

NO. 49198-2-II

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

STATE OF WASHINGTON, Respondent

v.

DOUGLAS MARVIN MACKEY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00974-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly admitted the statement Mackey made to police upon his arrest.**
- II. **Mackey was properly convicted of fourth degree assault as a lesser included of Assault in the Second Degree.**
- III. **Double Jeopardy does not bar Mackey's convictions for Assault in the Second Degree and Assault in the Fourth Degree.**
- IV. **Sufficient evidence supports Mackey's conviction for Unlawful Imprisonment.**
- V. **The State will not seek appellate costs.**

STATEMENT OF THE CASE

The State charged Douglas Marvin Mackey (hereafter 'Mackey') with Assault in the Second Degree Domestic Violence by reckless infliction of substantial bodily harm, Assault in the Second Degree Domestic Violence by strangulation, Unlawful Imprisonment Domestic Violence, and Felony Harassment Domestic Violence. CP 3-4. The charges were based on events that occurred between March 7, 2015 and March 10, 2015, when Mackey assaulted the mother of his child, Mallory Anderson, over the course of three days, threatened to kill her, and refused to allow her to leave his residence. CP 2.

At trial, Ms. Anderson testified that she and Mackey dated for three years, and have a two-and-a-half year old son together. RP 151. On March 7, 2015, Mackey picked Ms. Anderson up from her parents' house and drove her to Vancouver. RP 152. Their son and Mackey's other two children were with them. RP 152. Mackey drove Ms. Anderson to a friend, Brandi England's house in Vancouver, Washington, where Mackey was residing. RP 152. That evening, Ms. Anderson and Mackey got into an argument and Mackey got mad at Ms. Anderson, put her on the ground, held her by the neck, and then pushed his thumbs into her eyes, pushing hard, breaking an eye vessel and giving Ms. Anderson two black eyes. RP 156. This occurred in the garage of the residence. RP 156.

Over the following few days, Mackey assaulted Ms. Anderson multiple times and threatened to kill her. RP 158-59. During one incident on the third day, Mackey chased after Ms. Anderson as she ran upstairs, saying he was going to "fucking kill her," and then pushed her onto the bed, pounded her on her back three hard times, pulled her off the bed by her hair, and kicked her "over and over again." RP 159. Ms. Anderson begged Mackey to stop. RP 159. While he assaulted her, Mackey screamed at her that he was going to kill her. RP 159. Ms. Anderson believed him. RP 159.

On another day over the weekend, Mackey got mad at Ms. Anderson and smacked her repeatedly on the face as they walked through the living room, and he then grabbed her by the neck and pulled her up against the wall. RP 159-60. Mackey held Ms. Anderson by the neck up against the wall so that her feet were off the ground. RP 160. Ms. Anderson could not breathe for a few seconds, and she clung to the arm that held her up with both her arms. RP 160. Mackey is 10 inches taller than Ms. Anderson and weighs 97 pounds more than she does. RP 160.

Over the weekend, Ms. Anderson kept asking if Mackey would take her home and he told her that she could not leave until the bruises had healed. RP 161. Ms. Anderson was scared of what would happen, and she did not want Mackey to go to jail, so Ms. Anderson did not call police over the three days of beatings. RP 161. However, after the worst beating on the third day, when Mackey screamed that he was going to kill her while he repeatedly kicked her, Ms. Anderson was “terrified.” RP 167. Ms. Anderson worried that Mackey was not going to stop hitting her; she kept begging him to stop, telling him “please don’t, I won’t do it again.” RP 167.

Over the weekend, Ms. Anderson was very dizzy and in a lot of pain; she had bruises everywhere. RP 168. Eventually, she texted her dad

for help, telling him it was an emergency, and to please come get her. RP 168. She cautioned her father not to call her on her phone because Mackey would hear it. RP 168. Her father, Keith Anderson, and her brother-in-law, Josh Mathie, came to pick Ms. Anderson and her son up after she asked for help. RP 170. As she left the house, Mackey put sunglasses on Ms. Anderson, in an attempt to hide her black eyes. RP 171.

Ms. Anderson did not want to call police, but when Mr. Mathie and Mr. Anderson saw the extent of Ms. Anderson's injuries, they called police and took Ms. Anderson to meet with officers. RP 171. Ms. Anderson told police what happened, and went to the hospital where she was diagnosed with a concussion. RP 225.

Josh Mathie testified that when he and Mr. Anderson arrived to pick Ms. Anderson up on March 10, 2015, she was wearing sunglasses and that she started crying as they drove away. RP 212. Ms. Anderson told them that she had been beaten repeatedly and that Mackey would not let her leave. RP 212. Mr. Mathie asked her to take her sunglasses off, and saw that Ms. Anderson's face was bruised, and one of her eyes was extremely bloodshot and bloody. RP 212. Mr. Mathie then said he needed to call the police. RP 213. Ms. Anderson begged him not to call the police and said that she had told Mackey she wouldn't call the police and that she

had just wanted to leave. RP 213. Mr. Mathie took photos of Ms. Anderson's injuries, including her black eyes, bloodshot eye, bruises on both legs, and bruises about her face. RP 216. Ms. Anderson also had bruising to her arms. RP 264.

Mackey had a history of abusing Ms. Anderson. On one occasion while Mackey was driving on I-205, other motorists saw him hitting Ms. Anderson repeatedly. RP 174. On another occasion, Mackey pulled Ms. Anderson off a chair by her hair, and drug her into another room. RP 174. This caused her to lose some hair. RP 174. And on yet another occasion, Mackey hit Ms. Anderson in the face in front of her father. RP 175, 206.

Two and a half months after this incident, Deputy Jon Shields of the Clark County Sheriff's Office arrested Mackey on a "BOLO," which means "be on the lookout." RP 268. When Deputy Shields told Mackey what he was being arrested for, Mackey responded, "that was months ago." RP 268.

Once he was in jail, Mackey made recorded phone calls to his friend, Brandi England. RP 283. In the call he tells Ms. England that he had been arrested and then he said, "Listen, I need you to get your husband and my – Jason already knows – my J, and – he already knows – your J doesn't know make sure that they fucking goddamn all collaborate

on the story, okay.” RP 283-84. He further told her, “Okay, listen. You guys got to get the same story down that Mallory showed up with the bruises, okay? And that I didn’t imprison her, okay?” RP 284. Mackey also called Jason Van Metrey from jail. RP 285-86. During that call he told him, “I’ve to get my witnesses together to beat this thing with Mallory I need you and Jason and her to all testify that she showed up with bruises, dude. Do you hear me? Do you hear me, bro? ... I need your help. (Inaudible), bro.” RP 286. Mackey also asked Mr. Van Metrey to “make sure you get to Jason’s and tell Brandi and all them to testify for me and you, okay, bro?” RP 286.

Brandi England and Jason England testified in Mackey’s defense. RP 306-47. Ms. England testified that when Ms. Anderson first arrived at the residence on March 7, 2015 that she appeared “frazzled,” and was wearing make-up that was either a day old or caked on. RP 313-14. Ms. England then testified that Ms. Anderson “showed up at our house with definite bruises and marks on her body.” RP 316. Ms. England admitted that Mackey told her to tell Jason England, her husband, that Ms. Anderson showed up at their house with bruises and that Mackey did not put them there, and that he never told her she had to stay. RP 325. Ms. England and Mackey had a sexual relationship, and Ms. England helped Mackey get out of jail. RP 326.

Mr. England testified similarly to Ms. England and indicated that when Ms. Anderson arrived at their home she was wearing more make-up than usual. RP 338. And though things were tense between Mackey and Ms. Anderson, Mr. England never witnessed any assault between the two. RP 341.

Prior to trial, the court held a hearing pursuant to CrR 3.5 to determine the admissibility of the statement Mackey made to Deputy Shields upon his arrest. RP 84-89. The State argued the statement Mackey made, “that was months ago!” was a spontaneous statement made not in response to questioning or interrogation by the deputy. RP 88-89. In response, Mackey responded, “...our position on that simply is that it appears there were no Miranda warnings given, but I don’t know that they would have had to be under that circumstance so I don’t think we’re contesting that he made that particular statement.” RP 89. The trial court then found it was a spontaneous statement and was admissible at trial. RP 89. The trial court later entered findings of fact and conclusions of law to this effect. CP 103-04.

The trial court instructed the jury on lesser included crimes of assault in the fourth degree for both count 1 and count 2, which were charged assault in the second degree by substantial bodily harm and by

strangulation, respectively. CP 39, 48. The court gave a *Petrich* instruction for count 1 as the State presented evidence of two separate assaults that each could have been the basis for an assault in the second degree by reckless infliction of substantial bodily harm. CP 34. The State relied upon one specific incident to support the allegation of assault in the second degree by strangulation as charged in count 2. RP 458-59. The State did not request the court give a *Petrich* instruction on count 2 as it was relying on one specific act to support that allegation. RP 398. Mackey told the court he had no exceptions to the instructions as given with regard to count 2. RP 398. Mackey did not request the court give a *Petrich* instruction with regard to count 2. *Id.*

The jury returned verdicts of guilty on Assault in the Second Degree as charged in count 1, guilty on the lesser included of Assault in the Fourth degree as to count 2, Unlawful Imprisonment, and Felony Harassment. CP 80, 86, 88, 91. The jury found each count was a domestic violence offense. CP 84. For counts 1, 3, and 4, the jury returned special verdicts that the crimes were aggravated domestic violence offenses. RP 82, 89, 92. The trial court sentenced Mackey to a standard range sentence. CP 124. This appeal follows.

ARGUMENT

I. The trial court properly admitted the statement Mackey made to police upon his arrest.

Mackey argues the trial court erred in admitting the statement he made to Deputy Shields after Deputy Shields told Mackey why he was under arrest. Not only did Mackey waive his right under CrR 3.5 to contest the admissibility of this statement, but the trial court properly concluded the statement was admissible as a spontaneous statement and that Mackey was not subjected to custodial interrogation. The trial court should be affirmed.

a. Mackey waived his right under CrR 3.5 by not contesting the admissibility of his statement at trial.

The purpose of a pretrial confession hearing under CrR 3.5 is to allow the court, prior to trial, to rule on the admissibility of a defendant's statements to law enforcement. *State v. Taylor*, 30 Wn.App. 89, 92, 632 P.2d 892 (1981). The rule promotes judicial efficiency by insulating juries from tainted evidence, thus avoiding continuances, mistrials, and appeals. *State v. Rice*, 24 Wn.App. 562, 565, 603 P.2d 835 (1979). Mackey impliedly waived his rights under CrR 3.5 by failing to object to the deputy's testimony during the CrR 3.5 hearing and at trial, and by failing to object to the admission of the statement he made to the deputy. *See*

State v. Fanger, 34 Wn.App. 635, 638, 663 P.2d 120 (1983) (holding a defendant impliedly waived his rights under CrR 3.5 by failing, in part, to object to the officer's testimony). Mackey did not give the trial court any opportunity to litigate the issue of voluntariness of his statement to police that he now raises on appeal.

Mackey waived any objection to the admission of his statement to police by telling the court that

Your honor, our position on that simply is that it appears there were no *Miranda* given, but I don't know that they would have had to be under that circumstance so I don't think we're contesting that he made that particular statement.

RP 89. In *State v. Rice*, 24 Wn.App. 562, 603 P.2d 835 (1979), this Court found a defendant who withdrew his objection to the admissibility of a statement he made to police waived his right to the protections under CrR 3.5. *Rice*, 24 Wn.App. at 567 (discussing prior holdings that the failure to object to the admissibility of a statement precludes review). As the defendant waived his right to challenge the admissibility of his statement on voluntariness grounds, he was foreclosed from having the issue considered on appeal. *Id.* at 568.

Thus Mackey's statement to the trial court that no *Miranda* needed to have been given in the situation involved in his case shows that Mackey

did not contest the voluntariness of the statement he made to Deputy Shields. He is therefore precluded from raising this issue now on appeal.

b. The trial court properly found Mackey's statement was voluntary and admissible.

Mackey claims the trial court improperly found that Mackey was not subject to custodial interrogation and that his statement was spontaneous. The trial court properly, and without objection from Mackey, ruled the statement was admissible as the deputy did not interrogate Mackey and Mackey's statement was spontaneous. The trial court's findings and conclusions on the CrR 3.5 hearing should be affirmed.

This Court reviews a trial court's decision after a CrR 3.5 hearing by determining whether substantial evidence supports the trial court's findings of fact, and whether those findings of fact support the court's conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Solomon*, 114 Wn.App. 781, 789, 60 P.3d 1215 (2002) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Police must inform a suspect of his or her rights under *Miranda* prior to beginning a custodial interrogation. *State v. Cunningham*, 116 Wn.App. 219, 227, 65 P.3d 325 (2003) (citing *State v. Baruso*, 72 Wn.App. 603, 609, 865 P.2d 512

(1993)). There are three elements to a custodial interrogation: 1) custody; 2) interrogation; and 3) by a state agent. *Solomon*, 114 Wn.App. at 787.

The trial court below found Mackey was in custody at the time he made the statement the State sought to introduce at trial. RP 103. Neither the State nor Mackey contest this finding. The issue that Mackey now raises is whether an “interrogation” occurred while Mackey was in custody. To be subject to exclusion due to lack of *Miranda* warnings, statements must result from police interrogation. *State v. McWatters*, 63 Wn.App. 911, 915, 822 P.2d 787, *rev. denied*, 119 Wn.2d 1012, 833 P.2d 386 (1992). Interrogation means questioning or other words or actions likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). “[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” *Innis*, 446 U.S. at 301-02.

Spontaneous statements made while in police custody are admissible. *State v. Bradley*, 105 Wn.2d 898, 904, 719 P.2d 546 (1986). Such spontaneous statements are admissible because they are unsolicited, not the product of custodial interrogation, and are not coercive within the

concept of *Miranda*. *State v. Roberts*, 14 Wn.App. 727, 544 P.2d 754 (1976); *State v. Toliver*, 6 Wn.App. 531, 494 P.2d 514 (1972).

In *State v. McIntyre*, 39 Wn.App. 1, 691 P.2d 587 (1984), this Court held a defendant's spontaneous in-custody statements were admissible because they were not prompted by questioning or other conduct equivalent to interrogation, and the actions of the police were merely those attendant to arrest. *McIntyre*, 39 Wn.App. at 6. Further, in *State v. Sadler*, 147 Wn.App. 97, 193 P.3d 1108 (2008), this Court found a defendant's statements to a detective after the detective told the defendant he was going to apply for a search warrant were spontaneous, voluntary statements. *Sadler*, 147 Wn.App. at 131. "Merely telling a suspect about the status of the investigation is not likely to elicit a response." *Id.* This is on par with the deputy's actions in Mackey's case: Deputy Shields informed Mackey of the reason for his arrest, did not ask him any questions, yet Mackey made a statement following Deputy Shields' statement of the reason for arrest. As in *Sadler*, Deputy Shields merely told Mackey about the status of the case, something that is typically attendant to an arrest. This was not a statement likely to elicit an incriminating response and thus was not an interrogation.

The trial court properly found that no interrogation occurred when Deputy Shields told Mackey the basis for his arrest. As no interrogation

occurred, Mackey's statement was spontaneous and admissible at trial.

The trial court should be affirmed.

II. Mackey was properly convicted of fourth degree assault as a lesser included of Assault in the Second Degree.

Mackey argues that he was denied his right to jury unanimity for his conviction for assault in the fourth degree in count 2. Mackey's argument fails as the State specifically elected which act it relied upon to support a conviction for count 2, and no unanimity instruction was needed. A defendant may only be convicted when a unanimous jury concludes the criminal act charged in the information was committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). If the State presents evidence of multiple acts which could form the basis of one 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 specified act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *Petrich*, 101 Wn.2d at 570; *State v. Workman*, 66 Wn. 292, 294-95, 119 P. 751 (1911)). This rule, often referred to as the *Petrich* rule, applies only when there has been evidence of multiple acts that could each constitute the crime charged. *Id.*

As an initial matter, this Court should decline review of this issue as Mackey failed to propose a unanimity instruction for count 2 at trial, and failed to object or take exception to the instructions the trial court

gave the jury. RAP 2.5 can preclude review of issues raised for the first time on appeal. However, “manifest error affecting a constitutional right” may be raised for the first time on appeal. RAP 2.5(a)(3). Failure to give a unanimity instruction does affect a constitutional right; however, Mackey cannot show that any potential error was manifest. *See State v. Fiallo-Lopez*, 78 Wn.App. 717, 725, 899 P.2d 1294 (1995); *State v. Hepton*, 113 Wn.App. 673, 684-85, 54 P.3d 233 (2002); *State v. Camarillo*, 115 Wn.2d 60, 63 n. 4, 794 P.2d 850 (1990). An error is only “manifest” when there is actual prejudice; appellate courts look to whether the error is so obvious as to warrant appellate review. *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). Actual prejudice is shown when there is a plausible showing that the error had practical and identifiable consequences at the trial. *State v. Irby*, 187 Wn.App. 183, 193, 347 P.3d 1103 (2015) (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)). An error has practical and identifiable consequences when the trial court could have corrected the error. *O’Hara*, 167 Wn.2d at 100. The appellate court must place itself in the shoes of the trial court in making this determination, and should not “address claims where the trial court could not have foreseen the potential error, or where the prosecutor or trial counsel could have been justified in their actions or failure to object.” *Id.*

Here, it is clear that Mackey cannot show any error, let alone manifest error. As such, this court should decline to review this issue. At the time of the giving of the jury instructions, it was clear the State chose to elect which assaultive contact it relied upon to support count 2, and defense counsel neither requested a unanimity instruction, nor objected when the State withdrew its initial request for one as it indicated it intended to only rely upon one act to support a conviction for count 2. Mackey now argues the State did not elect which act it relied upon in the lesser included of count 2, however, the trial court would not reasonably have expected any argument that the singular act of strangulation for which the State sought a conviction in count 2 would not be the same act it relied upon for the lesser included in count 2. In analyzing whether this court should review this issue for the first time on appeal, the court does not “engage in the analysis the trial court would have conducted if [the defendant] proposed a *Petrich* instruction or objected and thereby brought the unanimity issue to the trial court’s attention. We focus on what was manifest where no objection was raised and no such arguments were made.” *State v. McNearney*, 193 Wn.App. 136, 143, 373 P.3d 265 (2016). Defense agreed no unanimity instruction was required and the State did appropriately elect an act to constitute the crime charged in count 2. This

issue was not preserved for review as Mackey has not shown a manifest constitutional error.

However, even if this Court addresses this issue on the merits, Mackey's claim should be denied as the State properly elected one act in its closing argument and told the jury to only rely upon that act in considering a conviction for count 2. A unanimity instruction is not required when the State chooses which act to rely upon for a conviction.

Kitchen, 110 Wn.2d at 409. In her closing statement, the prosecutor stated:

The assault two, strangulation, which is your Count 2, is a little more straightforward. I had to prove that the defendant intentionally assaulted her by strangulation between March 7 and March 10th and, again, in Washington.

...
... And here we have a situation where she could not breathe, and this is – the situation that I'm talking about is the situation that occurred against the wall, downstairs, where the defendant picked her up, by her neck, with one hand, and her feet were off the ground. She described putting her hands on his arms and trying to pull herself up so she could breathe. She could not breathe during that. That is a strangulation.

...
So again, there's a lesser included on the strangulation count, and you only get to that if you first find not guilty of strangulation.

RP 458-59. From her argument, it is clear the prosecutor elected the act upon which the jury relied in deciding whether the defendant committed the crime charged in count 2. The State must tell the jury which act it is

relying upon for each count in order to properly elect in this type of situation. *See State v. Carson*, 184 Wn.2d 207, 228 n. 15, 357 P.3d 1064 (2015). There was only evidence of one act of strangulation presented at trial, and the State made it clear that count 2 was for strangulation (as did the jury instructions), and the State only discussed and argued one incident to support a conviction for count 2. As the State made such an election, no error occurred. Mackey's conviction was found by a unanimous jury. His claim that he was denied his right to a unanimous verdict fails.

III. Double Jeopardy does not bar Mackey's convictions for Assault in the Second Degree and Assault in the Fourth Degree.

Mackey argues his right to be free from double jeopardy was violated by his conviction for assault in the second degree by substantial bodily harm, and assault in the fourth degree as a lesser included of an originally charged assault in the second degree by strangulation. The two convictions clearly do not constitute the same offense and Mackey's claims they do fail. Mackey's convictions should be affirmed.

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution, and article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995) and *State v.*

Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995)). When a defendant is convicted of violating a single statute multiple times, the inquiry is “what ‘unit of prosecution’ has the Legislature intended as the punishable act under the specific criminal statute.” *State v. Tili*, 139 Wn.2d 107, 113, 985 P.2d 365 (1999) (quoting *Adel*, 136 Wn.2d at 634 (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) and *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982), *superseded on other grounds as stated in State v. Elliott*, 114 Wn.2d 6, 16, 785 P.2d 440 (1990)). If the Legislature has defined the scope of a criminal act, then double jeopardy provisions come into play and prevent a defendant from being convicted more than once for just one unit of the crime. *Adel*, 136 Wn.2d at 634.

Mackey was convicted of violating RCW 9A.36.021(1)(a), assault in the second degree by recklessly inflicting substantial bodily harm, and RCW 9A.36.041(1), assault in the fourth degree. In this situation, the unit of prosecution analysis applies. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014). In a unit of prosecution analysis, the first step is to analyze the criminal statute. *Adel*, 136 Wn.2d at 635. Assault can be a course of conduct offense, meaning multiple assaultive acts can constitute one course of conduct in certain situations. *Villanueva-*

Gonzalez, at 985. In determining whether more than one crime of assault occurred, our courts look to:

- 1) the length of time over which the assaultive acts took place;
- 2) whether the assaultive acts took place in the same location;
- 3) the defendant's intent or motivation for the different assaultive acts;
- 4) whether the acts were uninterrupted or whether there were any intervening acts or events; and
- 5) whether there was an opportunity for the defendant to reconsider his actions.

Id. In applying these factors to Mackey's case, it is clear that Mackey committed multiple separate and distinct acts, and his actions did not constitute a single course of conduct.

The acts Mackey perpetrated against the mother of his child took place over several days, and all occurred in different parts of the residence: the garage on one day, the bedroom on another, and the hallway on yet another day. The acts were separated by significant time and thus many intervening acts and events occurred. And finally, there was ample opportunity for the defendant to reconsider his actions. He literally had days to think things over, yet chose again to assault the victim anew.

This case is similar in its posture to *Villanueva-Gonzalez*, *supra*. However, the facts of *Villanueva-Gonzalez* differ significantly from the facts at bar. Every factor in the five factor analysis to determine whether

multiple assaultive acts constitute one course of conduct weighed in favor of finding a single course of conduct in *Villanueva-Gonzalez*. The two assaultive acts occurred at the same location, in a very short period of time with no interruption or intervening events, and no time for the defendant to reconsider his actions. *Villanueva-Gonzalez*, 180 Wn.2d at 985-86. Whereas in Mackey's case, every factor weighs against finding a continuing course of conduct.

Here, Mackey assaulted the mother of his child on one day by bursting a vessel in her eye and giving her two black eyes, and on another day by hitting her about the head so significantly that he gave her a concussion. These two acts both separately constituted assault in the second degree by reckless infliction of substantial bodily harm. The State then charged a second count of assault by strangulation for an assault that occurred on yet another day wherein Mackey squeezed the victim's neck causing her to be unable to breathe for several seconds. This assault occurred in the hallway, on a different day from the other assaults, after Mackey had significant time to reconsider his assaultive actions. This is not a course of conduct case. Mackey separately committed an assault in the second degree and a separate and distinct assault in the fourth degree. His convictions should be affirmed.

IV. Sufficient evidence supports Mackey's conviction for Unlawful Imprisonment.

Mackey claims the State failed to present sufficient evidence to support his conviction for Unlawful Imprisonment. The State presented sufficient evidence so that any rational trier of fact could have found Mackey guilty of Unlawful Imprisonment. Mackey's claim fails. The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Evidence that is direct or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975). Furthermore, a reviewing court defers to the trier of fact to weigh the evidence and judge the credibility of the witnesses. *State v. Bryant*, 89 Wn.App. 857, 869, 950 P.2d 1004 (1998).

A person commits the crime of unlawful imprisonment when that person knowingly restrains another person. RCW 9A.40.040. “‘Restrain’ means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is ‘without consent’ if it is accomplished by (a) physical force, intimidation, or deception....” RCW 9A.40.010(6). At trial, the State argued that Mackey committed unlawful imprisonment by using intimidation to prevent the victim from leaving the house. RP 460-61. Mackey specifically argues the State failed to prove that any act of the defendant caused the victim to be intimidated and restrained. The State presented ample evidence that Mackey restrained the victim through intimidation.

At trial, the victim testified that Mackey did not let her leave the house. RP 162. She stated further that “I kept asking him if he would take me home over, and over, and over again. And he said, ‘you can’t leave until the bruises are gone.’” RP 161. Ms. Anderson further testified that she initially didn’t call anyone to come help her because she didn’t want Mackey to go to jail and she was scared of what would happen. RP 161. After three days of assaults which left her covered in bruises, Ms. Anderson only got away from Mackey by sneaking a text message to her father telling him it was an emergency and to come get her, but not to call

her phone because “he will hear it.” RP 168. Ms. Anderson’s father and her sister’s fiancé, Joshua Mathie, picked her up from Mackey’s house, and as soon as she was in the car and the car left Mackey’s residence, Ms. Anderson began to cry and told her father and Mr. Mathie that Mackey had beaten her over and over and would not let her leave. RP 212. In testifying about the three days of terror that Ms. Anderson endured at Mackey’s hands, she told the jury she had never been more scared, and had never been hurt like that before. RP 176. The State also presented evidence that Mackey had previously abused Ms. Anderson, once in a vehicle while driving on I-205, another time where he drug her around by her hair so viciously she lost chunks of her hair, and yet another time where he hit her in front of her father. RP 174-75, 206.

This evidence, when viewed in the light most favorable to the State, shows that Mackey would not let Ms. Anderson leave the house. This was done throughout a time period when he beat her repeatedly, over several days, leaving significant bruising and a concussion. Ms. Anderson repeatedly asked him to let her leave and to take her home, and he told her she could not leave until her bruises had healed. In a relationship wherein Ms. Anderson has been abused repeatedly by Mackey, and brazenly so at times, in front of others, including her own father, any rational juror could have concluded that she was intimidated by his telling her she could not

leave and his continued beatings of her. Her fear of what would happen to her was real and was reasonable. The jury appropriately concluded that Mackey restricted Ms. Anderson's movements without her consent in a manner that substantially interfered with her liberty. There was sufficient evidence presented at trial to support the conviction for unlawful imprisonment. Mackey's conviction should be affirmed.

V. The State will not seek appellate costs.

The State does not intend to seek appellate costs if it substantially prevails in this appeal.

CONCLUSION

Mackey has failed to show any error denied him a fair trial. The trial court should be affirmed in all respects.

DATED this 22nd day of May 2017.

Respectfully submitted:

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