

NO. 47489-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH WHEARTY,

Appellant.

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

The Honorable James Lawler, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by not using a *Petrich* instruction for the offense of unlawful imprisonment as alleged in Count 2.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by not using a *Petrich* instruction for the unlawful imprisonment charge when the State presented several alternative theories for the unlawful restraint? Assignment of Error 1.

C. STATEMENT OF THE CASE

1. Procedural facts:

Joseph Whearty was charged in Lewis County Superior Court by amended information with two counts of assault in the second degree and one count of unlawful imprisonment, pursuant to RCW 9A.36.021(1)(g) and RCW 9A.40.040. Clerk's Papers (CP) 10-12. The State alleged that the offenses contained in Count 1 and Count 2 were committed against Chelcie Dalmeny, a family or household member, pursuant to RCW 10.99.020, and that the offenses occurred within sight or sound of children under age eighteen. RCW 9.94A.535(3(h)).¹ CP 10-11.

a. CrR 3.5 hearing:

On March 4, 2015, the court heard Mr. Whearty's motion to suppress

¹The State also charged Mr. Whearty with second degree assault against Ms. Dalmeny's daughter S.L.J. in Count 3 of the amended information. CP 10-12.

statements to law enforcement under CrR 3.5. RP (3/4/15) at 22-42. Mr. Whearty moved to suppress statements he made at the time of his arrest and after he was transported to the Lewis County Jail on January 27, 2015 on the basis that he was intoxicated when he spoke to police. RP (3/4/15) at 40-41. After hearing testimony, the Court found that Mr. Whearty's statements to police were voluntarily made and were admissible. RP (3/4/15) at 40. The Court entered findings of fact and conclusions of law on March 5, 2015. CP 18-20.

b. Trial, conviction, and sentencing:

The matter came on for jury trial on March 23, 2015, the Honorable James W. Lawler presiding.

The defense moved for mistrial following opening statements on the basis that the prosecution violated a prior court order to not refer to ER 404(b) prior bad acts. 1Report of Proceedings (RP) at 32.² Defense counsel argued that the State violated the court's *in limine* ruling by stating that Mr. Whearty told Chelcie Dalmeny—the complaining witness—that “since you tell everybody I beat you all the time, that’s what I’m going to do.” 1RP at 32. The court denied the motion for mistrial. 1RP at 33.

²The record of proceedings is designated as follows: RP – January 28, 2015, January 29, 2015, February 12, 2015, February 19, 2015, February 26, 2015, March 4, 2015 (suppression hearing), March 5, 2015, March 19, 2015; 1RP (jury trial); 2RP (jury trial); 3RP (jury trial); 4RP (jury trial), and April 22, 2015 (sentencing).

No objections or exceptions to jury instructions proposed or denied were made by either party. 4RP at 435. The court granted an instruction for the inferior degree of assault in the fourth degree in Counts 1 and 3. (Jury Instruction 15, 25); CP 91-125.

The jury convicted Mr. Whearty of fourth degree assault in Count 1 and unlawful imprisonment in Count 2. He was acquitted of Count 3. 4RP at 520-22. The jury also found that Count 2 was aggravated by the following circumstances: the crime was committed against a family or household member and occurred within sight or sound of the victim's minor children. RCW 9.94A.535(3)(h)(ii); CP 133, 134.

At sentencing, the State calculated an offender score of "8" for Count 2, with a standard range of 43 to 58 months. RP (4/22/15) at 529-30. The State introduced certified copies of Mr. Whearty's prior felony convictions. Exhibits 1-4. The State requested an exceptional sentence of 60 months, two months higher than the top of the standard range sentence. RP (4/22/15) at 533. The court initially imposed a 60 month sentence for unlawful imprisonment and 12 months for fourth degree assault, to be served concurrently. RP (4/22/15) at 542. Upon motion by the defense, however, the court found that the counts encompass the same criminal conduct, reducing Mr. Whearty's offender score to "7," resulting in a standard range

of 33 to 43 months. RP (4/22/15) at 544-45.

The court nevertheless imposed an exceptional sentence of 60 months, resulting in a sentence 17 months above the standard range. RP (4/22/15) at 545; CP 139-51.

Timely notice of appeal was filed on April 22, 2015. CP 152. This appeal follows.

2. Trial testimony:

Joseph Whearty was in a relationship with Chelcie Dalmeny for approximately six months. They lived together in a house located on the Koontz Road, in Chehalis, Washington, with her children, O.M.D.³ and S.L.J.⁴ 1RP at 47. Ms. Dalmeny worked regularly as a bartender, and Mr. Whearty and Ms. Dalmeny both participated as mixed martial arts (MMA)⁵ fighters. 1RP at 44.

They met at a gym while training for MMA in July, 2014 and moved in with each other in September, 2014, to a guest house located near their landlord's house. 1RP at 45.

Both participated in MMA fights at a casino the weekend of January 24, 2015. 1RP at 47. Ms. Dalmeny, who had been in several previous matches, won her match by technical knockout. Mr. Whearty was not as

³DOB: 2/2/06

⁴DOB: 9/13/12

fortunate and lost in the first round when the fight was stopped by the referee.

IRP at 44, 49.

Following their respective matches, they were argumentative and were not getting along. IRP at 52. On January 27, Ms. Dalmeny notified him through Facebook messaging that she wanted to break up. IRP at 54. According to her testimony, they messaged back and forth through the day while she was at work. IRP at 54-55. She stated that he messaged that he was moving his belongings out of the house. IRP at 55. However, when she returned home from work his vehicle was still at the house. IRP at 57. She left the house with O.M.D. and S.L.J. and drove to pay her car insurance and then drove around, and returned to the house at 5:00 or 5:30 p.m. IRP at 59.

When she and the children returned to the house, Mr. Whearty was still at the house but had packed all his belongings. IRP at 59. She noted that he seemed to be intoxicated when she returned. IRP 59.

Ms. Dalmeny stated that she directed her children to go to play in their room and she went to her room and lay down on the bed. IRP at 61. She stated that he went back and forth by the doorway to her room several times, and then came running into the room and put his fist on her throat and punched her in the back of her head. IRP at 62. She stated that her younger daughter—S.L.J.—tried to defend her and jumped on Mr. Whearty, and that

⁵ https://en.wikipedia.org/wiki/Mixed_martial_arts

he pushed S.L.J. off him. 1RP at 63, 2RP at 147.

Ms. Dalmeny stated that Mr. Whearty released her and then pushed her on the bed, folded the mattress over her, and then jumped on her while punching her through the mattress. She stated when she got out of the mattress he tried to push her through a window. 1RP at 64.

Ms. Dalmeny picked up S.L.J. and then called for O.M.D., who was hiding in her bedroom. 1RP at 65-66. She tried to dress O.M.D. and testified that he grabbed the diaper bag and would not let her take it and emptied the contents of the bag on the living room floor. 1RP at 66.

Outside the house, she stated that Mr. Whearty tried to get the car keys from her, which she had in her purse. She stated that as he did, he pinned her against the garage and choked her with his forearm. 1RP at 68. She started screaming to get the attention of the landlord, and at that time he ran back inside the house. 1RP at 68-69. She stated that he ran into the house and she put the children in the car, but was not able to back out of the driveway because Mr. Whearty had laid down under the back tires of her vehicle, preventing her from leaving. 1RP at 70. She accelerated the engine and that caused him to get up and move out of the way. 1RP at 70. As she backed down the driveway, Mr. Whearty jumped on top of the car and beat on the windshield until it cracked. 1RP at 70. When she reached the Koonz

Road, she saw the headlights of an approaching vehicle. 1RP at 71. She stated the Mr. Whearty said that he was sorry and asked her to let him off the car. 1RP at 71. Mr. Whearty got off the car and ran into the house, and Ms. Dalmeny drove to a local store and called her sister. 1RP at 73. She then drove to her father's house and called the police. 1RP at 74.

Police contacted Mr. Whearty at the house and questioned him about the incident. 2RP at 212-13. He was taken into custody and transported to the Lewis County Jail. 2RP at 236.

Mr. Whearty said that he was behind the car and jumped on the car because Ms. Dalmeny was high on marijuana and he did not want her to leave with the children while intoxicated. 2RP at 289. Ms. Dalmeny stated that she smoked marijuana every morning and that she had smoked the substance earlier that morning. 1RP at 67.

Mr. Whearty stated that she attacked him when he was lying on the bed, and that she hit him and caused a cut above his eye. He denied that he wrapped her in the mattress and denied hitting or choking her. 2RP at 279, 3RP at 309.

He stated that he remembered the first part of the night until he became intoxicated after she left and experienced a "brown out" from the alcohol. 3RP at 318. He said that his only contact with her during the

incident was to prevent her from hitting him and to keep the car keys away from her. 2RP at 283. He stated that he tried to take her keys because she was high and that he did not want to her drive with children while intoxicated. 1RP at 282. He denied her accusation that he put his forearm on her throat while they were near the garage, but acknowledged that he put his forearm against her chest in self defense while near the garage because she was trying to swing at him with her left hand. 2RP at 283.

After the altercation, Mr. Whearty texted a picture of his injured face to Sharon Johnson, who knew both Mr. Whearty and Ms. Dalmeny. He also texted to Ms. Johnson that Ms. Dalmeny had hit him. 3RP at 368. After receiving the text, Ms. Johnson texted back, encouraging him to leave the house before Ms. Dalmeny returned. 3RP at 369. Ms. Johnson went to the house to pick him up, stating that she was concerned for his safety and believed that Ms. Dalmeny would “involve the police,” and that Mr. Whearty would be taken to jail because she had “known Chelcie to be somewhat manipulative and was concerned that she would tell lies about what happened.” 3RP at 369. When she arrived at the house she noted that Mr. Whearty had a cut above his right eye. 3RP at 370. She stated that he did not want to leave the house. 3RP at 371. She left a few minutes later and returned to her house. 3RP at 371.

Mr. Whearty stated that after he was handcuffed by a deputy sheriff, he started crying and was shocked that he was under arrest because Ms. Dalmeny had assaulted him and that he was acting in self-defense. 3RP at 315. Mr. Whearty told law enforcement that the cut over his eye and black eye were from the fight with Ms. Dalmeny when she attacked him. 3RP at 302, 305. He stated that Ms. Dalmeny had hit him repeatedly during the incident. 3RP at 305.

D. ARGUMENT

1. THE STATE CHARGED MR. WHEARTY WITH AN OFFENSE INVOLVING ALTERNATIVE ACTS BUT THE COURT DID NOT ISSUE A *PETRICH* INSTRUCTION

The trial court failed to instruct the jury on the need for unanimity pursuant to *State v. Petrich*. When the prosecution presents evidence of several acts that 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 specific criminal act. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). The Washington Supreme Court Committee on Jury Instructions has created a pattern jury instruction for just this purpose. WPIC 4.25. The issue of whether a court must give a *Petrich* instruction is one of constitutional magnitude and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Fiallo-Lopez*, 78 Wn.App. 717, 899

P.2d 1294 (1995).

The State presented testimony that Mr. Whearty unlawfully restrained Ms. Dalmeny. The record shows that during the altercation, Mr. Whearty engaged in several acts that he stated constituted as unlawful imprisonment. These include the allegation that while in the house, he pinned her to the bed and wrapped her in the mattress. 1RP at 62, 63. The State alleged that he grabbed the diaper bag containing her car keys in order to keep her from leaving, and that once they were both outside the house, that he pushed against the side of the garage with his forearm. 1RP at 68. The State also alleged that Mr. Whearty laid down behind the car, and that he then jumped on top of the car as she backed down the driveway, again to prevent her from leaving. 1RP at 70 -72. The State reiterated the testimony during its closing argument:

When he shoved his hand into her neck and pinned her to the bed, wrapped her up in the mattress, threw her around the room, wouldn't let her leave, grabs the diaper bag, through the keys, lays behind the car, jumps on top of the car. All of that is unlawful imprisonment.

4RP at 476.

The State presented multiple alternative theories of the unlawful imprisonment offense: (1) Mr. Whearty unlawfully restrained Ms. Dalmeny both pinning her to bed and (2) wrapping her in the mattress,(3) by trying to take the diaper bag from her, (4) by pushing and holding her against the

garage wall against her will; (5) by lying behind the car to prevent her from learning, and (6) by jumping on the top of the car.

The prosecutor presented both evidence and argument of six acts that could form the basis of one count charged without electing which one he committed.

The to-convict instructions for the counts required the jury to find that Mr. Whearty unlawfully imprisoned Ms. Dalmeny, and "[t]hat on or about January 27, 2015, the defendant restrained the movement of Chelcie Dalmeny in the manner that substantially interfered with her liberty...." CP 111. No unanimity instruction was issued to the jury for purposes of the offense.

a. **The failure to issue *Petrich* instructions deprived Mr. Whearty of a unanimous jury verdict.**

The Washington Constitution requires jury unanimity as to guilt. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); Wash. Const. art. 1, §§ 21, 22. "When the prosecution presents evidence of multiple acts . . . any one of which could form the basis of a count charged, either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act." *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); *Petrich*, 101 Wn.2d at 572. The right to jury unanimity may be violated where a to-convict instruction describes separate crimes or where a to-convict instruction describes separate

means of committing a single crime. *State v. Stephenson*, 89 Wn. App. 217, 222, 948 P.2d 1321 (1997).

These are six potential, separate acts and the jury should have been instructed on the need for unanimity. The charge required the jury to decide on the commission of separate acts to support an essential element, thus the Court denied Mr. Whearty a unanimous jury verdict by failing to issue a *Petrich* instruction the State prosecuted Mr. Whearty for unlawful imprisonment based upon RCW 9A.40.040, which provides that a person is guilty of unlawful imprisonment if he or she "knowingly restrains another person."

Here, the State alleged multiple acts to support its theory that Mr. Whearty restrained her from leaving.

The acts involved three potential victims and occurred both inside and outside the house. The jury accordingly had to be instructed that they must be unanimous as to which act or acts it considered to support the "restraint" element of the charge. *Coleman*, 159 Wn.2d at 513 (unanimity instruction must be given "when separate identifiable instances of criminal conduct are introduced in support of a single charge") (citation omitted). The State did not elect which of these acts it proved.

b. **The failure to ensure jury unanimity prejudiced Mr. Whearty.**

The failure to give a required unanimity instruction is a constitutional error that is harmless only if a rational trier of fact could have no reasonable doubt as to whether each act established the charged crime. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

This Court should conclude that Mr. Whearty was prejudiced by the absence of jury unanimity. Given the multiple acts, this Court should conclude that the failure to issue a unanimity instruction prejudiced Mr. Whearty.

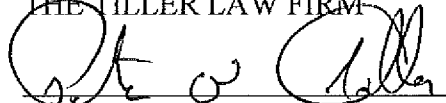
E. CONCLUSION

For the foregoing reasons, Mr. Whearty respectfully requests that the court reverse his convictions.

DATED: October 30, 2015.

Respectfully submitted,

THE TILLER LAW FIRM



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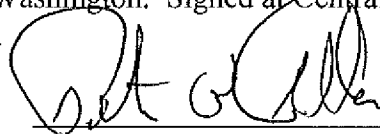
CERTIFICATE OF SERVICE

The undersigned certifies that on October 30, 2015, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copy was hand delivered to Sara Beigh and a copy was mailed to the appellant by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 30, 2015.



PETER B. TILLER

APPENDIX A

RCW 9A.40.040

Unlawful imprisonment.

(1) A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.

(2) Unlawful imprisonment is a class C felony.

TILLER LAW OFFICE

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