

No. 47489-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH RAYMOND WHEARTY,

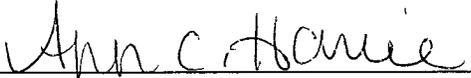
Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUE

- A. Did the trial court fail to instruct the jury on the need for a *Petrich* instruction?

II. STATEMENT OF THE CASE

On January 27, 2015, Lewis County Deputy Michael Mohr was dispatched to Onalaska, Washington, Lewis County, for a reported domestic assault. RP 200. Deputy Mohr made contact with the complainant and victim, Ms. Chelcie Dalmeny. RP 200-201. Ms. Dalmeny was visibly upset and appeared quiet and frightened. RP 201. Deputy Mohr could tell that Ms. Dalmeny had been crying. RP 201. Ms. Dalmeny had visible injuries, which included pre-existing injuries from a sanctioned mixed martial arts fight she had several days before, as well as new injuries, which included redness under her ear and at the base of her neck. RP 204-206. Ms. Dalmeny also had a sore left wrist and a sore left ankle as a result of the attack. Deputy Mohr learned that the assailant was Ms. Dalmeny's ex-boyfriend, Joseph Whearty ("Whearty") RP 240.

Ms. Dalmeny and Whearty lived together at a house on Koontz Road in Chehalis with Ms. Dalmeny's daughters, Olivia (aged 9) and Savannah (aged 2). RP 44-45, 47. Earlier that morning, Ms. Dalmeny and Whearty had been arguing. RP 53. By the time Ms.

Dalmeny left for work that morning things had gotten pretty bad. RP 53. Throughout the day, Ms. Dalmeny communicated with Whearty through Facebook messages and told him that she wanted to break up with him. RP 54. After a lot of back and forth arguing through Facebook messaging, the two were in agreement that they were breaking up. RP 55. Ms. Dalmeny offered to pack up Whearty's belongings since he had to work late, but Whearty told her not to worry about it, that he was "already here taking care of it." RP 55. Whearty agreed to move out of the house and there was no dispute about whether he would get to keep the house. RP 55.

Ms. Dalmeny got off work around 2:00 p.m. and went to go pick up her youngest daughter, Savannah, from the babysitter's house, before heading home to see her other daughter. RP 56-57. When Ms. Dalmeny got home the first thing she noticed was that Whearty's vehicle was in the driveway and it was not packed. RP 57. She went inside the house to get Olivia and when she saw Whearty she told him that the breakup was serious and she was going to take the girls into town. RP 57-58. Whearty was upset and did not want to move out. RP 58. Ms. Dalmeny got Olivia and started to leave. RP 58. Whearty asked if they were really breaking up. RP 58. Ms.

Dalmeny replied, "yes," and then left with the two girls. RP 58. At this time Whearty was sober. RP 59.

Ms. Dalmeny went into town to take care of some errands and get the girls food. RP 59. They returned to the house between 5:00 and 5:30 p.m. RP 59. Ms. Dalmeny noticed that Whearty's vehicle was still in the driveway. RP 59. This time the vehicle was packed with Whearty's belongings and he appeared to be following through with moving out. RP 59. When Ms. Dalmeny went inside the house with the girls she noticed right away that Whearty was extremely intoxicated and his demeanor was agitated. RP 59. Ms. Dalmeny put the girls to bed and then went into her room and laid down on the bed. RP 61. While Ms. Dalmeny was on the bed Whearty started walking back and forth through the doorway to the bedroom. RP 61. Whearty did this for a bit and eventually ran into the bedroom screaming at Ms. Dalmeny. RP 62. Whearty went after Ms. Dalmeny and put his fist on her throat and started punching her in the back of the head. RP 62. Ms. Dalmeny was scared and felt defeated like she was going to die. RP 62. Whearty did not stop yelling at her and the fist on her throat made it difficult for Ms. Dalmeny to breath. RP 62-63. Ms. Dalmeny kept thinking about what was going to happen to her kids and felt trapped and unable to do anything. RP 63. Ms.

Dalmeny's two-year old daughter, Savannah, came into the room and jumped on top of Whearty and Ms. Dalmeny and was yelling "please don't hurt my mom." RP 63. Whearty lifted his hand off of Ms. Dalmeny to push Savannah off and as he did this Ms. Dalmeny was able to get him off of her. RP 63. Ms. Dalmeny got to the end of the bed and tried to rationalize with him and get him to calm down, especially since the girls were watching. RP 63. Whearty continued attacking Ms. Dalmeny, with complete disregard for her requests to stop. RP 63.

Whearty kicked Ms. Dalmeny in the stomach back onto the bed and then rolled the mattress on top of her and began jumping on her. RP 64. Savannah was in the room while this occurred. RP 64. Ms. Dalmeny was pushed and managed to get the mattress off of her and held Savannah. RP 64. Whearty grabbed Savannah from Ms. Dalmeny and threw her and she landed on the bed. RP 64. Whearty then grabbed Ms. Dalmeny, picked her up and tried to throw her out the window of the room. RP 64. Ms. Dalmeny was in pain and was injured at this point, especially after hitting something hard on her side. RP 64. She was able to get a hold of Savannah again and hold her. RP 64. Ms. Dalmeny started pushing her way out of the room and into the hallway, but Whearty grabbed her wrist and twisted

it in the opposite way. RP 64-65. Ms. Dalmeny did not fight back for fear that things would escalate, especially since her children were watching. RP 65. Ms. Dalmeny managed to grab the diaper bag and both of her girls and get out of the house. RP 65.

Ms. Dalmeny continued to try and calm Whearty by telling him that the behavior was not alright and that she needed to take the girls away from the situation. RP 66. Eventually, Whearty went from being crazy and screaming to a calm demeanor, with Whearty telling Ms. Dalmeny that he would take her and the girls wherever they wanted to go in the car. RP 66. Ms. Dalmeny did not trust him at this point, especially since he had just tried to kill her in front of her children. RP 66. Whearty's demeanor changed back to threatening after Ms. Dalmeny told him that she was leaving the house without him. RP 67. Whearty told Ms. Dalmeny that if he did not finish the job that someone else would. RP 68.

When Ms. Dalmeny got to the car Whearty tried to get the keys, which were in her purse. RP 68. Whearty was pulling at the purse and shoved Olivia out of the way at some point. RP 68. When Whearty could not get a hold of the keys he pushed Ms. Dalmeny up against the garage with his arm and started choking her. RP 68. Meanwhile, Ms. Dalmeny was still holding Savannah, and Whearty

continued to try and grab the keys out of her purse. RP 68. Ms. Dalmeny began screaming for their landlord, who lived in front of them. RP 68. Not wanting to draw attention to the situation, Whearty started going back towards the house until he saw that Ms. Dalmeny was not going to the landlord's house and was getting into the car with the kids. RP 69. Whearty laid down under the back tires with his neck under one of the tires saying that Ms. Dalmeny would have to kill him if she wanted to leave. RP 70. Ms. Dalmeny was unable to drive straight ahead because of the garage in front of the car. RP 70. Ms. Dalmeny could not drive away with Whearty under the back tire and was not willing to run him over. RP 70. She continued to rev the motor and shimmy the car a bit. RP 70.

Whearty jumped up and Ms. Dalmeny took the opportunity to gun the vehicle. RP 70. Whearty jumped on top of the car as she was going down the driveway, and as he was on top of the car he continued to use profanities and tell her that he was going to kill them. RP 71. Whearty hit the windshield repeatedly, cracking it in several spots and making glass fly inside of the vehicle which hit Ms. Dalmeny and the girls. RP 72. Ms. Dalmeny was determined to get her kids out of the situation, and the kids were screaming and crying from the ongoing actions of Whearty. RP 72. As Ms. Dalmeny

approached another car Whearty got scared and jumped off the vehicle. RP 72. Ms. Dalmeny still did not feel safe, and was shaken up. RP 72. She figured he was going to go back to the house and get his car and pursue them some more. RP 72.

Eventually, Ms. Dalmeny drove to Onalaska with the hope that Whearty would not be there. RP 73. She drove to the Justice General Store and was able to call her sister, Sarah Dalmeny. RP 74. Sarah had never heard her sister sound so scared. RP 171. Ms. Dalmeny was usually upbeat and happy when she called and on this night she was crying and scared. RP 171. At one point during the conversation Ms. Dalmeny told Sarah "Joe attacked me." RP 171. Sarah called 911 and Ms. Dalmeny got on the phone with the police. RP 74. Ms. Dalmeny met with Deputy Mohr once she got to her father's house in Onalaska. RP 75.

Whearty was found later that night at the residence on Koontz Road, Chehalis. RP 211. Deputy Mohr knocked repeatedly on the door and could hear someone inside the residence shuffling around. RP 211-212. After about 20 minutes Whearty finally opened the door. RP 212. Whearty smelled of intoxicants and had slurred speech. RP 212. Whearty was read his Miranda rights and notified that he was under the arrest for Assault in the 2nd Degree. RP 213. Whearty was

asked if he wanted to talk about the incident and he continuously answered in one-word riddles. RP 214. When asked what happened between him and Ms. Dalmeny he told Deputy Mohr that he did not cheat on her and began crying. RP 215. When asked about his side of the story Whearty would just scream that he did not cheat on Ms. Dalmeny and he did not do anything wrong. RP 216.

Whearty was charged with three felonies, including two counts of assault in the second degree and one count of unlawful imprisonment, pursuant to RCW 9A.36.021(1)(g) and RCW 9A.40.040. CP 10-12. After a four-day jury trial Whearty was found guilty of the lesser included offenses of assault in the fourth degree (on both assault charges) and unlawful imprisonment. RP 520-522. Whearty appeals.

III. ARGUMENT

A. WHEARTY CANNOT RAISE THE ISSUE OF BEING DENIED HIS STATE CONSTITUTIONAL RIGHT OF A UNANIMITY INSTRUCTION BECAUSE A UNANIMITY INSTRUCTION WAS NOT APPROPRIATE.

Whearty argues, for the first time on appeal, that the jury should have been given a unanimity instruction because the jury considered multiple acts to establish unlawful imprisonment and that Whearty was prejudiced by the absence of jury unanimity. Brief of

Appellant 10-11, 13. Whearty argues that the failure to provide the instruction presents a constitutional issue that warrants a reversal of Whearty's conviction. Brief of Appellant 13. The alleged error is not manifest constitutional error and therefore, Whearty cannot raise this issue for the first time on appeal.

1. Standard Of Review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Drum*, 168 Wn.2d 23, 31, 225 P.3d 237 (2010).

2. Whearty Has Not Shown That The Alleged Error Is Manifest.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error

is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O’Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (citations omitted). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

The alleged error does encompass a constitutional right, the right to a trial by jury, and therefore the only question is whether the alleged error is manifest. U.S. Const. amend. VI, XIV; Const. art. I, § 21, 22; *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Whearty does not explain how he is able to raise the issue

for the first time on appeal, nor does he show that he was prejudiced by the lack of a unanimity instruction.

- a. A unanimity instruction was not appropriate because the six acts that occurred during the unlawful imprisonment were all one continuing course of action.**

For a unanimity instruction to be appropriate, there must be more than one act and the acts must not be part of a continuing course of action. *State v. Petrich*, 101 Wn.2d 566, 571-572, 683 P.2d 173 (1984). When determining whether a continuing course of conduct constitutes a single charge count, an appellate court will consider the time elapsed between the criminal acts and whether the different acts involved the same parties, location and same ultimate purpose. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

In *Fiallo-Lopez*, the State charged the Defendant with one charge of possession, even though there were two separate and distinct quantities of cocaine that were delivered at two different locations. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995). The Court held that this was one continuous course of action because both deliveries were intended for the same ultimate purpose - the delivery of cocaine. *Id.* at 726.

Whearty's argument that the prosecutor presented six acts that could be the basis for one act is correct. However, Whearty's argument fails because these six acts were all done in a continuous course of action that involved the same party, location and purpose: to unlawfully imprison Ms. Dalmeny. The reign of terror imposed onto Ms. Dalmeny by Whearty from the time he entered her bedroom until the time he jumped off of the vehicle was all part of one continuous course of action. Whearty was trying to prevent Ms. Dalmeny from leaving with the girls and did so in a continuous manner.

Thus, the elements of unlawful imprisonment were met because on or about January 27, 2015, Whearty restrained the movement of Ms. Dalmeny in the manner that substantially interfered with her liberty. CP 111. The State did not present multiple alternative theories of unlawful imprisonment; the State presented a string of events that were part of the continuous course of action to restrain her freedom.

Whearty has not met his burden to show that he was prejudiced by the lack of unanimity instruction. Without prejudice the error is not manifest. There is no reasonable probability that the alleged error affected the outcome of the trial. Whearty cannot raise

this issue for the first time on appeal and this Court should affirm his conviction.

IV. CONCLUSION

The trial court was correct not to issue a *Petrich* instruction. Whearty's constitutional rights were not violated because a unanimity jury instruction was not appropriate for this case. Whearty's conviction should not be reversed.

RESPECTFULLY submitted this 9th day of December, 2015.

JONATHAN L. MEYER
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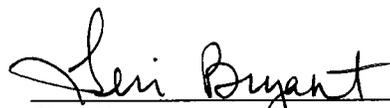
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. JOSEPH RAYMOND WHEARTY, Appellant.	No. 47489-1-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Ann C. Harrie, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 9, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John Hays, attorney for appellant, at the following email address: Slong@tillerlaw.com.

DATED this 9th day of December, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

December 09, 2015 - 10:45 AM

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