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NO. 50410-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEREMY TATE,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAMANIA COUNTY

HONORABLE JUDGE RANDALL C. KROG

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED.....	1
1. Did the trial court’s failure to instruct the jury that it must unanimously agree defendant committed a particular criminal act in order to convict him of unlawful imprisonment deny his right to a unanimous jury verdict?	
2. Was trial counsel ineffective in failing to object to characterizations of Robin Tate as a “victim” despite his successful motion in limine to exclude such characterization?	
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	1
1. The trial court’s failure to instruct the jury that it must unanimously agree defendant committed a particular criminal act in order to convict him of unlawful imprisonment did not deny his right to a unanimous jury verdict	
a. In multiple acts cases, a criminal defendant is entitled to jury unanimity on a specific criminal act	
b. The State charged only one instance of conduct in the unlawful imprisonment count and did not argue that defendant’s acts in the Tate home were a basis for that offense	3
i. The State clearly identified defendant’s acts of restraint in the vehicle as the specific criminal act underlying the unlawful imprisonment charge.....	4
ii. The State’s election obviated the need for the trial court to instruct the jury to agree on a specific criminal act with respect to the unlawful imprisonment charge.....	8

c.	The jury could have considered defendant's acts a continuous course of conduct and, therefore, no unanimity instruction was required.....	9
d.	Even if the court finds the state's election ineffective or that defendant's acts do not constitute a continuous course of conduct, any error was harmless and the court should uphold the conviction.....	12
2.	Trial counsel was not ineffective in failing to object to characterizations of Robin Tate as a "victim"	16
a.	There was a legitimate strategic or tactical reason for trial counsel not to object to the characterizations of Robin Tate as a "victim"	17
b.	The result of the trial likely would not have been different had trial counsel objected to such characterizations.....	20
E. CONCLUSION.....		21
F. CERTIFICATE OF SERVICE.....		23

TABLE OF AUTHORITIES

Table of Cases

WASHINGTON CASES	Page
<u>Washington Supreme Court</u>	
<i>In re Pers. Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	19
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963)	12
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990)	13
<i>State v. Carson</i> , 184 Wn.2d 207, 357 P.3d 1064 (2015)	4, 8, 10
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	2, 9
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986)	12
<i>State v. Handran</i> , 113 Wn.2d 11, 17, 775 P.2d 453 (1989).....	9
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	16, 17
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988)	1, 2, 4, 8, 12, 13
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	16, 17

<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002).....	18
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	2, 8, 9, 12, 13, 15
<i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	2
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....	16
<i>State v. Townsend</i> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	17
<i>State v. Workman</i> , 66 Wash. 292, 119 P. 751 (1911).....	2
<u>Washington Court of Appeals</u>	
<i>State v. Carter</i> , No. 23246-8-III, 2005 Wash. App. LEXIS 2732 (2005).....	13, 14
<i>State v. Donald</i> , 68 Wn. App. 543, 844 P.2d 447 (1993).....	19
<i>State v. Gitchel</i> , 41 Wn. App. 820, 706 P.2d 1091 (1985), <i>review denied</i> , 105 Wn.2d 1003 (1985).....	2
<i>State v. Fiallo-Lopez</i> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	9
<i>State v. Little</i> , 136 Wn. App. 1039, 2007 Wash. App. LEXIS 509 (2007)	13
<i>State v. Thompson</i> , 169 Wn. App. 436, 290 P.3d 996 (2012)	4, 5, 6, 9
<i>State v. Williams</i> , 136 Wn. App. 486, 150 P.3d 111 (2007)	5, 6, 7

FEDERAL CASES

Chapman v. California,
386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)12

Kimmelman v. Morrison,
477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).....17

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984),
rehearing denied,
467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984).....16, 17

Thompson v. Calderon,
109 F.3d 1358, 1364-65 (9th Cir. 1996).....18

Rules, Statutes and Regulations

Washington State

Const., Article 1, §22 12

Federal

U.S. Const., Amendment VI..... 12

A. ISSUES PRESENTED

1. Did the trial court's failure to instruct the jury that it must unanimously agree defendant committed a particular criminal act in order to convict him of unlawful imprisonment deny his right to a unanimous jury verdict?
2. Was trial counsel ineffective in failing to object to characterizations of Robin Tate as a "victim" despite his successful motion in limine to exclude such characterization?

B. STATEMENT OF THE CASE

Respondent adopts appellant's statement of the case in its entirety.

C. ARGUMENT

1. **THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE DEFENDANT COMMITTED A PARTICULAR CRIMINAL ACT IN ORDER TO CONVICT HIM OF UNLAWFUL IMPRISONMENT DID NOT DENY HIS RIGHT TO A UNANIMOUS JURY VERDICT.**
 - a. **IN MULTIPLE ACTS CASES, A CRIMINAL DEFENDANT IS ENTITLED TO JURY UNANIMITY ON A SPECIFIC CRIMINAL ACT.**

In Washington, a criminal defendant may be convicted only when a jury unanimously concludes that the defendant committed the criminal act charged in the information. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d

105, 108 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). When the State presents evidence of several separate and distinct acts that could each 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 reach unanimous agreement on a specific criminal act. *Kitchen*, at 409; *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984); *State v. Workman*, 66 Wash. 292, 294-95, 119 P. 751 (1911). Therefore, *Petrich* requires an election or unanimity instruction in cases where evidence establishes several separate and distinct criminal acts that could each support conviction of a criminal offense in order to protect a defendant's right to a unanimous jury verdict. *State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10, 18 (1991).

In multiple acts cases, several criminal acts are alleged and any one of them could provide the basis for the crime charged. In these cases, the jury must be unanimous as to which specific criminal act or incident constitutes the crime. *Kitchen*, at 411. To ensure jury unanimity in multiple acts cases, Washington criminal courts require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that it must unanimously agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Petrich*, at 572; *State v. Gitchel*, 41 Wn. App. 820, 822, 706 P.2d 1091, *review denied*, 105 Wn.2d 1003 (1985).

b. THE STATE CHARGED ONLY ONE INSTANCE OF CONDUCT IN THE UNLAWFUL IMPRISONMENT COUNT AND DID NOT ARGUE THAT DEFENDANT'S ACTS IN THE TATE HOME WERE A BASIS FOR THAT OFFENSE.

The State charged Mr. Tate in this case with one count of assault in the second degree, one count of assault in the fourth degree, and one count of unlawful imprisonment. Clerks Papers (CP), No. 17-1-00006-8, COA No. 50410-3-II, at 001-003 (Second Amended Information). The State presented evidence of several acts by defendant that arguably could serve as a basis for conviction on either of the assault accounts. RP 242-252. By contrast, when the State presented evidence of defendant's acts of restraint in the vehicle, it argued that those acts were the only basis for convicting defendant on the unlawful imprisonment charge. RP 250.

Appellant contends that there were multiple separate and distinct acts that could be the basis for the unlawful imprisonment count. However, with respect to that count, the State only alleged that defendant unlawfully imprisoned Robin Tate inside the vehicle. Appellant argues that the multiple acts involved in this count could have been either (1) Mr. Tate's acts of restraining Robin from leaving the vehicle or (2) Mr. Tate's assault of Robin in the Tate home. Br. Of Appellant at 14-16. But the information did not allege this second set of acts with respect to the unlawful imprisonment count and there was no argument that Mr. Tate's acts assaulting Robin Tate

in the Tate home could have been a basis for the offense. Thus, the multiple act theory simply does not apply to this count. And if there are not multiple acts of unlawful imprisonment alleged, then there is no issue with respect to jury unanimity for that count.

**i. THE STATE CLEARLY IDENTIFIED
DEFENDANT’S ACTS OF RESTRAINT IN THE
VEHICLE AS THE SPECIFIC CRIMINAL ACT
UNDERYLING THE UNLAWFUL
IMPRISONMENT CHARGE.**

The issue, with respect to finding the requisite jury unanimity on the unlawful imprisonment charge, is whether the State properly elects the act or acts upon which it will rely for conviction when the State clearly identifies the act upon which the charge is based during closing arguments at trial. The Washington Supreme Court has never held that the State's election of a specific criminal act must be ratified by the court or incorporated into the charging document or jury instructions in order to be effective. *State v. Carson*, 184 Wn.2d 207, 227-28, 357 P.3d 1064, 1075 (2015).

On the contrary, as the phrase “*tell the jury*” in *Kitchen* suggests, *id.* (emphasis added), an election can be made by the prosecuting attorney in a verbal statement to the jury so long as the State “clearly identify[s] the act upon which” the charge in question is based. *Carson*, 184 Wn.2d at 227-28 (2015) (citing *State v. Thompson*, 169 Wn. App. 436, 474-75, 290 P.3d 996

(2012) (“[b]ecause the State clearly identified the act upon which the sexual motivation allegation was based” in its closing argument, “no unanimity instruction was necessary”); *compare*, e.g., *Id.*, with *State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007) (no clear election in closing argument where prosecutor “emphasized” one act over others but did not “expressly elect to rely only on” one act “in seeking the conviction”).

In *State v. Thompson*, the defendant argued that he was entitled to a unanimity instruction with respect to sexual motivation allegations on three separate charges of burglary, unlawful imprisonment, and assault. He argued that the sexual motivation allegation could have been predicated on separate acts because there was evidence that he touched one victim’s arm and later instructed another victim to disrobe, and the State failed to elect the act upon which it relied. However, the State clearly identified the act upon which the sexual motivation allegation was based in its closing argument. The court held that because the State clearly identified the act upon which the sexual motivation allegation was based in its closing argument, no unanimity instruction was necessary. *Id.*, at 475.

As in *Thompson*, the State in this case explicitly told the jury that the evidence of defendant’s acts in the vehicle, in forcibly preventing Robin Tate from exiting the vehicle against her will, were the basis for the unlawful imprisonment charge.

And then Count III – the Unlawful Imprisonment – ladies and gentlemen Dorothy Tate said Robin Tate didn't want to be in the car. Robin said she didn't want to be in the car. [The defendant,] Mr. Tate – I think admitted she didn't want to be in the car. RP 250.

And when she tried to get out of the car – when she realized they weren't going home she was pulled back in the car – against her will using physical force. RP 250.

And when she tried to unlock the door – which actually happened prior – was blocked and the door was held locked so she couldn't get out. And it culminated in the strangulation component. RP 250 – 251.

As in *Thompson*, the State clearly identified the act upon which the unlawful imprisonment charge was based. The allegations regarding the later assault in the Tate home are part of the State's general summary of the entire encounter. Those allegations are clearly not a continuation of the discussion of "Count III – the Unlawful Imprisonment." Therefore, no unanimity instruction was necessary and the court should uphold the conviction.

This case is distinguishable from the State's ineffective election in *State v. Williams*. The State in this case only argued that the defendant committed unlawful imprisonment by restraining Robin Tate by physical force within the vehicle. RP 250. The State never argued that defendant's

acts or the various incidents that occurred in the Tate home were to be considered by the jury in its deliberations with respect to the unlawful imprisonment charge. In fact, the State, during its closing arguments, explicitly told the jury to focus on defendant's acts in the Tate home in deciding whether to convict on either or both assault charges. RP 240.

In *Williams*, the State offered evidence indicating that defendant had committed two separate assaults against two separate individuals (Johnson and Otis) and referred to both assaults in its closing argument. *State v. Williams*, 136 Wn. App. 486, 497 (2007). In that case, the State did not specifically elect to rely on the assault against Johnson. *Ibid*. Therefore, the court held that the trial court's failure to provide a unanimity instruction violated defendant's right to a unanimous jury verdict. *Ibid*.

Here, the State did not argue that defendant committed two separate acts of unlawful imprisonment. Rather, the State elected to rely on defendant's actions in the vehicle for the single count of unlawful imprisonment. RP 250. Therefore, the trial court's failure to provide a unanimity instruction did not violate Mr. Tate's right to a unanimous jury verdict.

While the jury apparently interpreted the assault in the Tate home as evidence that Mr. Tate restrained Robin Tate to some degree in the Tate home, the incidents occurring there more properly speak to either the charge

of assault in the fourth degree or the charge of assault in the second degree. RP 23, 29, 82, 143, 152, 155, 204, 246, 249, 252, 257, and 266; *see also* Supp. CP at 095 (Jury Note). The jury's question does not invalidate the State's clear election.

ii. THE STATE'S ELECTION OBVIATED THE NEED FOR THE TRIAL COURT TO INSTRUCT THE JURY TO AGREE ON A SPECIFIC CRIMINAL ACT WITH RESPECT TO THE UNLAWFUL IMPRISONMENT CHARGE

Petrich's multiple acts instruction applies only when the State fails to "elect the act upon which it will rely for conviction." *Petrich*, 101 Wn.2d at 572; *see also* WPIC 4.25 at 110 note on use ("If there is evidence of multiple distinct occurrences of the crime, but the prosecution elects to rely upon a specific occurrence to support a conviction, then this *Petrich* instruction should not be used."). Because there was scant, if any, evidence of multiple distinct occurrences of the crime of unlawful imprisonment and the State specifically elected to rely upon defendant's acts in the vehicle to support a conviction, the trial court was not required to provide the jury with a *Petrich* instruction on the unlawful imprisonment charge. For an election to be effective, "either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." *Kitchen*, at 409; *Carson*, at 227.

As in *Thompson*, the State in this case elected defendant's acts in the vehicle and told the jury to consider those acts in its deliberations on the unlawful imprisonment charge. Therefore, the trial court's failure to instruct the jury to agree on a specific criminal act did not violate the defendant's right to a unanimous jury verdict and his conviction for unlawful imprisonment should be affirmed.

c. THE JURY COULD HAVE CONSIDERED DEFENDANT'S ACTS A CONTINUOUS COURSE OF CONDUCT AND, THEREFORE, NO UNANIMITY INSTRUCTION WAS REQUIRED.

In contrast to ordinary multiple acts cases, no election or unanimity instruction is required if the evidence establishes a "continuing course of conduct." *Petrich*, at 571. Washington courts review the facts in a commonsense manner to determine whether several allegedly distinct criminal acts constitute a continuing course of conduct. *Ibid*. Evidence that the defendant engaged "in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct." *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Additionally, where criminal conduct occurs within a short time frame and against the same victim, a commonsense approach suggests that this exception may apply. *See, e.g., State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (assault); *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (assault); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724-25,

899 P.2d 1294 (1995) (delivery of cocaine).

Here, defendant's criminal conduct occurred within a two-hour period and against the same victim. RP 86, 97, 102, 159, 160, 180, 181, 189-191, 206-212. Defendant testified that he returned from shoveling snow with his brother to the Tate home sometime between 7 and 7:30 pm on the evening of February 8, 2017. RP 180, 181. Robin Tate testified that she, defendant, and Dorothy Tate arrived at the Carson General Store just before nine o'clock that night. RP 86.

Additionally, there is evidence that the defendant's conduct in the vehicle and at the Tate home were intended to secure the same objective: restraining or physically preventing Robin from leaving against her will. RP 74, 76-78, 88, 89, 92-94, 152-160. The defendant testified that he may have locked the car door in an attempt to prevent Robin from jumping out of the car. RP 196. Additionally, defendant testified that he may have grabbed Robin from the backseat in "trying to keep her from jumping out of the vehicle." RP 197.

As to the scuffle at the Tate home, defendant testified that he "had [Robin] restrained on the ground" in the Tate home shortly after returning from the store. RP 190. Jarod Tate testified that he "saw [defendant] on top of Robin . . . in the hallway – in the kitchen" and that "[defendant] had tackled her to the ground." RP 152. Jarod Tate further testified that he hit

the defendant in an effort to get him off Robin and then [defendant] “finally stopped and left and once we finally got him to leave Robin left.” RP 153.

Because all of these events unfolded over the course of a relatively short period of time (approximately two hours) and all of defendant’s criminal conduct was directed toward the same victim, a commonsense approach suggests that the jury may have considered defendant’s acts in the vehicle and at the Tate home to be a continuing course of conduct. Furthermore, defendant’s actions at both locations evince an intent to secure the same objective: restraining or physically preventing Robin from leaving against her will. Additionally, during its deliberation, the court received a question from the jury regarding the evidence they were to consider in deciding on the unlawful imprisonment charge. Supp. CP at 095 (Jury Note); RP 270 (“(1) Are we considering the events in the automobile? In the house? Or at any time between February 8 and February 9?”). The court responded that the jury should “consider all the admissible evidence presented at trial and . . . look at the instructions for directions on the law.” RP 271. The jury unanimously agreed to convict the defendant of assault in the fourth degree and unlawful imprisonment. Based on the record, the jury may have considered defendant’s acts in the car and at the Tate home a continuing course of conduct. As noted above, no election or unanimity instruction is required if the evidence establishes a “continuing course of

conduct.” *Petrich*, at 571. Therefore, no unanimity instruction was required and the court should affirm defendant’s conviction.

d. EVEN IF THE COURT FINDS THE STATE’S ELECTION INEFFECTIVE OR THAT DEFENDANT’S ACTS DO NOT CONSTITUTE A CONTINUOUS COURSE OF CONDUCT, ANY ERROR WAS HARMLESS AND THE COURT SHOULD UPHOLD THE CONVICTION.

If the court does find that the State presented two separate and distinct acts of unlawful imprisonment and did not properly elect a single act to rely on, then any error was harmless. In multiple acts cases, the State’s failure to elect or the court’s failure to instruct the jury to unanimously agree on a specific criminal act establishes constitutional error that violates a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial. *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); Const. art. 1, § 22 (amend. 10); U.S. Const. amend. 6.

But, the standard of review for constitutional error is whether the error was “harmless beyond a reasonable doubt.” *Kitchen*, at 405 (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986); *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 A.L.R.3d 1065 (1967)). The error is harmless if a rational trier of fact could find that each incident established the crime

beyond a reasonable doubt. *State v. Little*, 136 Wn. App. 1039, 2007 Wash. App. LEXIS 509 (2007) (citing *Kitchen*, at 406, 411; *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990)).

In *State v. Carter*, No. 23246-8-III, 2005 Wash. App. LEXIS 2732 (2005), the State charged that defendant knowingly restrained one victim (Ms. Sand) and/or the other victim (Mr. Brickey) and, therefore, a unanimity instruction was required. The court found that the trial court's failure to give a *Petrich* instruction was harmless because no rational trier of fact could have doubted that defendant's acts toward both victims established the charge of unlawful imprisonment and the court affirmed the conviction.

The *Carter* court held that the State's failure to elect either Ms. Sand or Mr. Brickey as the basis for the unlawful imprisonment charge allowed the jury to convict Mr. Carter in one of three ways: (1) Mr. Carter unlawfully imprisoned Ms. Sand; (2) Mr. Carter unlawfully imprisoned Mr. Brickey; or (3) Mr. Carter unlawfully imprisoned both Ms. Sand and Mr. Brickey. Based on this evidence at trial, the court held that no rational trier of fact could have doubted that Mr. Carter's acts toward Ms. Sand and Mr. Brickey established the charge of unlawful imprisonment beyond a reasonable doubt. Thus, the trial court's failure to give a *Petrich* instruction was harmless error.

In the instant case, similar to *Carter*, the trial court's failure to

instruct the jury that it must unanimously agree on the basis for the unlawful imprisonment charge may have allowed the jury to convict the defendant in one of three ways: (1) defendant unlawfully imprisoned Robin Tate inside Dorothy Tate's vehicle; (2) defendant unlawfully imprisoned Robin Tate inside the Tate home; or (3) defendant unlawfully imprisoned Robin Tate inside Dorothy Tate's vehicle and later inside the Tate home. Assuming the failure of the trial court to instruct the jury on unanimity was instructional error as found in *Carter*, the next issue is whether the error was harmless beyond a reasonable doubt.

At trial, Robin and Dorothy Tate both testified that while Robin was trying to exit the moving vehicle by climbing out of the window, the defendant held the door-locks down. Robin Tate testified that she wanted to get out of the car when it became apparent that Dorothy was not taking her home. When they returned to the Tate home, Robin and the defendant began arguing again and an altercation ensued that left Robin and the defendant on the kitchen floor, Mr. Tate with his arms around Robin's upper body. Robin testified that she did not want to be there and that she did not feel free to leave. In fact, she was not free to leave until Jarod Tate heard the ruckus from the basement, came up to see what was happening in the kitchen, and eventually pulled his father, the defendant, off Robin. It seems reasonable to assume that if Jarod had not pulled the defendant off Robin, the defendant

would have continued imposing his will over Robin by physically preventing her from leaving. Furthermore, the jury question suggests that the jury clearly believed Robin and Jarod's testimony about the incident at the house, which Mr. Tate denied even happened.

Based on this evidence, no rational trier of fact could have doubted that defendant's acts toward Robin Tate in the vehicle and in the Tate home established the charge of unlawful imprisonment beyond a reasonable doubt. In sum, although the State only argued that defendant's acts in the vehicle established the necessary elements of unlawful imprisonment, defendant's acts toward Robin in the Tate home would also satisfy the necessary elements of unlawful imprisonment. The jury plainly believed that the evidence showed that any one of the three scenarios noted above established the elements of unlawful imprisonment. Based on the evidence, the jury was satisfied that one, either, or both alleged instances of conduct established unlawful imprisonment beyond a reasonable doubt. Therefore, no rational trier of fact could have doubted whether these elements were met in both instances and, thus, the trial court's failure to give a *Petrich* instruction on the unlawful imprisonment charge was harmless error. The court should affirm the conviction.

2. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO CHARACTERIZATIONS OF ROBIN TATE AS A “VICTIM”

Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). In order to prevail on its ineffective assistance of counsel claim, appellant must satisfy a two-part test. First, appellant must show that defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland*, 466 U.S. at 687)). Second, appellant must show that defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* Failure to establish either element defeats an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. The United States Supreme Court has defined reasonable probability as “a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

Washington courts approach ineffective assistance of counsel arguments with a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335. Nonetheless, appellant can “rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (citing *Strickland*, 466 U.S. at 688-89). Whether counsel’s performance was reasonable is an issue that should be “evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” *Id.*

a. **THERE WAS A LEGITIMATE STRATEGIC OR TACTICAL REASON FOR TRIAL COUNSEL NOT TO OBJECT TO THE CHARACTERIZATIONS OF ROBIN TATE AS A “VICTIM”**

To prove that a failure to object rendered counsel ineffective, appellant must show that trial counsel’s decision fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. *State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001); *McFarland*, 127 Wn.2d at 337 n.4; *Hendrickson*, 129 Wn.2d at 80. To establish that trial counsel’s decision fell below prevailing professional norms, the appellant must rebut the presumption that counsel's failure to object “can be characterized as *legitimate* trial strategy or tactics.”

State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added); *see also Thompson v. Calderon*, 109 F.3d 1358, 1364-65 (9th Cir. 1996) (“Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances.”) Although deliberate tactical choices may still amount to ineffective assistance of counsel if they fall outside the expansive range of professionally competent assistance, “exceptional deference must be given when evaluating counsel's strategic decisions.” *McNeal*, 145 Wn.2d at 362.

Appellant contends that trial counsel’s failure to object to characterizations of Robin Tate as a “victim” amounts to ineffective assistance of counsel. Br. of Appellant, 18-20. Appellant argues that the failure to object was particularly egregious because trial counsel successfully moved the court to exclude reference to Robin Tate as the “victim.” Br. of Appellant, 19; Supp. CP 062-064 (Defendants Motion In Limine). Appellant further argues that there was no strategic or tactical reason to fail to object to such characterizations. Br. of Appellant, 20.

Appellant has not established that trial counsel’s failure to object to characterizations of Robin Tate as the “victim” was unsupported by

strategic or tactical considerations. Even assuming the testimony of Dep. Helton and the State's reference in closing arguments violated the motion in limine to exclude these characterizations, defense counsel's decision not to object can be characterized as legitimate trial strategy or tactics.

Counsel may not have wanted to risk emphasizing the testimony with an objection. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1, 37 (2004) (citing *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (“Trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence.”)). Had trial counsel objected when Dep. Helton referred to Robin Tate as the “victim,” trial counsel would have drawn the jury's attention to the characterization after already hearing the statement. Trial counsel's failure to object thus minimized the risk that the jury would attribute undue significance to Dep. Helton's characterization.

Furthermore, the defendant admitted that he had punched Robin in the face. RP 189. At the very least, defendant's own admission established that Robin was a “victim” of Mr. Tate's assault. Appellant has not rebutted the presumption that defense counsel had a legitimate tactical reason for not objecting. Considering the circumstances, trial counsel's decision was objectively reasonable and, therefore, appellant has failed to show defense counsel's representation was deficient.

b. THE RESULT OF THE TRIAL LIKELY WOULD NOT HAVE BEEN DIFFERENT HAD TRIAL COUNSEL OBJECTED TO SUCH CHARACTERIZATIONS

Even assuming trial counsel's failure to object rendered the representation deficient, the result of the trial likely would not have been different. The jury clearly believed that Mr. Tate committed an assault on Robin Tate because, among other reasons, Mr. Tate admitted that he punched her in the face. RP 189. The jury further found that Mr. Tate unlawfully imprisoned Robin Tate within the vehicle by holding down the locks and restraining her from leaving the vehicle.

The characterizations appellant complains of did not prejudice Mr. Tate because there was only one person involved in the facts of this case that may reasonably be described as a "victim" of Mr. Tate's criminal conduct: Robin Tate. Based on all the evidence presented at trial, the jury viewed Robin Tate as the "victim" of the assault and the unlawful imprisonment. Furthermore, if the jurors had been so unfairly swayed by Dep. Helton's characterizations or the State's cursory reference in closing arguments that the jury could not rationally judge the credibility of Robin Tate or any other witness, then the jury would likely not have acquitted Mr. Tate of assault in the second degree. In other words, the jury did not believe that Mr. Tate had intentionally strangled or restricted Robin Tate's airway. So, the jury found that Robin Tate was not a "victim" of that alleged crime.

By contrast, all the evidence at trial establishes that Mr. Tate punched Robin Tate at the Tate home and restrained her from leaving the vehicle when she tried to leave. At minimum, the evidence establishes that Robin Tate was the “victim” of these two acts independent of any opinion testimony provided by Deputy Helton or the prosecutor.

In sum, trial counsel’s failure to object to the characterizations does not raise a probability sufficient to undermine confidence in Mr. Tate’s conviction for assault in the fourth degree and unlawful imprisonment. Therefore, the court should deny appellant’s ineffective assistance of counsel claim and affirm the conviction.

D. CONCLUSION

The trial court’s failure to instruct the jury that it must unanimously agree that Mr. Tate committed a specific criminal act did not violate his right to a unanimous jury verdict. The State clearly identified Mr. Tate’s act of restraining Robin Tate within the vehicle as the basis for the unlawful imprisonment charge. Additionally, the jury may have considered Mr. Tate’s acts of restraint in the vehicle and at the Tate home to be a continuing course of conduct. Even if the court finds that a unanimity instruction was required as to the unlawful imprisonment charge, any error was harmless because no rational trier of fact could have doubted that defendant’s acts toward Robin Tate in the vehicle and in the Tate home established the

charge of unlawful imprisonment beyond a reasonable doubt. Trial counsel's failure to object to characterizations of Robin Tate as the "victim" was not ineffective assistance because the decision was a legitimate tactical decision and was objectively reasonable under the circumstances. Furthermore, even if trial had objected, there is no reasonable probability that the outcome of the trial would have been different. Therefore, this court should affirm Mr. Tate's conviction.

DATED this 31st day of August, 2018
RESPECTFULLY submitted,

By: 

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August 31, 2018, City of Stevenson, Washington

SKAMANIA COUNTY PROSECUTOR

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