NO. 103825-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

POLEVIA VALOAGA,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. ISSUES PRESENTED

1. The Court of Appeals found that Valoaga's multiple assaultive acts constituted a single ongoing course of conduct. Has Valoaga failed to show that any conflict exists between the intermediate appellate divisions as to the appropriate standard of review for jury unanimity issues? Has Valoaga also failed to show that further clarification on this issue is either a significant constitutional question or an issue of substantial public interest?

2. Has Valoaga failed to show that the Court of Appeals' analysis of judicial estoppel in this case conflicts with that of any published decision or otherwise presents an issue of substantial public interest?

B. STATEMENT OF THE CASE

The State relies on the facts previously discussed in the Brief of Respondent and the Court of Appeals' unpublished opinion affirming Valoaga's conviction, *State v. Valoaga*, No.

85289-2-I, 2024 WL 5201436 (December 23, 2024, Unpublished).

C. ARGUMENT

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

Valoaga asks this Court to accept review based on an alleged conflict between divisions as to the appropriate standard for assessing jury unanimity as well as the application of judicial estoppel. RAP 13.4(b)(2). Pet. for Review at 8, 23. He further characterizes the former issue as posing a significant question of constitutional law and claims both issues are of

substantial public interest.[1] RAP 13.4(b)(3)-(4). Pet. for Review at 20, 23.

This Court should deny review because the opinion below applied well-established precedent and Valoaga has not shown any doctrinal disagreement between the divisions of the Court of Appeals.

1. THE PROSECUTOR DESCRIBED A SINGLE COURSE OF CONDUCT IN CLOSING ARGUMENT.

As an initial matter, Valoaga claims the prosecutor expressly "identif[ied] two separate assaults." Pet. for Review at 6, 11-13. While Valoaga's petition accurately quotes the record in support of his argument, he has de-emphasized other statements that do not fit his theory.

[1] While questions concerning jury unanimity are not unusual in the appellate courts, the State doubts whether the general public has much interest in this esoteric legal issue. It is even less likely that the public has "substantial" interest in judicial estoppel.

The Court of Appeals appropriately took a more holistic view, observing, for example, the prosecutor's statement that Valoaga "started his assault at [the] bus stop" and that "for the next 20 minutes…the defendant used this deadly weapon…to assault Daniel Whitesel." *Valoaga*, No. 85289-2 at 7. As noted in the Brief of Respondent at 10, the trial prosecutor's argument contained numerous references to a singular assault. *See* RP 852-53 ("this defendant started his assault at that bus stop"); RP 857 ("after the assault, this defendant ran to the west"); RP 857 ("We know that the assault ended at 8:01…"); RP 859 (noting it was undisputed that "an assault occurred"); RP 859 ("…what is at issue is whether…the defendant committed this assault"); RP 870 ("We know that the assault ended around 8:01:03. That's a period of almost 20 minutes…").

Taken in context, the State's position "was that the assault was a continuous course of conduct beginning with the assault at the bus stop." *Valoaga*, No. 85289-2 at 7. The scattered references to an "initial" and "second assault" were

simply used to chronologically orient the jury. *See*, *e.g.*, RP 853 ("[Valoaga] pursued [Whitesel] all of the way up and until in front of [the auto repair shop] where he initiated his second assault").

2. THERE IS NO CONFLICT BETWEEN DIVISIONS ON THE STANDARD FOR ASSESSING JURY UNANIMITY ISSUES.

"To protect a criminal defendant's right to be convicted only if found guilty beyond a reasonable doubt, the jury must be unanimous as to the act constituting the crime charged." *State v. Lee*, 12 Wn. App. 2d 378, 392, 460 P.3d 701 (2020). When there is evidence of multiple acts that could support a conviction, courts generally enforce this rule by requiring that either a unanimity instruction[2] be given or that the prosecutor verbally elect in closing argument to rely upon a specific act. *Id.*

[2] *See* WPIC 4.25; *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

However, if a defendant's multiple acts can be characterized as a single "continuing course of conduct," then neither an election nor an instruction is required. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995); *Lee*, 12 Wn. App. 2d at 393. Because assault is a course-of-conduct crime, multiple assaults committed within a short period of time may be considered one continuous act. *E.g.*, *State v. Monoghan*, 166 Wn. App. 521, 537, 270 P.3d 616 (2012); *see also State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 329 P.3d 78 (2014) (concluding that assault is a course of conduct crime).

Valoaga claims there is a disagreement amongst the Court of Appeals as to the appropriate standard for assessing jury unanimity. He cites *State v. Hanson*, 59 Wn. App. 651, 800 P.2d 1124 (1990), as an example of the proper analytical framework for jury unanimity, and claims a split of authority exists because the panel in this case "ignored the framework" from *Hanson*. Pet. for Review at 19.

Hanson held that three questions must be asked to determine whether a *Petrich* instruction was required: (1) "what must be proven under the applicable statute?", (2) "what does the evidence disclose?", and (3) "does the evidence disclose more than one violation of the statute?" 59 Wn. App. at 656-57.

As to the first question, it is undisputed that assault can be proven as a "continuing course of conduct." *Valoaga*, No. 85289-2 at 19; *see Hanson*, 59 Wn. App. at 657.[3] As to the second question, the Court of Appeals appropriately considered the facts adduced at trial, including: (1) the length of time separating the two assaultive acts, (2) the number of victims, (3) the physical distance traversed, and (4) whether the defendant had the same criminal objective throughout the incident. *Valoaga*, No. 85289-2 at 8-10 (comparing

[3] "First, what must be proven under the applicable statute? With most criminal statutes, this will be a single event, such as a burglary, robbery or assault. With some, though, it will be a continuing course of conduct, such as operating a prostitution enterprise." *Hanson*, 59 Wn. App. at 656.

State v. Aguilar, 27 Wn. App. 2d 905, 927, 534 P.3d 360 (2023) with *State v. Handran*, 113 Wn.2d 11, 12-17, 775 P.2d 453 (1989)). Based on this factual inquiry, the court concluded, consistent with *Hanson*'s third question, that Valoaga's acts "constituted a continuing course of conduct, not multiple distinct acts." *Id.* at 11.

Although *Valoaga* did not frame this issue in exactly the same way as *Hanson*, the two cases are fundamentally consistent and reconcilable. Under either case, an election or *Petrich* instruction was not required if the evidence showed only a single "pattern or practice of assaultive conduct." *State v. Russell*, 69 Wn. App. 237, 249, 848 P.2d 743 (1993) (citing *Hanson*, 59 Wn. App. at 657); *Valoaga*, No. 85289-2 at 6.

Next, Valoaga cites *Aguilar*, 27 Wn. App. 2d at 927, for the proposition that two legally distinct assaults occurred in this case because "likely due to mental illness…there was not a 'continuing impulse to harm.'" Pet. for Review at 17. Whether "multiple assaultive acts constitute one course of conduct" is

"highly dependent on the facts." *Villanueva-Gonzalez*, 180 Wn.2d at 985. *Aguilar* involved very different facts from this case, where the defendant engaged in "numerous activities" between assaultive acts, some of which, such as "searching for and doing drugs," were "prolonged endeavors." *Id.* at 927. That a different court considering different facts reached a different result does not suggest a split of authority or an incorrect result in this case.

Valoaga's argument is best characterized as a disagreement with how the Court of Appeals viewed the facts of his case, and he has not shown a true conflict of authority regarding the unanimity analysis. Because there is no need for additional clarification on this issue, Valoaga's petition does not present a significant constitutional question or an issue of substantial public interest. Review is not warranted.

3. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD FOR JUDICIAL ESTOPPEL.

The Court of Appeals laid out the following standard for assessing judicial estoppel: "(1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether accepting the new position would create the perception that a court was misled, and (3) whether a party would gain an unfair advantage from the change." *Valoaga*, No. 85289-2 at 6-7. Valoaga does not dispute that this was the proper analysis. Pet. for Review at 21.

Valoaga's briefing to the Court of Appeals and Petition for Review both rely heavily on *State v. Kautz*, No. 54386-9-II, 2022 WL 291005 (2022 Unpublished). Br. of Appellant at 16; Pet. for Review at 21-22. He complains that the Court of Appeals rejected his judicial estoppel argument "[w]ithout discussing *Kautz*." Pet. for Review at 22. But *Kautz* was unpublished and thus has "no precedential value." GR 14.1(a). Appellate courts are discouraged from citing unpublished cases

"unless necessary for a reasoned decision." GR 14.1(c). Furthermore, RAP 13.4(b)(2) authorizes review by the supreme court only if a "decision of the Court of Appeals is in conflict with a **published** decision of the Court of Appeals." (emphasis added).

As the Court of Appeals correctly found, Valoaga plainly cannot satisfy the established test for judicial estoppel. First, as discussed, *supra*, the State did not take "clearly inconsistent" positions at trial. Second, he cannot show the court was misled since jury unanimity was not litigated at trial and the court made no relevant rulings. Third, he does not provide any non-conclusory allegation of prejudice. Valoaga asserted an identity defense at trial. RP 323; Pet. for Review at 6. It is unclear how arguing that two assaults occurred could have unfairly compromised this defense. Whether it was two assaults or one, Valoaga's defense was the same – that he had nothing to do with Whitesel's injuries and had simply been misidentified. *See* RP 872-95.

Valoaga has not shown a conflict of authority on this issue, nor has he shown that the application of judicial estoppel is a matter of substantial public interest.

D. CONCLUSION

For all the foregoing reasons, this Court should deny Valoaga's petition for review.

I certify this document contains 1,787 words, excluding those portions exempt under RAP 18.17.

DATED this 6th day of February, 2025.

Respectfully submitted,

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