

NO. 49620-8-II

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

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STATE OF WASHINGTON, Respondent

v.

KONSTANTIN V STATOVOY, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00858-5

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Statovoy is barred from arguing that a single special verdict form is insufficient because its use was not objected to at trial.**
- II. **One special verdict form is sufficient to find that Statovoy and Yermilova were family or household members. A separate form for each count involving domestic violence is unnecessary.**

### STATEMENT OF THE CASE

On April 18, 2016, the State charged Konstantin Statovoy (hereafter ‘Statovoy’) with five criminal counts: assault in the second degree (domestic violence), felony domestic violence court order violation (domestic violence), two counts of assault in the fourth degree (domestic violence), and reckless driving (domestic violence), for an incident that occurred on April 13, 2016. CP 1-2. On September 19, 2016, the State filed an amended information removing the domestic violence designation from counts four and five. CP 13-14. The State maintained the domestic violence designation on counts one, two, and three. *Id.*

Both charging documents indicated that the first three criminal counts involved domestic violence and were committed against the same victim – Olga B. Yermilova. CP 1-2, 13-14. And both charging documents allege that all acts occurred on April 13, 2016. *Id.* At trial, Ms. Yermilova testified that Statovoy was her ex-husband and they have three children

together; she had a no contact order prohibiting Statovoy from contacting her. RP 166-69. On April 13, 2016, Statovoy sent text messages to Ms. Yermilova, and then was at her home when she arrived back from work. RP 176, 208-11. Statovoy then “attacked” Ms. Yermilova, strangling her, and telling her she would be the first to die. RP 211-16. To deescalate the situation, Ms. Yermilova offered to drive Statovoy to his car, which she did and then returned home. RP 222024. Statovoy quickly returned to Ms. Yermilova’s house in his car, lost control of his vehicle and hit a mailbox. RP 225-26. Statovoy positioned his car so that it blocked Ms. Yermilova’s vehicle in her driveway. RP 227. Ms. Yermilova was still in her vehicle; Statovoy then jumped out of his car and ran to Ms. Yermilova’s vehicle and grabbed at her through the driver’s side window of her vehicle. RP 228. Statovoy grabbed Ms. Yermilova so that she was unable to move; Ms. Yermilova yelled for help, but Statovoy continued to hold Ms. Yermilova so she could not move. RP 228-29.

Two men, unknown to Ms. Yermilova, arrived at the scene and they helped Ms. Yermilova get out of her vehicle. RP 231. Steven Kujava was one of the Good Samaritans who came to Ms. Yermilova’s aid. RP 98-116. The other was another neighbor, Jack Hassler. RP 132-46. Mr. Kujava first saw Statovoy’s vehicle come fast up the road, going so fast he spun around the corner sideways, leaving tire marks that lasted and were

still present on the day of the trial. RP 100. The vehicle continued up the road and Mr. Kujava heard a big slam on the brakes, so he went up the road to investigate, and called another neighbor, Jack Hessler to help. RP 101-02, 135-36. Upon arriving at Ms. Yermilova's residence, the Good Samaritans saw the vehicle parked against the mail box and heard a woman screaming, and saw a man pulling a woman out of a vehicle through a window and "smacking" her with his hand, and choking her. RP 102-03, 136-37. The woman was screaming. RP 102. Mr. Kujava screamed at the man to stop; the man eventually stopped hitting Ms. Yermilova and told Mr. Kujava he would kill him too. RP 104. The man was completely enraged and came at Mr. Kujava and grabbed him. RP 104. Mr. Hessler heard Statovoy yell that he was going to kill Mr. Kujava. RP 138. Mr. Kujava, and another neighbor, Jack Hassler, put the man down on the ground and held him there by sitting on his back and holding onto his shirt. RP 105, 138-39. Mr. Kujava hurt two fingers during the incident. RP 105.

They held Statovoy down, and they waited for police to arrive. RP 141-46, 231. Ms. Yermilova had many injuries from this attack: her lip was cut open, leaving a scar for multiple months; her jaw hurt badly for a week, she felt "beat up" all over her body, and had blue marks on her chest, shoulders and most of the top area of the body. RP 232.

The State also presented evidence that Ms. Yermilova had obtained a protection order barring Statovoy from having any contact with her, and that the order was served on Statovoy. RP 289-91, 293-94, 301-02.

At the end of the trial on September 21, 2016, the jury was given six verdict forms – one verdict form for each count charged by the State and a verdict form for a lesser included offense to count one. CP 118-23. The jury was also given Special Verdict Form A to determine whether Statovoy and Yermilova were members of the same family or household. CP 124. Jury Instruction Number 25 stated that Special Verdict Form A applied to counts one, two, and three. CP 116. Statovoy did not object to Special Verdict Form A or the accompanying instruction, nor did he request additional special verdict forms be given. RP 333-34.

The jury returned verdicts of guilty on all five counts<sup>1</sup> and found that Statovoy and Yermilova were members of the same family or household. CP 116, 118-23.

At sentencing, the court scored Statovoy's concurrent domestic violence offenses (counts one, two, and three) under RCW 9.94A.525(21) and, based on the convictions for counts two and three, calculated

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<sup>1</sup> Regarding count two, the jury was also given Special Verdict Form B to determine whether the no contact order violation occurred by an assault. The jury found Statovoy guilty of a misdemeanor no contact order violation instead of a felony based on its answer to Special Verdict Form B. See RP, 325-27; CP, 120, 125.

Statovoy's offender score as "2" for sentencing purposes on count one, assault in the second degree. CP 143-53. Statovoy was sentenced to 14 months on count one and a total of nine months on counts four and five.<sup>2</sup> CP 146.

## ARGUMENT

### **I. Statovoy is barred from arguing that a single special verdict form is insufficient because its use was not objected to at trial.**

Statovoy argues for the first time on appeal that Special Verdict Form A is insufficient for a finding that multiple crimes against the same victim were perpetrated against a family or household member and therefore involve domestic violence. Statovoy is barred from making this argument on appeal because the use of this form was not objected to at trial and he has failed to demonstrate any manifest constitutional error. Because this issue has not been preserved for appeal, this Court should deny Statovoy's request.

This Court may refuse to review a claim of error that was not raised in the trial court. RAP 2.5(a); *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). Generally, the reason for this rule is to encourage litigants to point out errors to the trial court so that they may be corrected

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<sup>2</sup> The court suspended all of the time on counts two and three. CP, 170-74

at the time, instead of saving them for appeal in order to obtain a new trial or some other advantage. *See State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). One exception to this rule is if the claimed error involves a “manifest error affecting a constitutional right.” RAP 2.5(a). To meet this exception, Statovoy must show that his claimed error is manifest and of constitutional magnitude. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)). To be “manifest,” the error must have actually prejudiced the appellant, and he must show that the “asserted error had practical and identifiable consequences in the trial of the case.” *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting *WWJ Corp.*, 138 Wn.2d at 603). Then, even if an error is manifest, it should still not be reviewed on appeal unless it actually implicates a constitutional interest as compared to other forms of trial error. *Scott*, 110 Wn.2d at 689-91. Statovoy’s claimed error is neither one of constitutional magnitude, nor did it have a practical and identifiable consequence in his trial.

Jury instructions become the law of the case when not objected to at trial. *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). Because there was no objection to the use of Special Verdict Form A at trial, Statovoy must meet the requirements of RAP 2.5(a) in order to challenge “a manifest error affecting a constitutional right” for the first

time on appeal. He fails to explicitly make this argument, but chooses instead to simply argue that the error was not harmless. However, to reach any harmless error analysis, this Court must first determine there was manifest constitutional error. *See State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

“To demonstrate that an error qualifies as manifest constitutional error an appellant must identify a constitutional error and show how the alleged error actually affected the appellant’s rights at trial.” *State v. Guzman Nunez*, 169 Wn. App. 150, 157-58, 248 P.3d 103 (2011) (citations omitted). Washington appellate courts “do not assume that an error is of constitutional magnitude.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (citations omitted).

In this case, there is no manifest constitutional error. Statovoy fails to argue that any error is of constitutional magnitude and does not show how it actually affected his rights at trial. Even assuming giving one special verdict form inquiring about Statovoy’s relationship to Yermilova was an error, it does not rise to the level of a constitutional error. In *State v. O’Hara*, the Washington Supreme Court listed examples of manifest constitutional errors in jury instructions. The list includes directing a verdict, shifting the burden of proof to the defendant, failing to define a “beyond a reasonable doubt” standard, failing to require a unanimous

verdict, and omitting an element of the crime charged. *O'Hara*, 167 Wn.2d at 100 (citations omitted). Giving the jury one special inquiry instead of three identical special inquiries does not rise to the level of the errors listed in *O'Hara*.

Statovoy also cannot show how providing the jury with one special inquiry regarding his relationship with Yermilova actually affected his rights at trial. As discussed below, a finding that a crime involves domestic violence is not an additional element of that crime. *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000). Further, common sense would dictate that if Statovoy and Yermilova were family or household members during the commission of one of the crimes from April 13, 2016, they remained so while Statovoy committed other crimes on the same day.

Because this issue is not preserved for appeal and Statovoy cannot show any manifest constitutional error, this Court should deny his request to vacate the findings of domestic violence and remand the case for resentencing.

**II. One special verdict form is sufficient to find that Statovoy and Yermilova were family or household members. A separate form for each count involving domestic violence is unnecessary.**

The Superior Court appropriately provided the jury with one special verdict form inquiring about the relationship between Statovoy and

Yermilova. Requiring multiple forms all asking the same question would have been unnecessary and redundant. Because Special Verdict Form A was not given in error, this Court should deny Statovoy's request and affirm his sentence.

“[D]omestic violence is not a separate crime with elements that the State must prove.” *State v. Goodman*, 108 Wn. App. 355, 359, 30 P.3d 516 (2001). Designating a crime as domestic violence “does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.” *O.P.*, 103 Wn. App at 892. Additionally, jury instructions are “sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). A jury is presumed to follow all instructions given to them by the trial court. *State v. Keend*, 140 Wn. App. 858, 868, 116 P.3d 1268 (2007).

To raise a defendant's offender score under RCW 9.94A.525(21), the fact that a crime involves domestic violence must be plead and proven. Statovoy appears to argue that when a defendant is charged with multiple crimes involving domestic violence against the same victim occurring on the same day, the jury must determine separately for each crime whether that defendant and victim remain family or household members in order

for the concurrent domestic violence offenses to be calculated as part of the offender score. Statovoy cites no case on point to support this proposition. Further, the authorities that he does cite in his brief are inapplicable. The three cases cited discuss issues involving same criminal conduct, consecutive or concurrent sentencing, or ineffective charging documents. None of these cases answer the question at issue here.

Contrary to Statovoy's argument, the State did plead and prove that counts one, two, and three involved domestic violence. That these crimes were perpetrated against a family or household member was stated explicitly in both charging documents filed by the State. CP 1-2, 13-14. And the jury found at trial that Statovoy and Yermilova were family or household members. Further, the jury instruction related to the inquiry regarding Statovoy's relationship to Yermilova specifically stated that Special Verdict Form A applied to "crimes charged in counts 1, 2 and 3." CP 116. Read as a whole, the instructions and the verdict forms were not misleading and properly informed the jury of the applicable law. Because the jury is presumed to have followed the instructions, it did find that Statovoy and Yermilova were family or household members in relation to counts one, two, and three. Given these facts, it was plead and proven that counts one, two, and three were domestic violence offenses and therefore

may properly be considered as concurrent offenses when calculating Statovoy's offender score.

Based on the clear jury instructions given in this case, this Court should find that one inquiry regarding a family or household relationship between Statovoy and Yermilova was sufficient to find that counts one, two, and three were domestic violence offenses. To require a jury to find that a defendant and victim are family or household members for each separate count involving domestic violence would be redundant and waste judicial economy.

#### **CONCLUSION**

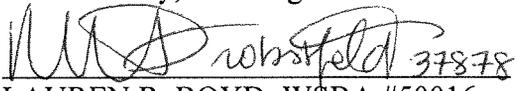
For the reasons stated above, this Court should affirm the Superior Court's finding that counts one, two, and three were domestic violence offenses and affirm the calculation of Statovoy's offender score. Because the State alleged domestic violence in both charging documents and the jury found that Statovoy and Yermilova were family or household members, the domestic violence designations were plead and proven and these crimes were accurately scored as concurrent domestic violence offenses.

This Court should deny Statovoy's request to vacate the findings of domestic violence and remand for resentencing.

DATED this 31<sup>st</sup> day of May, 2017.

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