not for the truth but to explain why they did what they

did. Like Rocha, why officers went to the scene and their state of mind at the time were not at issue at trial. Because the specific information received from dispatch was irrelevant, we conclude the statements that they were responding to a "sexual assault" were irrelevant and improperly admitted hearsay.

Maya Estrada also contends that the testimony of a "sexual assault involving a knife," that there was a "serious[] . . . offense that occurred," and that there was a "sexual assault with a weapon," amounted to opinion testimony on the ultimate issue of guilt and invaded the province of the jury in violation of article I, sections 21 and 22. WASH. CONST. art. I, §§ 21, 22. It is unclear from Maya Estrada's arguments how the officers' hearsay statements amounted to opinions of his guilt. While the statement might opine that a sexual assault occurred with a weapon, and that the crime was serious, none of the testimony concluded that Maya Estrada committed the crime. We generally do not address unsupported constitutional arguments. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 169, 876 P.2d 435 (1994). But here, as discussed below, even if the statements were improper under Washington's constitution, they were harmless beyond a reasonable doubt.

D

Nonconstitutional error is harmless if 'there is a reasonable probability that, without the error, the outcome of the trial would have been materially affected." Rocha, 21 Wn. App. 2d at 34 (internal quotation marks omitted) (quoting State v. Gower, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014)). "Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have

reached the same result absent the error." State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). Both standards are met here.

Maya Estrada relied on a general denial and focused on the lack of any semen in the swabs taken from B.S.G.'s mouth and breast, and the lack of DNA evidence in B.S.G.'s mouth swab. But the lack of DNA evidence in B.S.G.'s mouth swab is at best inconclusive. B.S.G. only testified that Maya Estrada's penis in her mouth tasted salty, she never claimed that Maya Estrada ejaculated. Also, the State's DNA expert, Christine Vo, explained that because of the high turnover rate of cells in a person's mouth due to the constant making of saliva and swallowing, it is highly unlikely for DNA from external sources to stick around in the mouth for a long time. And as such, it is "rare to get DNA from another person on oral swabs if those swabs haven't been collected very quickly after the alleged incident, and if not very much, DNA is left behind." And further, there was mixed testimony as to whether B.S.G. vomited or rinsed her mouth after the event. B.S.G. testified that she thought she vomited at Ramirez's apartment, but she told the sexual assault examination nurse that she did not. Ramirez, however, testified that B.S.G. tried to vomit but could not and rinsed her mouth out with water.

More importantly, the swab taken from B.S.G.'s breast revealed the presence of saliva, and DNA testing overwhelmingly revealed that Maya Estrada was a contributor to the DNA mixture.[4] Further, B.S.G. testified in detail to the event, including identifying

[4] Forensic scientist Dr. Gina Dembinski explained that assuming B.S.G. was one of the contributors to the DNA mixture found on her own breast, it was 710 octillion times more likely that the mixture came from B.S.G. and Maya Estrada as opposed to B.S.G. and an unrelated individual selected at random.

Maya Estrada in court, and was subject to cross-examination. Her testimony was also supported by the testimony from the sexual assault examination nurse and responding neighbor. Considering the untainted evidence, any error in admitting the officers' statements was harmless beyond a reasonable doubt.

We affirm.

Mann, J.

WE CONCUR:

Cox, J.

Brown, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83837-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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