

No. 49198-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS MACKEY II,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

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APPELLANT'S OPENING BRIEF

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## **A. INTRODUCTION**

Douglas Mackey's former girlfriend visited Mr. Mackey at his home. After staying three or four days, during which she drank alcohol and took drugs, she left, alleging that Mr. Mackey assaulted her and told her she could not leave. Mr. Mackey and the two other adults who lived at the home contradicted her claim, testifying that she was bruised when she arrived. To support its case as to each charge, the prosecution relied on a statement from Mr. Mackey that was elicited during custodial interrogation without Miranda warnings. The jury rejected some of the prosecution's claims, but without a unanimity instruction and contrary to the prohibition against double jeopardy, found Mr. Mackey guilty of two overlapping assaults. The jury also convicted Mr. Mackey of unlawful imprisonment without evidence that Mr. Mackey had intimidated Ms. Anderson from leaving.

Because the trial court erred in admitting a statement taken in violation of Miranda and this error was prejudicial, the convictions should be reversed and a new trial ordered. Independent of this error, the conviction for fourth degree assault should be reversed due to violations of jury unanimity and double jeopardy. And the conviction for unlawful imprisonment should be dismissed for insufficient evidence.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution, the trial court erred in admitting a statement elicited during custodial interrogation.

2. The trial court erred in determining that no interrogation occurred. CP 104.

3. The trial court erred in determining that Mr. Mackey's statement after his arrest was "spontaneous." CP 104.

4. In violation of article I, section 21 of the Washington Constitution, the trial court erred by failing to provide a unanimity instruction as to the charge of fourth degree assault in count two.

5. The trial court erred in not instructing the jury that to convict Mr. Mackey of two assaults, the assaults must be based on separate and distinct acts.

6. Because it is not manifestly apparent that the convictions for second degree and fourth degree assault are based on separate and distinct acts, the fourth degree assault conviction violates the prohibition against double jeopardy under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution.

7. In violation of the due process provisions of the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, the conviction for unlawful imprisonment is not supported by sufficient evidence.

### **C. ISSUES**

1. Absent a valid waiver, Miranda forbids custodial interrogation. “Interrogation” includes any words that the officer should know are reasonably likely to elicit an incriminating response. In May 2015, Mr. Mackey was in custody in the back of a patrol car and had not been read his Miranda rights. An officer told Mr. Mackey the basis for the arrest was for domestic violence occurring in March. Mr. Mackey responded, “That was months ago!” Did the trial court err in concluding that this statement was not elicited in violation of Miranda?

2. Mr. Mackey was charged with two counts of assault. The jury heard evidence of multiple distinct incidents involving assaultive behavior against his girlfriend over the course of three or four days. As to the second assault count, the jury convicted Mr. Mackey of the lesser offense of fourth degree assault. Unlike the first count, the jury was not instructed that it must be unanimous as to the assaultive act. Was Mr. Mackey’s right to jury unanimity violated, requiring reversal of the conviction for fourth degree assault?

3. The jury was not instructed that the two charged assaults must be based on separate and distinct acts. If it is not manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense and that each count was based on a separate act, there is a double jeopardy violation. Should the conviction for fourth degree assault be vacated because it is not manifestly apparent that this conviction is not based on the same act constituting the conviction for second degree assault?

4. A person commits the offense of unlawful imprisonment if the person restrains another person's liberty of movement through intimidation. Mr. Mackey's girlfriend testified that she asked Mr. Mackey for a ride home, but he told her she could not leave until her bruises were healed. She did not testify that she did not leave due to any express or implied threats. No one took her phone. Later, she called her father for a ride. Mr. Mackey did not stop her from leaving. Did the State fail to prove that Mr. Mackey committed the offense of unlawful imprisonment?

#### **D. STATEMENT OF THE CASE**

On June 1, 2015, the State charged Mr. Mackey with two counts of second degree assault—one alleging infliction of substantial bodily harm (count one) and the second alleging assault by strangulation (count two), unlawful imprisonment (count three), and felony harassment (count four).

CP 3-5. The State alleged that Mr. Mackey perpetrated these offenses against his girlfriend, Mallory Anderson, on or between March 7 and March 10, 2015.<sup>1</sup> CP 3-5.

Mr. Mackey has three young children. RP 151-52. The mother of his youngest, a boy, is Ms. Anderson. RP 151. Mr. Mackey and Ms. Anderson lived together around 2013 to 2014. RP 151, 203. Around Christmas 2014, Mr. Mackey moved in with Brandi and Jason England in Vancouver, Washington. RP 153, 356-57. The Englands had three children. RP 358. Mr. Mackey's two older children resided with him at the Englands' and his youngest with Ms. Anderson. RP 152.

Ms. Anderson testified that there had been occasional violence in her relationship with Mr. Mackey, but that it was "not really too violent."<sup>2</sup> RP 173. She testified that Mr. Mackey had hit her while they were driving on the freeway, that he had pulled her by her hair in a different incident, and that he had once hit her in front of her father. RP 174-75.

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<sup>1</sup> The State also alleged that all the counts were domestic violence offenses, that they were part of an ongoing pattern of abuse, and that they were committed in sight or sound of either Mr. Mackey's or Ms. Anderson's minor children. CP 3-4.

<sup>2</sup> The trial court ruled under ER 404(b) that evidence of prior incidents of domestic violence were relevant to show that Ms. Anderson may have experienced reasonable fear and intimidation in relation to the current charges. RP 138, 249; CP 55 (instruction 30) (limiting instruction).

On March 7, 2015, Ms. Anderson visited Mr. Mackey at the Englands' home. RP 152. She brought their son. RP 154.

Ms. Anderson testified that over the next few days, she drank alcohol and used methamphetamine. RP 154-55. Ms. Anderson, who weighed about 118 pounds, drank two or three cans of 22-ounce malt liquor per day. RP 155, 160, 193. Mr. Mackey also drank. RP 155. Ms. Anderson testified that the adults, other than Mr. England, used methamphetamine in the garage, where they "hung out." RP 154-55, 199. On the first night, Mr. Mackey and Ms. Anderson went out to buy shoes using money Mr. Mackey had received from his tax refund. RP 183, 362. Mr. Mackey had used most of his refund to buy himself a car and Ms. Anderson was upset about how he had spent it. RP 195, 359. Ms. Anderson explained that Mr. Mackey had told her that he was going to buy her a car. RP 183.

According to Ms. Anderson, while she and Mr. Mackey were alone in the garage the first night, they got into a fight. RP 156, 184. She said Mr. Mackey hit her and pushed his thumbs into her eyes, resulting in a broken blood vessel in one eye. RP 156. Ms. Anderson stated she ran upstairs and encountered Mr. England, who wanted to call the police, but she told him not to. RP 156, 185.

Ms. Anderson testified that other assaultive acts occurred over the next two or three days. She claimed that Mr. Mackey, in front of visitors in the living room, slapped her and picked her up by the neck. RP 159-60, 187-88. She alleged in a different incident, she was not sure exactly when, that Mr. Mackey hit her in the face. RP 161-62. Mr. Mackey would always apologize afterward. RP 165.

Ms. Anderson testified she asked Mr. Mackey to take her home, but that Mr. Mackey said she could not leave until her bruises and black eyes were gone. RP 161, 164. Ms. Anderson explained she did not try to leave because she did not have a car and was unfamiliar with the Vancouver area. RP 161. While she had a cell phone and no one took it from her, she did not call anyone because she did not want Mr. Mackey to go to jail. RP 161, 197. She did not use her phone to summon a ride share service, such as Uber or Lyft,<sup>3</sup> because she had no money. RP 187. Ms. Anderson acknowledged that there was at least one time where Mr. Mackey left the house with Ms. England, leaving her alone with Mr. England. RP 186. She was concerned that if she went to her parents' house, they would call the police on Mr. Mackey. RP 187.

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<sup>3</sup> See [https://en.wikipedia.org/wiki/Real-time\\_ridesharing](https://en.wikipedia.org/wiki/Real-time_ridesharing) (last accessed February 3, 2017).

On March 10, 2015, the Englands were gone with their children. RP 194, 364. Ms. Anderson testified that Mr. Mackey got mad at her, hit her, pulled her by the hair, and kicked her. RP 159, 167. While this happened, Mr. Mackey purportedly threatened to kill her. RP 159. Ms. Anderson used her phone and sent text messages to her father, asking him to come pick her up. RP 168-69; Exs. 8-9.

Ms. Anderson's father, Allen Keith Anderson, went to pick up his daughter and grandson. RP 204. Mr. Anderson's son-in-law, Joshua Mathie, was with him. RP 205, 209. When they arrived, Ms. Anderson was outside smoking. RP 205. They waited about half an hour for Ms. Anderson to gather her and her son's possessions. RP 205. Mr. Mackey did not try to stop Ms. Anderson. RP 170-71. Ms. Anderson testified that Mr. Mackey said he was sorry and asked her to not call 911. RP 170. He gave her some sunglasses to wear. RP 171.

After Ms. Anderson took off her sunglasses in the vehicle, Mr. Mathie called the police because she had bruises and one eye appeared bloodshot. RP 210, 212. Ms. Anderson did not want to call the police because she did not want to get Mr. Mackey in trouble. RP 171.

Ms. Anderson was taken to the hospital. RP 222-23. Ms. Anderson had contusions (bruises) and her right eye appeared bloodshot. RP 223-24; Exs. 2-6, 10-14. She had no fractures. RP 229. She was

prescribed pain medications. RP 228. She did not return for any follow up care. RP 196.

Mr. Mackey denied the charges, including the allegations of prior domestic violence. RP 360, 365. He testified that Ms. Anderson came over with their son unannounced, and would not tell him how she got there. RP 361. Ms. Anderson was bruised. See RP 365, 373. She was wearing more makeup than usual, was wearing sunglasses, and explained her bruises by telling him she had fallen. RP 361, 373. He recalled Ms. Anderson going to the grocery store with Ms. England around Monday (March 9, 2015). RP 365. He testified that people used marijuana at the house, not methamphetamine. RP 362, 366-67.

Jason and Brandi England corroborated Mr. Mackey's testimony. RP 306-46. Mr. England testified that Ms. Anderson appeared unannounced. RP 336. Ms. England testified that when she saw Ms. Anderson, she had marks and bruises. RP 312, 316. She appeared to be under the influence of drugs. RP 314, 339. Neither Ms. England nor Mr. England saw Ms. Anderson get hit by anyone. RP 319, 344. Mr. England denied that Ms. Anderson ever came before him crying. RP 341. Both testified that Ms. Anderson had accompanied Ms. England to the grocery store around the third day after she arrived. RP 317, 340. Mr. England testified he had asked Ms. Anderson to leave due to the "drama" between

her and Mr. Mackey. RP 344. The Englands testified they often had neighbors over on the weekend. RP 318, 339. They acknowledged there was marijuana use in their home, but denied methamphetamine use. RP 319, 323, 339, 343.

Shortly after Ms. Anderson left, Mr. Mackey took his two children to his father's house. RP 368. He suspected that Ms. Anderson's father would think he was responsible for Ms. Anderson's injuries. RP 373.

Mr. Mackey was arrested by police on May 27, 2015. RP 369. While in custody and in response to the arresting officer telling him the basis of the arrest was an incident involving Ms. Anderson in March, Mr. Mackey responded, "That was months ago!" CP 104. Mr. Mackey had not been informed of his right to silence or an attorney. CP 103-04. The trial court ruled this statement was admissible. RP 89; CP 103-04.

In jail, Mr. Mackey was very scared. RP 369. He called his friend Jason Van Metrey and Ms. England. Ex. 17; RP 283-86, 300. Ms. England was in love with Mr. Mackey and had been in a sexual relationship with him. RP 321-22, 326. He told Ms. England that Ms. Anderson was bruised when she came over, that he did not imprison her, and that Ms. England and the others had "to get the same story down." Ex. 17; RP 284. Although Mr. Van Metrey had not been there, Mr. Mackey told him that he needed Mr. Van Metrey and the Englands to

testify that Ms. Anderson showed up bruised. Ex. 17; RP 286, 383. Mr. Mackey explained later that he had been terrified and that he had not been trying to fabricate evidence. RP 369, 382.

The jury found Mr. Mackey guilty of second degree assault (count one), unlawful imprisonment (count three), and felony harassment (count four). RP 494-97; CP 80, 88, 92. The jury found Mr. Mackey not guilty of second degree assault by strangulation (count two), but found him guilty of the lesser offense of fourth degree assault. RP 495; CP 85-86.

The trial court rejected the State's request for an exceptional sentence.<sup>4</sup> RP 520, 523. The court sentenced Mr. Mackey to the high end of the standard range of 84 months. RP 523; CP 123. Mr. Mackey appeals.

## **E. ARGUMENT**

### **1. In violation of *Miranda*, the court erred in admitting Mr. Mackey's inculpatory statement, which was elicited during custodial interrogation.**

#### **a. Statements elicited from suspects during custodial interrogation are inadmissible absent a valid waiver of the suspect's *Miranda* rights.**

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these

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<sup>4</sup> The jury found some, but not all the aggravators. CP 82-83, 89-90, 92-33.

constitutional rights, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before interrogation. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). Absent a valid waiver, statements obtained from custodial interrogation are inadmissible. Miranda, 384 U.S. at 475.

Under Miranda, the term “interrogation” refers to “any words or actions” that a person “should know are reasonably likely to elicit an incriminating response from the suspect.” Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). This is an objective test. State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). The test is not whether the officer intended to elicit an incriminating response. Id.; State v. Wilson, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). The focus is on “the perceptions of the suspect,” not the person eliciting the response. Innis, 446 U.S. at 301; In re Pers. Restraint of Cross, 180 Wn.2d 664, 685, 327 P.3d 660 (2014).

**b. Mr. Mackey’s statement to police was made while in custody and in response to a statement that the arresting officer should have known was likely to elicit an incriminating response.**

The trial court held a CrR 3.5 hearing to determine the admissibility of statements made by Mr. Mackey to law enforcement.

2015. RP 84-88; CP 103-04.<sup>5</sup> On May 27, 2015, Deputy Jon Shields “placed [Mr. Mackey] under arrest, handcuffed him, and secured him in the back of his patrol car.” CP 103 (FF 1.1, 1.3). Deputy Shields learned earlier there was probable cause to arrest Mr. Mackey for harassment (domestic violence) and unlawful imprisonment (domestic violence). CP 103 (FF 1.2). “Deputy Shields told [Mr. Mackey] he was being arrested for an incident that occurred on March 10, 2015 involving [Ms. Anderson].” CP 104 (FF 1.4). “[Mr. Mackey] responded to this statement, saying ‘That was months ago!’” CP 104 (FF 1.5).

The court correctly determined that Mr. Mackey was in custody when he made this statement to Deputy Shields. CP 104 (Conclusion of Law (CL) 2.2). The court also correctly found that Mr. Mackey was “not Mirandized at any point during this encounter.” CP 104 (FF 1.7). The court, however, determined there was no interrogation. CP 104 (CL 2.3). The court reasoned, “[Mr. Mackey]’s statement was spontaneous as it was not made in response to any questioning.” CP 104 (CL 2.3).

The court erred. Interrogation is not limited to express questioning. Innis, 446 U.S. at 301. Here, after arresting Mr. Mackey, handcuffing him, and restraining him in the back of his patrol car, Deputy

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<sup>5</sup> A copy of the findings of fact and conclusions of law are attached in the appendix.

Shields told Mr. Mackey he was being arrested based on what happened with Ms. Anderson on March 10, 2015. CP 104 (FF 1.3, 1.4). Based on documents from law enforcement, Deputy Shields was aware of the allegations against Mr. Mackey. See CP 103 (FF 1.2). The Deputy should have known that his words recounting the basis for the arrest were reasonably likely to elicit an incriminating response from Mr. Mackey, who was detained in the back of his patrol car.

Our Supreme Court’s opinion in Cross supports this conclusion. There, an officer told a murder suspect in custody that “sometimes we do things we normally wouldn’t do and feel bad about it later.” Cross, 180 Wn.2d at 684-85. This comment, which was directed at the suspect, implied that he was guilty. Id. at 686. Any response to the comment, including silence, would have been incriminating. Id. at 686. “An officer’s comment is designed to elicit an incriminating response when a suspect’s choice of replies to that comment are all potentially incriminating.” Id. Thus, the officer’s comment constituted interrogation. Id. at 684.

Here, the same reasoning applies. Deputy Shields’ statement about the reasons for the arrest was directed at Mr. Mackey. As in Cross, any response by Mr. Mackey would have been potentially incriminating. Id. at 686. It impliedly called for a response from Mr. Mackey. Given the

circumstances, Deputy Shields should have known it was reasonably likely to elicit an incriminating response.

As for the court's conclusion that Mr. Mackey's statement was "spontaneous," the trial court found that Mr. Mackey "responded" to Deputy Shields' statement to Mr. Mackey that "he was being arrested for an incident that occurred on March 10, 2015 involving [Ms. Anderson]." CP 104 (FF 1.4, 1.5). This demonstrates Mr. Mackey's answer to the officer's remark was not "spontaneous." See Cross, 180 Wn.2d at 686 (suspect's statement to police after comment was a specific response, not an "irrelevant outburst").

This Court should hold that the trial court erred in concluding that Mr. Mackey's statement was not elicited in response to interrogation.

**c. The error is not harmless beyond a reasonable doubt.**

"A confession is like no other evidence." Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The admission of statements obtained in violation of Miranda are subject to the constitutional harmless error test. Id. at 292-97. Prejudice is presumed and the State bears the burden of proving the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

The State cannot meet its burden to prove the error harmless. The State elicited Mr. Mackey's statement from Deputy Shields during trial. RP 268. During both opening and closing statements, the State cited and relied on this statement to prove its case, essentially contending that Mr. Mackey had confessed. During opening, the prosecutor quoted Mr. Mackey's statement, arguing:

Those are the words of someone that knows exactly what they did wrong. He knew it when he was doing it. And he knew it when he was talking to law enforcement.

RP 148-49. Similarly, the prosecutor argued during closing that the statement proved Mr. Mackey guilty:

Then when finally arrested he says, "That was months ago." He knows exactly what happened. He knows exactly what police were talking about. He knows exactly what he did.

RP 466.

Moreover, the jury's decision rested largely on credibility determinations regarding Ms. Anderson, Mr. Mackey, and the Englands. Undermining Ms. Anderson's testimony, Mr. England testified he saw no assault and denied that Ms. Anderson had approached him while injured and crying. RP 341, 344. Ms. England likewise testified she never saw Ms. Anderson get hit. RP 319. Mr. Mackey denied assaulting Ms. Anderson. RP 365, 373. These witnesses said Ms. Anderson was bruised

when she appeared at the England home. RP 312, 316, 325, 338, 373.

Ms. England testified that Ms. Anderson was free to come and go, and in fact accompanied her to the store. RP 317. Mr. England and Mr. Mackey testified similarly. RP 340, 365.

Absent the error in admitting Mr. Mackey's statement, the jury could have entertained a reasonable doubt on all the charges. Because the error is not harmless beyond a reasonable doubt, this Court should reverse Mr. Mackey's convictions and remand for a new trial.

**2. As to count two, the jury was not instructed it must be unanimous as to the act constituting fourth degree assault and the State did not elect a specific act. The result is a violation of Mr. Mackey's right to a unanimous jury verdict, requiring reversal.**

**a. Criminal defendants have a right to jury unanimity on the act constituting the crime.**

"Criminal defendants in Washington have a right to a unanimous jury verdict." Const. art. I, § 22; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of several acts, any one of which is allegedly sufficient to constitute the crime charged, the jury must unanimously agree on which act constituted the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The State must elect the act it is relying on or the trial court must provide a

unanimity instruction, often called a “Petrich” instruction.<sup>6</sup> Id.; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 (4th Ed). Otherwise, some of the jurors may rely on one act while others may rely on another. Kitchen, 110 Wn.2d at 411. This violates the defendant’s constitutional right to jury unanimity. Id.

**b. The State did not make an election and the jury was not instructed that it must be unanimous as to the act constituting fourth degree assault.**

Mr. Mackey was charged with two counts of second degree assault. The State alleged that each count was committed between March 7, and March 10, 2015. CP 3-4. Count one was premised on reckless infliction of substantial bodily harm<sup>7</sup> while count two was premised on strangulation or suffocation.<sup>8</sup> CP 4.

As to these two counts, Mr. Mackey asked that the jury be instructed on the lesser included offense of fourth degree assault. RP 347. The State conceded that this was appropriate. RP 347. The court agreed and the jury was so instructed. CP 35, 38-39, 44, 48.

The prosecutor initially proposed Petrich instructions for both assault counts. RP 398; supp. CP \_\_\_\_ (Plaintiff’s Proposed Instructions).

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<sup>6</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

<sup>7</sup> RCW 9A.36.021(1)(a).

<sup>8</sup> RCW 9A.36.021(1)(g).

However, the prosecutor ultimately proposed only an instruction as to count one. RP 396-98. The prosecutor explained a unanimity instruction was unnecessary as to count two because she was arguing one act of strangulation. RP 398. The court agreed and the jury was provided a Petrich instruction only as to count one.<sup>9</sup> RP 398; CP 34.<sup>10</sup> During closing, the prosecutor did not elect any particular assaultive act for the lesser included offense of fourth degree assault on count two. RP 458-59.

Regarding count two, the jury found Mr. Mackey not guilty of second degree assault. CP 85. The jury, however, found Mr. Mackey guilty of the lesser included offense of fourth degree assault. CP 86.

As to this conviction, Mr. Mackey's constitutional right to a unanimous verdict as to the act constituting this offense was violated.

While there was evidence to support only one act of assault by

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<sup>9</sup> Mr. Mackey did not ask for a Petrich instruction at trial. However, the issue is properly raised for the first time on appeal as a matter of right because it concerns a manifest constitutional error. State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009); RAP 2.5(a)(3).

<sup>10</sup> The unanimity instruction as to count one read:

The State alleges that the defendant committed acts of Assault in the Second Degree as charged in Count 1 on multiple occasions. To convict the defendant on Count 1 of Assault in the Second Degree, one particular act of Assault in the Second Degree as charged in Count 1 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 Assault in the Second Degree.

CP 34 (instruction 9).

strangulation—which the jury rejected or found inadequate—there was evidence of multiple acts that could constitute simple assault. See State v. Hahn, 174 Wn.2d 126, 129, 271 P.3d 892 (2012) (“Fourth degree assault is essentially an assault with little or no bodily harm, committed without a deadly weapon—so-called simple assault.”). In contrast to count one, the jury instructions as to count two did not require the jury unanimously agree as to which act was proved. The “to-convict” instruction for fourth degree assault on count two permitted the jury to find guilt based on any act of assault committed during the charging period. CP 48 (requiring State to prove “[t]hat on or about March 7, 2015 and March 10, 2015, the defendant assaulted Mallory Anderson”). And the prosecutor did not elect any specific act, telling the jury only that “there’s a lesser included on the strangulation count, and you only get to that if you first find not guilty of strangulation.” RP 459. Because there was no unanimity instruction or election, Mr. Mackey’s right to jury unanimity was violated as to the conviction for fourth degree assault.

**c. Due to the conflicting evidence, the jury could have entertained a reasonable doubt as to at least one of the multiple acts. The error is not harmless.**

When the State does not make an election and the trial court fails to provide a Petrich instruction, the error is “harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident

established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 406. Here, there was substantial reason to doubt Ms. Anderson’s claims of assaultive acts. Mr. Mackey testified that he did not assault Ms. Anderson, and Mr. and Ms. England testified they did not witness any assaults. RP 319, 344, 360, 365. Ms. Anderson, who ingested significant amounts of alcohol and drugs, could not remember all the details. RP 192-93, 197.<sup>11</sup> And despite Ms. Anderson’s testimony, the jury acquitted Mr. Mackey of assault by strangulation. RP 495; CP 85. Given this record, the error is not harmless. See Kitchen, 110 Wn.2d at 412 (standard not satisfied because there was conflicting testimony as to the acts and jury could have entertained a reasonable doubt as to whether one or more of the acts happened). This Court should reverse.

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<sup>11</sup> In fact, after Ms. Anderson testified that she did not tell police that she thought she deserved to be hit, the State impeached Ms. Anderson with a police officer’s testimony that she had told him this. RP 162, 256-56, 261-62. So the State’s position was that Ms. Anderson had problems with her memory.

**3. In violation of double jeopardy, the record does not show that the conviction for fourth degree assault is based on a separate and distinct act different from the conviction for second degree assault.**

**a. Double jeopardy forbids punishment for the same offense. When two counts may constitute the same offense, the record must show it was manifestly apparent to the jury that the offenses are based on separate acts.**

The constitutional prohibition against double jeopardy forbids imposition of multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). A double jeopardy claim may be raised for the first time on appeal. Mutch, 171 Wn.2d at 661. Double jeopardy issues are reviewed de novo. Id. at 662.

Jury instructions which permit the jury to convict a defendant of two crimes that are the same offense create the possibility of a double jeopardy violation. State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007); Mutch, 171 Wn.2d at 663. This can occur when a defendant is charged with multiple counts of the same crime. See, e.g., Borsheim, 140 Wn. App. at 362, 370 (defendant's four convictions for rape of a child violated double jeopardy because jury instructions permitted jury to base each conviction on a single act). It may also occur when the defendant is convicted of two different crimes if the two crimes

are the same in fact and in law. State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013) (defendant convicted of molestation and rape potentially exposed to double jeopardy violation).

Jury instructions should make it “manifestly apparent” that multiple punishments for the same offense are not being sought. Borsheim, 140 Wn. App. at 367. When there is a risk of a double jeopardy violation due to multiple counts during the same charging period, the jury should be told each count requires proof of a different act. Id. at 367. This should be done by instructing the jury that it must find the criminal act was “separate and distinct” from other charged acts. See id. at 368; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 cmt. (4th Ed). Simply giving the jury a unanimity instruction or the standard “separate crime” instruction is inadequate. Mutch, 171 Wn.2d at 662-63; Borsheim, 140 Wn. App. at 367.

In determining whether there is a double jeopardy violation, the entire record is considered. Mutch, 171 Wn.2d at 664. However, “review is rigorous and is among the strictest.” Id. It must be “manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense and that each count was based on a separate act.” Id. (internal quotation and brackets omitted).

**b. The two assault convictions may constitute the same offense. The record does not make it manifestly apparent that the convictions are based on separate and distinct acts. Because this violates double jeopardy, the fourth degree assault conviction should be vacated.**

Mr. Mackey was charged with two counts of second degree assault, one premised on infliction of substantial bodily harm (count one) and other premised on strangulation (count two). CP 3-4. Fourth degree assault is a lesser included offense of second degree assault and is thus the same offense in law. See State v. Villanueva-Gonzalez, 180 Wn.2d 975, 982 n.3, 329 P.3d 78 (2014). The jury was provided lesser included offense instructions for fourth degree assault on both counts. CP 35, 38-39, 44, 48. The jury convicted Mr. Mackey of one count of second degree assault and one count of fourth degree assault. CP 80, 86.

The conviction for fourth degree assault violates double jeopardy because it may be based on the same act constituting the second degree assault. See Villanueva-Gonzalez, 180 Wn.2d at 978, 985-86 (convictions for second degree assault and fourth degree assault based on same course of conduct violated double jeopardy). The instructions and argument do not make it manifestly apparent that the conviction for fourth degree assault is based on an act separate and distinct from the conviction for second degree assault.

As discussed earlier, the jury was only provided a Petrich or unanimity instruction as to count one. CP 34 (instruction 9). No unanimity instruction was provided for count two. As to count two, the jury found Mr. Mackey not guilty of second degree assault, but convicted him of the lesser offense of fourth degree assault. CP 85-86. The instructions did not restrict which act the jury could find constituted the fourth degree assault for count two. See CP 48 (instruction 23) (requiring jury find that defendant committed assault “on or about March 7, 2015 and March 10, 2015”). The conviction for second degree assault as to count two was premised on the same date range. CP 37 (instruction 12) (requiring jury find that defendant committed assault “on or between March 7, 2015 and March 10, 2015”).

The jury was provided a standard “separate crime” instruction, which told the jury it “must decide each count separately” and that its “verdict on one count should not control your verdict on any other count.” CP 33 (instruction 8). But a “separate crime” instruction is inadequate to fully mitigate the risk of a double jeopardy violation. Mutch, 171 Wn.2d at 662-63; Borsheim, 140 Wn. App. at 367.

To ensure no double jeopardy violation in this case, an instruction telling the jury that each count must be based on a separate and distinct act was necessary. When jury instructions are inadequate to protect against

the potential double jeopardy violation, only in “rare circumstance[s]” will it be manifestly apparent that the jury’s verdict on the multiple counts rest on separate and distinct acts. Mutch, 171 Wn.2d at 665. In Mutch, such rare circumstances were present because the information, instructions, testimony, and argument convinced the court beyond a reasonable doubt that the five convictions for rape were based on separate and distinct acts. Id. at 663-65. The record showed the prosecutor discussed the five acts during closing and the defendant only raised a defense of consent, not that the acts did not happen. Id.

Unlike Mutch, this is not a “rare” case where the record proves beyond a reasonable doubt that the two convictions for assault are premised on separate and distinct acts. Mr. Mackey denied that the acts occurred. Excluding assault by strangulation (which the jury rejected), the prosecutor did not elect a particular act for each count. The prosecutor only cursorily discussed the lesser included offense of fourth degree assault for count two. RP 459. The prosecutor did not tell the jury that this act had to be based on the same act as the purported strangulation. RP 459. Accordingly, the record does not prove beyond a reasonable doubt there is no double jeopardy violation. This Court should reverse and vacate the conviction for fourth degree assault. Mutch, 171 Wn.2d at 664; Borsheim, 140 Wn. App. at 370-71.

**4. The evidence was insufficient to prove that Mr. Mackey committed the offense of unlawful imprisonment.**

**a. The State bears the burden to prove all the elements of an offense beyond a reasonable doubt.**

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. In reviewing whether the State has met this burden, the appellate court analyzes ““whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.”” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

**b. The State did not prove that Mr. Mackey “restrained” Ms. Anderson through intimidation.**

Unlawful imprisonment is a lesser included offense of kidnapping. State v. Davis, 177 Wn. App. 454, 461, 311 P.3d 1278 (2013). It requires proof that the defendant “knowingly restrains another.” RCW 9A.40.040. “‘Restraint’ is defined as a restriction of a person’s movement without his or her consent and without legal authority, in a manner substantially interfering with that person’s liberty.” State v. Berg, 181 Wn.2d 857, 863, 337 P.3d 310 (2014) (citing RCW 9A.40.010(6)). “Restraint” is “without

consent” if the restraint is accomplished by “physical force, intimidation, or deception.” RCW 9A.40.010(6)(a).

The State’s theory of the case was that Mr. Mackey “restrained” Ms. Anderson by preventing her from leaving the house and that this “restraint” was accomplished through “intimidation.” RP 460-61. “Intimidate” means “to make timid or fearful: inspire or affect with fear: frighten . . . to compel to action or inaction (as by threats).” State v. Lansdowne, 111 Wn. App. 882, 891, 46 P.3d 836 (2002) (quoting Webster’s Third New International Dictionary 1184 (1993)).

Ms. Anderson testified that while she was at the Englands’ house, she wanted to go home. RP 187. She testified that she asked Mr. Mackey to take her home, but that Mr. Mackey told her she could not leave until her bruises had healed. RP 161, 164. She explained she did not try to leave; not because she feared Mr. Mackey would hurt her, but because she did not have a car and she was unfamiliar with Vancouver. RP 161. She did not have money to use a ride sharing service. RP 187. She testified that she had a cell phone and that no one took it from her. RP 197. She explained that she did not call anyone for assistance because she did not want Mr. Mackey to go to jail. RP 161, 187. While at the Englands’ home, she admitted there had been a time where Mr. Mackey and Ms. England were gone and it was just her and Mr. England. RP 186. Only

after the last incident where Mr. Mackey purportedly beat and threatened to kill Ms. Anderson, did Ms. Anderson use her phone to contact her father. RP 161. This incident terrified her so she decided she had to leave. RP 161, 167-69; Exs. 8, 9. Mr. Mackey did not stop Ms. Anderson from collecting her and their son's belongings, and leaving with her father. RP 171-72.

In proving restraint by intimidation, the State has the burden of proving the victim's state of mind. See State v. Ashley, 186 Wn.2d 32, 45, 375 P.3d 673 (2016) (ER 404(b) evidence "helped the jury assess [victim's] state of mind—that is, whether she was restrained against her will because she was intimidated."); State v. Johnson, 172 Wn. App. 112, 123, 297 P.3d 710 (2013) ("The State also argues that intimidation, as an element of unlawful imprisonment, required the State to prove J.J.'s state of mind."), reversed in part on other grounds, 180 Wn.2d 295, 325 P.3d 135 (2014). The intimidation must be caused by the defendant and result in the restraint. See State v. Atkins, 130 Wn. App. 395, 402, 123 P.3d 126 (2005) (evidence that defendant used intimidating tone of voice when victim tried to signal help supported element of restraint); State v. Davis, 133 Wn. App. 415, 419-20, 425, 138 P.3d 132 (2006) (defendant restrained child where defendant assaulted child's mother, told child to not

leave, and child “testified she was scared and did not leave.”), vacated on other grounds, 163 Wn.2d 606, 184 P.3d 639 (2008).

Here, the evidence was insufficient to prove that Mr. Mackey intimidated Ms. Anderson from leaving the Englands’ home. Ms. Anderson did not testify that she did not leave due to any threats from Mr. Mackey. Rather, she testified that she initially decided to not contact anyone to help her in leaving because she did not want Mr. Mackey go to jail. In fact, she explained it was only the last day she was there that she felt afraid and therefore contacted her father and asked him to pick her up.

Without testimony or other evidence proving that Ms. Anderson experienced intimidation from Mr. Mackey and that this intimidation resulted in her believing she lacked the freedom to leave the home, the State failed to prove unlawful imprisonment. The conviction should be reversed and dismissed. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (the prohibition against double jeopardy forbids retrial when there is insufficient evidence to sustain a conviction).

**5. No costs should be awarded for this appeal**

If the State substantially prevails in the appeal, the State may request appellate costs. RCW 10.73.160(1); RAP 14.2. This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App.

380, 388, 367 P.3d 612 (2016). In exercising its discretion, the court should make “an individualized inquiry” into whether it is equitable to impose costs. Sinclair, 192 Wn. App. at 391 (citing State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015)). A person’s ability to pay is an important factor. Id. at 389.

The trial court found Mr. Mackey indigent and waived all discretionary legal financial obligations. CP 113-18, 126-27. This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. Accordingly, the Court should exercise its discretion and direct that no costs will be awarded.<sup>12</sup>

## **F. CONCLUSION**

In violation of Miranda, the trial court erred in admitting Mr. Mackey’s inculpatory statement, which was elicited during custodial interrogation. The error was prejudicial, requiring reversal of all the convictions. Independent of this error, the conviction for fourth degree assault should be reversed due to the violations of jury unanimity and

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<sup>12</sup> RAP 14.2 was recently amended and now instructs that a commissioner will not award costs to the State if the “adult offender does not have the current or likely future ability to pay such costs.” The rule keeps the pertinent language authorizing this Court to direct that no costs will be awarded in the decision terminating review. RAP 14.2 (costs will be awarded to substantially prevailing party “unless the appellate court directs otherwise in its decision terminating review”).

double jeopardy. The conviction for unlawful imprisonment should be dismissed for insufficient evidence.

DATED this 9th day of February 2017.

Respectfully submitted,

/s Richard W. Lechich  
Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorney for Appellant

# Appendix

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**FILED**

JUL 01 2016

DEPT. D. WEBER, Clerk, Clark Co

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

NO. 15-1-00974-5

Plaintiff,

vs.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW REGARDING  
CrR 3.5 HEARING

DOUGLAS MARVIN MACKEY,

Defendant.

On June 6, 2016, a CrR 3.5 hearing was held in this Court before the Honorable Daniel L. Stahnke. The Defendant was present with his attorney of record, Gregg Schile. Deputy Prosecuting Attorney Laurel K. Smith represented the State. The Court heard the testimony of Clark County Sheriff's Office Deputy Jon Shields.

**I. FINDINGS OF FACT**

- 1.1 On May 27, 2015, Deputy Jon Shields responded to 5717 NE 45<sup>th</sup> Avenue in Vancouver, Washington after being dispatched on a possible prowler call. Before his arrival, Deputy Adam Beck contacted the prowler and identified him as Douglas Marvin Mackey, the Defendant.
- 1.2 Deputy Shields ran the Defendant's name and learned that he had a BOLO issued by Deputy Andrew Kennison, and was wanted for Harassment-DV and Unlawful Imprisonment-DV. Deputy Shields confirmed the BOLO and had the Probable Cause statement faxed to booking at the Clark County Jail.
- 1.3 Deputy Shields placed the Defendant under arrest, handcuffed him, and secured him in the back of his patrol car.

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~~103~~

1 1.4 Deputy Shields told the Defendant that he was being arrested for an incident that  
2 occurred on March 10, 2015 involving Mallory.

3 1.5 The Defendant responded to this statement, saying "That was months ago!"

4 1.6 The Defendant was very intoxicated and was not asked any questions.

5 1.7 The Defendant was not Mirandized at any point during this encounter.

6 **II. CONCLUSIONS OF LAW**

7 2.1 The court has jurisdiction over the Defendant and the subject matter of this  
8 action.

9 2.2 The Defendant was in law enforcement custody at the time that he made a  
10 statement to Deputy Shields.

11 2.3 The Defendant's statement was spontaneous as it was not made in response to  
12 any questioning. No interrogation occurred.

13 2.4 The Defendant's statement was voluntary.

14 2.5 The Defendant's statement to Deputy Shields is admissible under CrR 3.5 at trial.

15 Done this 1<sup>st</sup> day of July, 2016.

16   
17 Superior Court Judge / Daniel L. Stahnke

18 Presented by:

19   
20  
21 Deputy Prosecuting Attorney  
22 Laurel K. Smith  
WSBA# 46970

Approved as to form only; notice of  
presentation waived.

23   
24  
25 Attorney for Defendant  
26 Gregg Schile  
WSBA#15087

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 49198-2-II
v.	)	
	)	
DOUGLAS MACKEY II,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF FEBRUARY, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[prosecutor@clark.wa.gov]	( )	HAND DELIVERY
CLARK COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA COA
PO BOX 5000		PORTAL
VANCOUVER, WA 98666-5000		
[X] DOUGLAS MACKEY II	(X)	U.S. MAIL
317057	( )	HAND DELIVERY
COYOTE RIDGE CORRECTIONS CENTER	( )	_____
PO BOX 769		
CONNELL, WA 99326		

SIGNED IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2017.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
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# WASHINGTON APPELLATE PROJECT

**February 09, 2017 - 4:03 PM**

## Transmittal Letter

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Court of Appeals Case Number: 49198-2

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