NO. _____
(Court of Appeals No. 86006-2-I)

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADAM PARKER HINZE,

Appellant.

PETITION FOR REVIEW

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I. INTRODUCTION

Both the Washington state and federal constitutions provide a criminal defendant with the right against self-incrimination. *See, e.g.*, *State v. Easter*, 130 Wn.2d 228, 235 (1996). *Miranda v. Arizona*, 384 U.S. 436 (1966) held, pursuant to the self-incrimination clause of the Fifth Amendment, that "if a person in custody is to be subjected to interrogation," they must first be informed that they have the right to "remain silent." *Id.* at 467-68.

Petitioner Adam Hinze was arrested and then charged with a domestic violence offense in the Island County Superior Court based upon an incident that occurred on June 25, 2022. On the evening of that incident, Hinze was detained and handcuffed by two law enforcement officers and then subjected to custodial interrogation without first receiving his *Miranda* warnings. Hinze objected to the admission of his unmirandized statements at trial. Nevertheless, after holding a cursory and one-sided hearing – a hearing that was undermined by the prosecution's failure to present

testimony from any witnesses and the trial judge's failure to comply with CrR 3.5(b) – the judge denied Hinze's objections. Instead, the prosecutor was permitted to present evidence of Hinze's detention and statements he made during the police interrogation. The prosecutor focused on this evidence at trial, and went so far as to claim that Hinze had lied to the police officers by withholding information during the interrogation.

The Court of Appeals acknowledged the paucity of evidence in the record and the trial judge's procedural neglect when handling the CrR 3.5 hearing, but ultimately concluded that RAP 2.5 did not permit Hinze to raise those foundational concerns on appeal. Then, after asserting that Hinze had the "benefit of a pretrial CrR 3.5 hearing," the Court concluded that police officer's intrusive tactics – and the detention of Hinze for interrogation – should be evaluated under the exception to the Fourth Amendment announced in *Terry v. Ohio*, 392 U.S. 1 (1968). Relying upon this flawed premise, the Court concluded that Hinze's detention was

reasonable even though the prosecutor had presented no evidence that Hinze posed a danger to the officers or a risk of flight.

The Court of Appeals' decision conflicts previous court decisions in several important respects. First, notwithstanding the clear mandate of RAP 2.5(a)(3), the Court refused to consider any of Hinze's claims regarding procedural defects during the CrR 3.5 hearing. Second, brushing aside concerns due to the lack of evidentiary support in the record, the Court concluded that Hinze's detention was reasonable and seemingly endorsed a domestic violence exception to the Fourth and Fifth Amendment. Given the number of domestic violence cases in Washington, this Court should accept review and clarify that a *de facto* arrest may occur when police officers place a suspect in handcuffs and engage in conduct that is more intrusive than necessary under the circumstances presented during the investigation. The Court should also confirm that a suspect is in custody for purposes of the Fifth Amendment when their freedom of movement is

restricted throughout the investigation of an allegation of domestic violence.

II. IDENTITY OF PETITIONER

Adam Hinze, Appellant below and Petitioner herein, asks this Court to grant the review.

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals affirmed Hinze's convictions and sentence in an unpublished decision. *See State v. Hinze*, No. 86006-3-I (May 5, 2025). A copy of the decision is attached as *Appendix A.*

IV. ISSUE PRESENTED FOR REVIEW

1. Whether this Court should accept review to determine whether RAP 2.5(a)(3) authorized an appellate court to consider issues relating to a defendant's unmirandized statements which were ruled admissible after the trial court conducted a cursory, one-sided hearing under CrR 3.5?

2. Whether this Court should accept review to determine whether the police must provide *Miranda* warnings to

a suspect prior to interrogation when that suspect has been handcuffed and detained such that his freedom of movement is restricted throughout the investigation of an allegation of domestic violence?

3. Whether this Court should accept review to determine whether a *de facto* arrest occurs when the police engage in conduct that is more intrusive than necessary under the circumstances presented during the investigation?

4. Whether this Court should accept review to determine whether there is a domestic violence exception to the Fourth Amendment or Fifth Amendment?

V. STATEMENT OF THE CASE

A detailed recitation of the facts is set out in the Opening. Brief. *See BOA at 7-40.* A more concise summary is as follows.

On June 25, 2022, Adam Hinze and his former wife, identified herein as "NS," engaged in a physical altercation at their home in Stanwood. Shortly thereafter, Hinze was handcuffed and interrogated by two police officers. This detention – and the police

interrogation – was captured on the officers' body-warn recording devices.

The Island County Prosecuting Attorney initially filed an information charging Adam Hinze with one count of Assault in the Second Degree. CP_1-2. The charges were amended during the ensuing months.[1]

Before trial, the prosecutor sought permission to present Hinze's statements to police officers following the incident. CP_45-51; CP_56-62.[2] While the prosecutor acknowledged that

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[1] First, the prosecutor filed an amended information charging Hinze with one count of Rape in the First Degree based upon the same incident that formed the basis of the initial charge. CP_6-7; CP_17-18. The prosecutor later filed a second amended information charging Hinze with one count of Rape in the First Degree (Count 1) and one count of Assault in the Second Degree with sexual motivation (Count 2). CP_52-54. Both charges included an allegation of domestic violence under RCW 10.99.020.

[2] Before trial, the prosecutor advised the judge he intended to present all of Hinze's "statements made from the moment of contact until he elected to not answer any further questions." RP_1467.

Hinze was interrogated by these officers, he claimed *Miranda* warnings were unnecessary during the investigation of the domestic violence allegation even though Hinze was detained and handcuffed at the time of the interrogation. CP_50; CP_61.

Hinze filed an extensive objection (CP_63-73), and argued his unmirandized statements were inadmissible because his freedom of movement was significantly restricted at the time of the interrogation. CP_66. As Hinze's counsel explained:

> The detention of Mr. Hinze in this case was not a *Terry* stop. None of the sheriff's deputies' observations gave them reasonable grounds for believing that Mr. Hinze had committed, was committing, or was about to commit a crime. The only basis they had for this belief was statements made by alleged victim [NS], not their observations.

CP_68.

The trial judge held a CrR 3.5 hearing on September 15, 2023, but there were several procedural irregularities during that proceeding. First, notwithstanding the clear mandate of CrR 3.5(b), the judge failed to advise Hinze of his right to testify. Second, rather than taking testimony from witnesses, the judge

relied exclusively upon excerpts of body-worn recordings of Hinze's interactions with the police officers at the time of the arrest. RP_1446-47.[3] Thus, the judge received no testimony from Hinze or the officers who interrogated Hinze.

During the abbreviated hearing, Hinze's counsel challenged the prosecutor's claims and emphasized he was never given a chance to cross-examine the investigating officers. RP_1469. Hinze's counsel also noted the prosecutor's factual assertions were not supported by what was seen on the recordings. *See id*. Rather, counsel contended that everything on the recording "looks to . . . a custody situation." *Id.*[4]

Viewing the totality of the evidence, a reasonable person in Hinze's circumstances would believe his movements were restricted to a degree associated with custodial arrest. Uniformed

[3] These excerpts were transcribed as part of the pretrial hearing. RP_1449-63.

[4] In conclusion, Hinze's attorney concluded: "And given what we saw in the video, that we would still ask for that to be excluded." RP_1471.

and armed law enforcement officers arrived at Hinze's home on June 25, 2022, at approximately 2:00 AM. The officers chose to place only one person in handcuffs, Hinze, soon after they arrived. Hinze, who was not fully clothed, was then forced to stand in the yard with one officer holding his arm as another officer shined a flashlight into his face. As explained by defense counsel: "A reasonable person in his position would not feel as though they're free to just terminate that interrogation of being asked questions." RP_1468.

Nevertheless, based exclusively upon the recordings, the judge decided that "the encounter did not amount to a formal arrest." RP_1477-78. The judge also concluded it was "reasonable to detain the Defendant in handcuffs at that moment." RP_1478. The judge subsequently signed a written order documenting this ruling. CP_224-26.

After approximately three days of deliberations, the jury returned verdicts. RP_1338. Hinze was found not guilty of Rape in the First degree; but guilty of the lesser charge of Rape in the

Second Degree. Hinze was also found guilty of Assault in the Second Degree. RP_1339.

VI. DISCUSSION

A. Standard for Acceptance of Review

RAP 13.4(b) sets forth the standard to support a petition for review: "(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 another 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).

All four factors are present in this case.

B. The Court of Appeals' Decision Conflicts with Other Court Decisions.

1. Washington's Courts Have Rendered Conflicting Decisions Regarding the Application of RAP 2.5(a) When a Defendant Seeks Review of Claims Under the Fifth Amendment.

The Fifth Amendment to the United States Constitution grants individuals the right to be free from self-incrimination. *See, e.g, State v. Rhoden*, 189 Wn.App. 193, 199 (2015). To protect this right while in police custody, "*Miranda* warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." *State v. Heritage*, 152 Wn.2d 210, 214 (2004). Thus, before questioning an individual in custody, police must advise the individual of their *Miranda* rights. *See State v. Hickman*, 157 Wn.App. 767, 772 (2010). If, after a suspect is properly advised of their rights, they knowingly, voluntarily, and intelligently waive those rights, a confession is admissible. *See Hickman*, 157 Wn.App. at 772.

CrR 3.5 provides a uniform procedure regarding the admissibility of a defendant's statements to law enforcement officers. The purpose of the rule is to allow the trial court an opportunity to rule on the admissibility of a defendant's statement in the absence of a jury. This procedure was initially established to protect a defendant's constitutional rights under the Fifth and Sixth Amendment. *See generally Jackson v. Denno,* 378 U.S. 368 (1964) (holding that Constitution requires a *per se* rule compelling such a procedure in every case). It also avoids due process problems that might arise if the jury were to hear evidence of an involuntary statement. *See, e.g., State v. Fanger*, 34 Wn.App. 635, 637 (1983).

CrR 3.5 is mandatory unless the defendant chooses to waive the right to such a hearing. *See State v. Taplin*, 66 Wn.2d 687 (1965); *State v. Ralph*, 41 Wn.App. 770, 776 (1985). Here, there was no waiver by the defense. While the trial judge held a CrR 3.5 hearing before trial, that hearing was impaired in several

important respects. Yet the Court of Appeals refused to consider any of these deficiencies when deciding Hinze's appeal.

In *State v. Campos-Cerna*, 154 Wn.App. 702 (2010), the reviewing court held that a *Miranda* waiver advisement issue is preserved so long as an objection is raised at a CrR 3.5 hearing. *See id. at 710* (*citing State v. Spearman*, 59 Wn.App. 323, 325 (1990)). Here, it is undisputed that Hinze challenged the admission of his unmirandized statements before and during the CrR 3.5 hearing. It is also undisputed that Hinze's counsel emphasized the prosecutor's failure to present witness testimony during that hearing. Given these objections, the Court of Appeals should have concluded that Hinze's claims – including objections regarding the prosecutor's failure to present witnesses testify – were properly preserved for appeal.

Additionally, a party may raise a "manifest error affecting a constitutional right" for the first time on appeal. *See* RAP 2.5(a)(3). To date, Washington's courts have offered conflicting

decisions regarding the application of RAP 2.5(a)(3) in relation to CrR 3.5 hearings.

In *State v. Curtis*, 110 Wn.App. 6 (2002), for example, the court held that a challenge to the admissibility of testimony that the defendant invoked his right to remain silent under *Miranda* can be raised for the first time on appeal. And a subsequent court held that a challenge to the admissibility of a defendant's post-arrest statements could be raised for the first time on appeal. *See State v. Courtney*, 2018 Wash.App. LEXIS 909 (2018) (unpublished). But another court concluded that RAP 2.5(a)(3) would not authorize review of a *Miranda* violation because the claimed error did not, in the Court's view, have a "practical and identifiable" effect at trial. *See State v. Fisher*, 2019 Wash.App. LEXIS 723 (2019) (unpublished).[5]

[5] When applying the "practical and identifiable effect" test, some courts seem to conflate the mandate of RAP 2.5(a)(3) with the harmless error standard. But, as evidenced by this case, a criminal defendant's statements are "like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). *Accord Martinez, v. Cate*, 903 F.3d 982, 999 (9th Cir. 2018) ("[Defendant's] improperly-

This Court has seldom been called upon to examine these important issues. In one unusual case, *State v. Williams*, 137 Wn.2d 746 (1999), the Court concluded that a trial court's failure to advise a defendant of his right under CrR 3.5(b) to testify, in itself, cannot be raised for the first time on appeal. Later, in *State v. S.A.W.*, 147 Wn.App. 832 (2008), the court concluded the holding in *Williams* was of limited application and emphasized that trial courts were not free to ignore the substance of the rights protected by a CrR 3.5 hearing. *See id*. at 842.[6] Thus, relying upon RAP 2.5(a)(3), the *S.A.W.* court held that the trial court had erred by "conducting only a cursory, one-sided analysis of the

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admitted statements were clear and damning; they were the backbone of the State's argument against self-defense."). Here, there should be no dispute the evidence presented to the jury – including evidence depicting Hinze in handcuffs as he is being interrogated by police officers – had a practical and identifiable effect at trial.

[6] *Williams* is something of an outlier, for as this Court noted: "Williams did not challenge the incriminating statements but disputed a minor fact going to the 'credibility and weight, but not legal admissibility.'" *Id.* at 839.

statement's admissibility" of the statements. *See id*. *Accord State v. Alexander*, 55 Wn.App. 102 (1989) (reversing conviction because trial court failed to conduct a CrR 3.5 hearing).

Here, as in *S.A.W.*, the trial judge conducted a "cursory, one-sided analysis" of the police interrogation of Hinze. To emphasize this point, Hinze's counsel challenged the prosecutor's presentation by emphasizing that the trial judge did not hear from any of the key witnesses. RP_1469.

This Court should accept review and clarify the scope of its prior decision in *Williams*. Ultimately, the Court should confirm that RAP 2.5(a)(3) authorizes appellate review even where a defendant has the "benefit" of a hearing under CrR 3.5.

2. Hinze's Detention Was Tantamount to a *De Facto* Arrest. This Court Should Accept Review to Confirm there is No Domestic Violence Exception to the Fourth Amendment or Fifth Amendment.

The United States Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 44. *Miranda* protects a suspect from making any incriminating statements to police while in custody." *State v. Heritage*, 152 Wn.2d 210, 214 (2004). The prosecution has a "heavy burden" of proving a defendant knowingly, intelligently, and voluntarily waived his constitutional right to remain silent. *See Miranda*, 384 U.S. at 475.

Here, the prosecutor conceded Hinze was interrogated by police officers following the incident. RP_1463. *See also* CP_225 (Finding 7). Thus, the sole issue for the judge at the CrR

3.5 hearing – and for the Court of Appeals – was whether Hinze was in custody during the interrogation.

Generally, a formal arrest takes place when a law enforcement officer manifests an intent to take a person into custody and detains that person. *See State v. Ortega*, 177 Wn.2d 116, 128 (2013); *State v. Patton*, 167 Wn.2d 379, 387 (2009). Likewise, a suspect is "in custody" if a reasonable person in the suspect's circumstances would believe his movements were restricted to a degree associated with formal or custodial arrest. *See Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); *Florida v. Bostick*, 501 U.S. 429, 437 (1991). *See also State v. Reichenbach*, 153 Wn.2d 126, 135 (2004); *State v. Lorenz*, 152 Wn.2d 22, 36-37 (2004); *State v. Gering*, 146 Wn.App. 564, 567 (2008). The existence of an arrest depends in each case on an objective evaluation of all the surrounding circumstances. *See State v. Patton*, 167 Wn.2d 379, 387 (2009).

Without taking testimony, the trial judge concluded Hinze had not been "formally arrested" when he was detained and

handcuffed by the police. CP_225. But an individual need not be formally arrested to be entitled to receive his *Miranda* warnings. For example, an individual who is handcuffed and placed in the back seat of a squad car is in the custody of the police, and therefore entitled to receive his *Miranda* warnings. *See United States v. Henley*, 984 F.2d 1040, 1042 (9th Cir. 1993) (while defendant was told he was not under arrest, he testified that he did not feel free to leave).

Thus, in most instances, handcuffing is seen as strong evidence that a suspect is in custody. *See, e.g., State v. Williams*, 102 Wn.2d 733, 740 (1984); *State v. Salinas*, 169 Wn.App. at 218-19 (2012). In *State v. Gering*, 146 Wn.App. 564 (2008), for example, the law enforcement officer asked the defendant to step outside of a business. When the defendant complied, the officer "placed him in custody by handcuffing him." *Id.* at 566. From this, the reviewing court determined that a reasonable person in the suspect's circumstances would believe his movements were restricted to a degree associated with formal arrest. *See also*

State v. Rowland, 172 Ariz. 182, 836 P.2d 395, 397 (Ct. App. 1992) (handcuffing a suspect signifies an arrest); *Broom v. United States*, 118 A.3d 207, 213 (D.C. 2015) (although handcuffing is not by itself dispositive of custody, "it is recognized as a hallmark of a formal arrest").

Here, Hinze was handcuffed by the police officers and physically restrained (with an officer holding onto his arm) during the entirety of the interrogation. The prosecutor attempted to justify this procedure by suggesting this was "necessary to maintain the safety of the scene." RP_1464. Yet the prosecutor presented no evidence – such as testimony from the responding police officers – to support such a conclusion.[7]

Moreover, the admitted evidence does not support a conclusion that Hinze posed any safety risk in this case. The body-cam recordings depicted the scene as two police officers

[7] And, as noted in the Opening Brief, the evidence presented at trial provided further support for Hinze's legal claims.

arrived at Hinze's home soon after NS placed a call to 9-1-1. This interaction occurred in the early morning hours, and at a time when most people would hope to be inside their home and asleep. The officers found Hinze waiting for them outside of his home; he was calm and cooperative throughout the interaction. The police officers had no reason to believe Hinze was in possession of any weapons – and NS had advised the 9-1-1 operator that Hinze did not have any weapons. The prosecutor's *post hoc* justifications – and the appellate court's wholesale acceptance of these justifications – for the use of handcuffs is belied by the fact that the police never conducted a pat down or other search of Hinze's person before commencing the interrogation.[8]

[8] Moreover, although the police were notified that one participant in the altercation – NS – was armed with a gun, she was not handcuffed or detained by the officers. This disparity further undermines any claim that Hinze needed to be detained while the law enforcement officers stabilized the scene. It was Hinze, and only Hinze, who was handcuffed and held in place such that his freedom of movement was restricted.

The judge relied heavily upon Division III's decision in *State v. Cunningham,* 116 Wn.App. 219 (2003) to support his conclusion to the effect that Hinze was not in custody during the interrogation. Likewise, the Court of Appeals classified Hinze's detention as a "*Terry* stop supported by reasonable articulable suspicion." *Appendix A at 13.* When reaching this conclusion, the Court failed to discounted the salient details in *Cunningham* – such as the fact that the suspect had initially fled the scene and subsequently failed to cooperate by identifying himself to the police officers. *See* 116 Wn.App. at 129. Notably, the *Cunningham* court relied upon this Court's decision in *State v. Williams*, 102 Wn.2d 733, 740-41 (1984), which held that handcuffing or secluding suspect may be appropriate in some circumstances but must be justified by reasonable belief suspect

is dangerous or may flee the scene. *See Cunnigham*, 116 Wn.App. at 229.[9]

The "ultimate touchstone" of the Fourth Amendment is "reasonableness." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "Under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs will violate the Fourth Amendment." *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996) (emphasizing that certain police actions constitute an arrest in circumstances where the suspect is cooperative). Simply put, a reasonable person in Hinze's position would believe he was "subjected to more than a temporary detention." *United States v. Guerrero*, 47 F.4th 984, 985 (9th Cir.), *rehearing denied*, 50 F.4th 1291 (2022).

[9] Moroever, in *Cunnigham*, the investigating officer testified and explained the "reasons" for handcuffing the suspect. *See id*. No comparable evidence was presented in this case.

The Court of Appeals' conclusion would seemingly authorize handcuffing in every investigation involving a potential claim of domestic violence. Accepting this logic, a suspect could be handcuffed and interrogated even where there is no individualized showing the suspect poses any risk to the officers. But there is no exception to the Fourth Amendment in cases involving claims of domestic violence. The "potential" for volatility is no substitute for the reasonableness requirements under the constitution. *See, e.g., Chinaryan v. City of Los Angeles*, 113 F.4th 888 (9th Cir. 2024).

> While circumstances may sometimes call for such intrusive tactics during a *Terry* stop, the police may not employ them "*every time* they have an 'articulable basis' for thinking that someone may be a suspect in a crime." Rather, there must be "special circumstances" that make such tactics reasonable.

Id. at 897 (*quoting Washington v. Lambert*, 98 F.3d 1181, 1187-89 (9th Cir. 1996)).

The line between an investigatory detention and an arrest "can be hazy." *Chestnut v. Wallace*, 947 F.3d 1085, 1088 (8th

Cir. 2020). Nonetheless, it is well established that an investigatory detention is transformed into a *de facto* arrest if the officers' conduct is more intrusive than necessary for an investigative stop. As explained by one recent Washington court:

> While "[t]here is no bright line standard for determining the degree of invasive force which may convert an investigative stop into an arrest," we analyze the degree of invasive force used against the officers' reasonable fears for their own safety. *State v. Belieu*, 112 Wn.2d 587, 599 (1989). Reasonable fear must be "based on 'particular facts' from which reasonable inferences of danger may be drawn." *Id.* (*quoting Sibron v. New York*, 392 U.S. 40, 64 (1968)). The officers must employ the least intrusive investigative method reasonably available to them. *Id.* "The force used should bear some reasonable by the officers." *Id.*

State v. Dummer, 2024 Wash. App. LEXIS 1689, *8-9 (2024) (unpublished).

Putting these arguments to the side, it is important to remember that Hinze is claiming a violation of the Fifth Amendment. Even in the context of a *Terry*-type stop (and where the circumstances are reasonable under the Fourth

Amendment), this Court has found a custodial environment requiring *Miranda* warnings. *See, e.g., State v. Escalante*, 195 Wn.2d 526, 536-38 (2020) (citing cases). This was such a case.

Following *Miranda,* courts have developed an objective test to define "custody" – focusing on how a reasonable person in the suspect's position would have understood the circumstances. *See, e.g., Howes v. Fields*, 565 U.S. 499 (2012); *State v. Short*, 113 Wn.2d 35 (1998). Here, Hinze was handcuffed by two police officers and physically restrained (with an officer holding onto his arm) during the entirety of the interrogation. A reasonable person in Hinze's position would not have believed he was free to leave or free to refuse to answer the officers' questions. The Court of Appeals failed to pay heed to these principles during its review of the trial judge's ruling.

In *State v. Gunderson*, 181 Wn.2d 916, 925 n.4 (2014), this Court explained there is no "domestic violence exception" to ER 404(b) or ER 403. The Court should take review in this case to confirm there is no such domestic violence exception to the

Fourth Amendment or Fifth Amendment (or any other portion of the constitution).

3. The Court of Appeals Decision Discusses Issues of Great Public Interest.

According to the Washington State Coalition Against Domestic Violence, there is a high prevalence of intimate partner violence in the State of Washington. *See https://wscadv.org/wp-content/uploads/2025/05/19th-Annual-Domestic-Violence-Counts-Report-Summary-B-Washington.pdf*. The Department of Health has released similar findings. *See also https://doh.wa.gov/sites/default/files/legacy/Documents/1000/SHA-DomesticViolenceandSexualViolence.pdf*.

Consequently, domestic violence cases amount to a significant percentage of the prosecutions in our state. *See https://waprosecutors.org/wp-content/uploads/2019/04/FINAL-DV-MANUAL.pdf*.[10] By some measures, these prosecutions

[10] Helpful research findings have been published by the Washington Institute for Public Policy. *See generally*

amount to more than 20 percent of our State's criminal cases. *See Veele,* Domestic Violence in Washington State: 1999-2010 (available for download at https://sac.ofm.wa.gov/sites/default/files/domestic_violence_in_wa_1999-2010.pdf).

The investigation, prosecution and adjudication of domestic violence allegations is a matter of substantial public concern. This case raises several significant legal questions relating to these matters, and a decision from this Court would provide much needed guidance to courts, law enforcement officers, and prosecutors throughout the State.

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https://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf#:~:text=As%20shown%20in%20Exhibit%202%2C%20approximately%2020%,felony%20cases%20include%20a%20domestic%20violence%20offense.&text=For%20example%2C%20for%20offenders%20with%20a%20current,compared%20to%204%%20of%20non-domestic%20violence%20offenders. *See also https://www.ojp.gov/pdffiles1/nij/225722.pdf*.

VII. CONCLUSION

For all of these reasons, and in the interests of justice, this Court should accept review and reverse the decision of the Court of Appeals.

Appellant certifies this document contains 4,448 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted this 3rd day of June, 2025.

/s/ Todd Maybrown
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PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 3rd day of June, 2025, I filed the above Petition for Review via the Appellate Court E-File Portal through which Respondent's counsel will be served.

I have also made arrangements for service of Petition for Review on Appellant.

s/ Sarah Conger

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APPENDIX A

FILED
5/5/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ADAM PARKER HINZE, Appellant.	No. 86006-2-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Adam Hinze appeals his conviction for rape in the second degree and assault in the second degree, arguing the trial court erred by denying his motion to suppress statements made before he was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), admitting evidence regarding Hinze's marital relationship in violation of ER 404(b), and concluding that his convictions did not constitute same criminal conduct for sentencing purposes. Finding no error, we affirm.

I

On June 24, 2022, N.S. noticed her then-husband Hinze was deleting messages from his phone and his Snapchat.[1] N.S. believed Hinze was deleting messages to other women and confronted him. She told Hinze she was going to bed, went into the primary bedroom, and locked the door. After Hinze unlocked

[1] "Snapchat" is a cell phone app similar to text messaging except photos and texts sent through Snapchat disappear once they are seen by the recipient and are not preserved.

the door and entered the primary bedroom twice, N.S. moved into the guest bedroom. Hinze followed N.S. into the guest room, attempted to lie in bed next to her, and N.S. used her feet to push him off the bed.

N.S. testified Hinze grabbed her ankles and pulled her toward him so that her legs were on either side of his body. Hinze began choking her with one of his hands to the point where N.S. could not breathe. While choking N.S. with one hand, Hinze used his other hand to grab his penis and put it inside N.S.'s vagina. After he penetrated her, Hinze placed both of his hands around N.S.'s neck, and N.S. testified that she thought she had blacked out.

When Hinze stopped, N.S. stood up and asked Hinze if he felt " 'like a fucking man now?' " and in response Hinze shoved N.S. to the floor, got on top of her, and "put [his fingers] inside of [her vagina]." Hinze put one hand around N.S.'s throat, and punched the wall next to her head with his other hand. N.S. testified that Hinze struck her eye with his fist multiple times. After Hinze stopped punching her, N.S. grabbed her phone, ran back into the primary bedroom to retrieve a handgun, and called 911. Law enforcement was dispatched to the scene, and arrested Hinze.

The State filed a second amended information charging Hinze with rape in the first degree and assault in the second degree of N.S., both with a domestic violence designation. As to the rape charge, the jury convicted Hinze of the lesser included offense of rape in the second degree. The jury also convicted Hinze of assault in the second degree. In a special finding, the jury concluded Hinze did not commit the assault with a sexual motivation.

At sentencing, the court determined the two convictions did not constitute same criminal conduct. The trial court imposed 14 months of confinement for the assault conviction and a concurrent, indeterminate sentence of 100 months to life for the rape conviction. Hinze appeals.

II

Hinze appeals the trial court's denial of his motion to suppress. We conclude that at the time of the challenged statements, Hinze was not in custody for purposes of Miranda.

A

Before trial, the State moved to admit Hinze's pre-Miranda statements. At a CrR 3.5 hearing, the State offered three excerpts of body-worn camera (BWC) footage as the sole evidence, and did not call as witnesses any law enforcement officers. Hinze did not object to the admission of the footage and the court admitted it.

In the footage, Deputy Geoffrey Adrian walked up to the house, asked where N.S. was, saw her walking toward him from the area of the house, and asked her where the gun was located, to which she replied, "[I]t's in my car." The footage depicts a male, later identified as Hinze, standing outside the house next to two vehicles. Deputy Adrian handcuffed Hinze, and stated that he was "not under arrest," but was "detained." After Hinze was handcuffed, another deputy walked over and placed a hand on Hinze's arm. Deputy Adrian asked Hinze his name and "why are we here?"

Hinze replied, saying among other things, "So, we got home from a friend's house. And my wife got my phone—There's—there's a friend of mine from high school. We have some past history." The deputy asked what that meant, and Hinze replied that he and the high school friend "fooled around like ten years ago," and she "Snapchatted" him which N.S. saw and "got defensive." Hinze continued, "We'd been out drinking. So it's like I get where she's coming from. But, one thing turned into another and she was, you know, defens[ive] like oh, 'Why is she, you know, talking to you?' and this and that." Deputy Adrian asked Hinze to elaborate, and Hinze explained, "[N.S.] pushed me in the bedroom. Slammed the door. I said, you know, I'm not trying to—You know, she has done nothing wrong tonight. If anyone has the blame, it's me." Hinze stated, "It escalated. You know, she put her hands on me. We started pushing back and forth. And all of a sudden, here we are sitting here."

Deputy Adrian walked over to N.S., who stated she did not need medical attention, there was a gun in her center console, and she did not want to press charges and "just wanted him to stop." Another deputy reiterated what N.S. told him, that she and Hinze were in an argument earlier, Hinze got upset and started hitting the ground, and hit her a couple of times in the face. Hinze was subsequently read his Miranda rights and arrested.

At the CrR 3.5 hearing, the court did not advise Hinze of his right to testify as to the circumstances surrounding the statements, nor that he could testify at the suppression hearing without waiving his right to remain silent at trial, as required

by CrR 3.5(b).[2] The trial court found that "the deputies' decision to place [Hinze] in handcuffs, while they ascertained both what had taken place and the location of any possible weapons and if there are any other threats to safety, was not an unreasonable circumstance." The trial court concluded the encounter did not amount to a formal arrest, and ruled the statements were admissible,

B

Hinze argues for the first time on appeal the CrR 3.5 hearing was "marred by procedural irregularities" because the State did not present witness testimony and the trial court failed to comply with the requirements of CrR 3.5(b). We conclude Hinze may not raise this claim of error for the first time on review.

Hinze did not object in the trial court that the State presented no live witness testimony or that the trial court failed to comply with CrR 3.5(b). Under RAP 2.5(a), "appellate courts will generally not consider issues raised for the first time on appeal." State v. Williams, 137 Wn.2d 746, 749, 975 P.2d 963 (1999). RAP 2.5(a)(3) states that a party may raise for the first time on appeal a "manifest error affecting a constitutional right." This rule is intended to allow a reviewing court to

[2] CrR 3.5(b) reads,

> It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

correct any "serious injustice to the accused" and to preserve the fairness and integrity of judicial proceedings. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To determine the applicability of RAP 2.5(a)(3), we ask whether (1) the error is truly of a constitutional magnitude, and (2) the error is manifest, meaning the appellant can show actual prejudice. State v. J.W.M., 1 Wn.3d 58, 90-91, 524 P.3d 596 (2023).

In Williams, the court held that the "mere failure to give the CrR 3.5(b) advice of rights is not constitutional error and [a defendant] cannot raise it for the first time on appeal." 137 Wn.2d at 753-54. The Supreme Court explained, "[T]he constitution does not require a trial court to inform a defendant of his or her constitutional right to testify *at trial*," so the failure to give the CrR 3.5(b) advice of rights would not logically be a constitutional error. Id. at 752-53. The constitutional concern behind the CrR 3.5 hearing is the Fourteenth Amendment right " 'to a fair hearing in which both the underlying factual issues and the voluntariness of [a defendant's] confession are actually and reliably determined.' " Id. at 751 (quoting Jackson v. Denno, 378 U.S. 368, 380, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)). This is "intended to ward against the admission of *involuntary, incriminating* statements." Id. at 751.

Hinze seeks to distinguish Williams by arguing that there was no question in Williams about whether the statements at issue had been given voluntarily. Williams made the disputed statements after receiving Miranda warnings and waiving his right to remain silent. Id. at 748. Hinze argues that his case is "more comparable" to State v. S.A.W., 147 Wn. App. 832, 836-37, 197 P.3d 1190 (2008),

in which we reviewed a claimed CrR 3.5 error despite the appellant's not having requested a CrR 3.5 hearing or objected to the failure to hold one in the trial court.

S.A.W. was a juvenile court proceeding in which, during closing argument, S.A.W.'s counsel argued that S.A.W.'s statements in custody had been made in a coercive environment, but the trial judge stated that the issue of the voluntariness of the statements was no longer before the court. Id. at 836. While it is true that Williams did not challenge the voluntariness of his statements, the dividing line between Williams and S.A.W. was that, in Williams, the trial court "fully assessed" the circumstances surrounding the admission of Williams' statements, but this did not happen in S.A.W.[3] S.A.W. 147 Wn. App. at 838-39. Rather, in S.A.W., the trial court "did not allow [S.A.W.] to challenge the State's use of [S.A.W.'s] incriminating statement" and "prevented [S.A.W.] from arguing this issue at trial." Id. at 839. This series of events in the trial court implicated the "constitutional right to 'have the voluntariness of an incriminating statement assessed prior to its admission.' " Id. (quoting Williams, 137 Wn.2d at 754).

In this case, Hinze had the benefit of a pretrial CrR 3.5 hearing focused on his objections to the admissibility of his statements to the officers. Hinze's counsel asked the trial court to review the same footage the State had presented, arguing it showed that Hinze was in custody. And, as this decision proceeds to review, Hinze preserved his objection to the statements based on the constitutional requirements of Miranda. Given this context, Hinze does not show that the trial

[3] S.A.W. also indicated the statements at issue in Williams were not incriminating. 147 Wn. App. at 838.

court's procedural neglect to provide the CrR 3.5(b) advice of rights in and of itself is a constitutional error that Hinze can raise for the first time on review.[4]

We also disagree with Hinze that the State's reliance solely on the BWC footage without any testimonial evidence, in and of itself, is reviewable under RAP 2.5(a)(3). In a CrR 3.5 hearing, the State's evidentiary burden is to establish a voluntary waiver of rights by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). Hinze does not articulate a constitutional principle limiting the nature of the evidence that the State may use to meet this burden. However, as discussed further below, the State's election to offer only the BWC footage in support of its burden of proof had serious consequences for the facts the State was able to prove.

C

Hinze argues that findings of fact 3 and 4 entered after the CrR 3.5 hearing were not supported by substantial evidence.[5]

We review disputed findings of fact under a substantial evidence standard. State v. Klein, 156 Wn.2d 102, 115, 124 P.3d 644 (2005). "Evidence is substantial

[4] Citing S.A.W. and State v. Alexander, 55 Wn. App. 102, 776 P.2d 984 (1989), Hinze also argues it was error for a court to admit his statement relying only on an officer's version of the facts. In both cases, the trial court failed to conduct a CrR 3.5 hearing and admitted the defendants' custodial statements over an objection to the statements' voluntariness. Alexander, 55 Wn. App. at 103; S.A.W., 147 Wn. App. at 836. These cases are distinguishable, because Hinze had the benefit of a CrR 3.5 hearing.

[5] Hinze also assigns error to findings of fact 5 and 13, but provides no argument or citation to authority on these assignments. We will not consider issues that are not supported by argument or citation to authority. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

if it is sufficient to convince a reasonable person of the truth of the finding." Klein, 156 Wn.2d at 115. We accept unchallenged findings of fact as true. State v. Martinez, 2 Wn. App. 2d 55, 63-64, 408 P.3d 721 (2018).

Finding of fact 3 states, "Responding police officers were aware there was at least one gun on the scene and involved in the incident, as shown by the deputy asking 'where's the gun' upon arrival." BWC footage showed Deputy Adrian arrive on scene and ask N.S. where the gun was located. Unchallenged finding of fact 2 states N.S. "told dispatchers that she had a gun, and had emptied it of bullets." Substantial evidence supports this finding of fact.

Finding of fact 4 states, "Domestic violence calls can be a higher risk incident than other types of law enforcement call-outs." There was no evidence at the CrR 3.5 hearing to support this finding. However, "[e]ven if a trial court relies on erroneous or unsupported findings of fact, immaterial findings that do not affect its conclusions of law are not prejudicial and do not warrant reversal." State v. Coleman, 6 Wn. App. 2d 507, 516, 431 P.3d 514 (2018). This finding is unsupported on this limited record,[6] but is immaterial in determining any of the legal conclusions that the trial court made. Therefore, the trial court's erroneous finding was harmless and does not warrant reversal.

[6] Our opinion should not be read as doubting the seriousness of domestic violence or that "[d]omestic violence situations can be volatile and quickly escalate into significant injury." State v. Schultz, 170 Wn.2d 746, 755, 248 P.3d 484 (2011). But the State's evidence at the CrR 3.5 hearing in this case did not show this as a general proposition, and critically did not relate such a proposition to the situation the officers encountered here. We are constrained by the limited evidence the State presented consisting solely of the BWC footage and no law enforcement testimony. This necessarily limits what the State was able to establish.

D

Hinze argues findings of fact 6, 8 through 12, and 15 and 16 are not findings of fact, but legal conclusions subject to de novo review.

Finding of fact 6 states, "It was reasonable, while [Hinze] was handcuffed behind his back, for a sheriff's deputy to place one hand on [Hinze's] bicep, to both stabilize him, and to prevent him from entering the house through the open door behind him." Findings of fact 8 through 12 state,

> 8. There was no booking photographs or fingerprinting facilities at the location, which weighs in favor of a finding that the encounter was not akin to formal arrest;
>
> 9. The place of interrogation was in front of [Hinze's] house, and not similar to a police interrogation room, which weighs in favor of this not being akin to a formal arrest;
>
> 10. Although the interrogation took place shortly after midnight, that factor does not tend to make the encounter more like a formal arrest, since the hour was not chosen by police;
>
> 11. [Hinze] was told that he was not under arrest. While that statement, in and of itself, does not shield an arrest from being akin to formal arrest, it is a factor, and in this situation in consideration of the other circumstances, it weighs in favor of a reasonable belief that [Hinze's] freedom was not curtailed to the degree associated with formal arrest;
>
> 12. The length of the detention, prior to reading Miranda rights was very brief, and only lasted long enough to confirm or dispel suspicion that [Hinze] had committed an assault, and this factor weighs in favor of a finding that a reasonable person would not believe the encounter was akin to formal arrest

Though framed as findings of fact, findings 6 and 8 through 12 end with legal conclusions. We consider such conclusions de novo. State v. Rosas-Miranda, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). Hinze also assigns error to finding

of fact 15, which states, "A reasonable person would believe that the defendant's freedom was not curtailed to the degree associated with formal arrest," and finding of fact 16, which states, "The encounter did not amount to a formal arrest." The State concedes, and we agree, these are conclusions of law subject to de novo review.

The Fifth Amendment right against compelled self-incrimination requires police to inform a suspect of their Miranda rights before a custodial interrogation. State v. Baruso, 72 Wn. App. 603, 609, 865 P.2d 512 (1993). The parties dispute whether Hinze was in custody. A suspect is in custody for purposes of Miranda as soon as their freedom " 'is curtailed to a degree associated with formal arrest.' " State v. Watkins, 53 Wn. App. 264, 274, 766 P.2d 484 (1989) (internal quotation marks omitted) (quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). To determine whether a person is in custody, courts examine the totality of the circumstances, including factors such as "the nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on the suspect, and the duration and character of the questioning."[7] State v. Escalante, 195 Wn.2d 526, 533-34, 461 P.3d 1183 (2020).

Hinze primarily focuses on the degree of physical restraint, arguing he was in custody because officers handcuffed him, and one placed his hand on Hinze's arm. The State answers that Hinze was not in custody for purposes of Miranda,

[7] These factors are analogous to the factors the Ninth Circuit uses: (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual. United States v. Barnes, 713 F.3d 1200, 1204 (9th Cir. 2013).

because the officers' detention and questioning of Hinze was within the scope of a valid stop under Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under Terry, it does not violate the Fourth Amendment protection against unreasonable searches and seizures for a law enforcement officer to temporarily detain an individual suspected of criminal activity if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 20-21.

"Washington courts agree that a routine Terry stop is not custodial for the purposes of Miranda." State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). During the investigatory detention, officers may ask the detained individual questions to confirm or dispel their suspicions, Florida v. Royer, 460 U.S. 491, 498, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (plurality opinion), and can "take such steps as [are] reasonably necessary to protect their personal safety," United States v. Hensley, 469 U.S. 221, 235, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). A suspect may be handcuffed and the detention may remain a valid Terry stop, albeit only when the degree of intrusion upon the suspect's liberty is not excessive and there is a legitimate concern for police safety. State v. Wheeler, 108 Wn.2d 230, 235-36, 737 P.2d 1005 (1987); State v. Mitchell, 80 Wn. App. 143, 146, 906 P.2d 1013 (1995) (handcuffing may be appropriate to accomplish a Terry stop only when police have "a reasonable fear of danger").

From the fact a Terry stop usually does not amount to custody for purposes of Miranda, and a Terry stop may involve the use of restraint appropriate to officer safety, courts have reasoned that "[h]andcuffing a suspect does not necessarily

dictate a finding of custody." United States v. Booth, 669 F.2d 1231, 1236 (9th Cir. 1981). We so held in State v. Cunningham, explaining, "An investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less 'police dominated,' and does not lend itself to deceptive interrogation tactics." 116 Wn. App. 219, 228, 65 P.3d 325 (2003) (quoting State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992)). In Cunningham, an officer attempted to stop a suspected stolen vehicle, its driver exited the vehicle and fled, another officer stopped a person matching the driver's description, and police detained the suspect for 45 minutes until an identification could be made. Id. at 223-24. We said the detention remained a valid Terry stop and did not amount to custody for purposes of Miranda, even with the suspect handcuffed, because there was a risk he would flee again. Id. at 228-29. "But if, during a valid Terry stop, police officers 'take highly intrusive steps' that are justified under the Fourth Amendment by the need to protect themselves from danger, they may create the type of custodial environment that requires them to 'provide protection to their suspects by advising them of their constitutional rights.' " Escalante, 195 Wn.2d at 537 (quoting United States v. Perdue, 8 F.3d 1455, 1465 (10th Cir. 1993)).

Here, law enforcement's detention of Hinze was a valid Terry stop supported by reasonable articulable suspicion. The deputies were called to Hinze's residence aware that at least one gun was present at the scene, and on arrival saw that N.S.'s face was bruised and she was upset. There were facts to suggest that Hinze had committed a violent crime, assault, against N.S., Hinze

was standing near vehicles, N.S. had said she placed a gun in a vehicle, and Hinze was standing near the open door to his home, giving him the ability to flee into the house out of the officers' observation. This combination of circumstances supports a conclusion that deputies had a legitimate concern for their safety and, under Terry, were justified in handcuffing Hinze until more information could be collected. But even with these safety concerns, in this case we are able to conclude Hinze was not in custody only when we additionally consider the remaining factors.

While Hinze's freedom of movement was limited, the deputies did not pressure, threaten, or coerce Hinze into answering their questions. Hinze was handcuffed for approximately 5 minutes—during approximately 2 minutes of disputed questioning to give his name and answer one, non-accusatory, question and during approximately 3 minutes of investigation before being formally arrested—a much shorter amount of time than in Cunningham. The very short duration of the deputies' inquiry was consistent with the intended scope of a Terry stop. And the nature of the questioning involved no confrontation with evidence of Hinze's guilt, but consisted solely of the lead deputy asking Hinze's name and "why are we here?" These facts support the conclusion Hinze was not in custody. If the questioning had exceeded the scope of a Terry stop, or if it had been lengthy or confrontational, we would be more likely to hold he was in custody.

The nature of the surroundings and the extent of police control over the surroundings further support the conclusion that Hinze was not in custody for purposes of Miranda. Officers questioned Hinze in front of the door to his home, from which he had exited as they approached, and to which they had been called

in response to a report.[8] Compare United States v. Eide, 875 F.2d 1429, 1437 (9th Cir. 1989) (brief interview of suspect at his home was not custody), with United States v. Barnes, 713 F.3d 1200, 1204 (9th Cir. 2013) (custody was signaled where "confrontation occurred with three law enforcement officials in a small office, behind a closed door, inside the Alaska Department of Corrections Probation building."). Furthermore, while officers had begun to assert some control over the surroundings, it was not to the degree present in cases finding custody. At least two officers approached the residence, and the lead officer directed N.S. where to stand away from Hinze and restrained Hinze while inquiring of him. At the same time, the lead officer advised Hinze that he was not under arrest, a fact weighing against a conclusion of custody. Compare Rosas-Miranda, 176 Wn. App. at 782 (defendant was not in custody where officer entered home with permission, stayed within earshot in case permission was revoked, but did not monitor occupants or restrict their movements), with State v. Dennis, 16 Wn. App. 417, 419, 421-22, 558 P.2d 297 (1976) (custody where police entered home coercively, refused occupants' directions, confronted occupants about involvement in crime, restrained their movements, and advised other officers were on the way with a warrant), and United States v. Craighead, 539 F.3d 1073, 1078, 1085 (9th Cir. 2008) (custody where eight officers executed a search warrant, some with drawn weapons, and officers isolated suspect in a storage room in his house and interviewed him for 20-30 minutes).

[8] The State did not put on evidence at the CrR 3.5 hearing that N.S. had called 911 and reported an assault. The BWC footage supports a reasonable inference that police had been called to the scene on an emergency basis.

While the level of intrusion was significant, given the totality of the circumstances, we conclude that a reasonable person in Hinze's circumstances would not have felt that their freedom was curtailed to a degree associated with formal arrest. Therefore, the prearrest detention did not rise to the level of custody, and the trial court did not err in admitting Hinze's prearrest statements.

III

Hinze argues the State's introduction of evidence of his marital relationship with N.S. was inflammatory and should have been excluded. Although we view the relevance of this marital relationship evidence as exceedingly marginal, we are unable to say that the trial court abused its discretion in admitting the evidence.

A

Before trial, the State moved to admit evidence of "the deteriorating relationship" between Hinze and N.S. under ER 404(b). The State hoped to introduce text messages between the couple in the months leading up to the incident primarily "to assess the credibility of the victim," and help explain why "someone who has been beaten so badly or someone who has been raped originally [might] make excuses for the perpetrator, ask that charges not be filed, make some attempts to reconcile the relationship." The State contended the evidence could also be admitted to prove "motive" because "[t]he exercise of control over the relationship and over control of his wife is a motive for why [Hinze] raped and beat her." The trial court conducted the proper four-step ER 404(b)

analysis on the record,[9] and ruled the evidence was admissible to show motive and explain N.S.'s late reporting.

The following testimony was elicited at trial. N.S. testified that her marriage "started getting pretty bad" at the beginning of 2022. Hinze was lying "[a] lot" about talking to other women on social media, and he "would not come home for days on end." N.S. recalled one instance where she woke up in the middle of the night to Hinze on his phone, and testified, "[He] started quickly deleting stuff and [I] grabbed his phone. He almost broke my hand squeezing my hand around his phone because he didn't want me to see whatever was on there." N.S. testified she had threatened to kick Hinze out if he did not "mend his ways" and Hinze was unhappy about her expectations of him, at one point mentioning he felt like he was under house arrest. N.S. testified that in April 2022, Hinze went to a bar with co-workers and did not respond to her for hours. N.S. looked at Hinze's phone location, and drove to a gas station in Everett to retrieve him, where Hinze was "completely black-out drunk" in a vehicle with two older women. N.S. brought Hinze back to their house, and the next morning Hinze moved out of the house for approximately two weeks. While Hinze was moved out, N.S. sent him text messages, "I just—just told—kept reassuring him that, you know, we made a vow to each other. And that I wanted him to get help." N.S. testified her intent was to reunify and get Hinze back. N.S. testified to two other instances where Hinze left the house and did not return for hours.

[9] During this determination, the trial court ruled the text messages between the couple would not be admitted. During Hinze's cross-examination, the State read portions of the text messages into evidence to refresh his recollection.

The trial court gave the following limiting instruction halfway through N.S.'s testimony and again at the end of her testimony:

> [C]ertain evidence has been admitted in this case for a limited purpose. This evidence consists of the testimony from [N.S.] regarding alleged acts of misconduct committed by [Hinze] prior to June 25 of 2022.
>
> This evidence may be considered by you only for the purpose of:
>
> 1. Assessing whether [Hinze] had a motive to harm [N.S.], and
>
> 2. [N.S.'s] state of mind[,] and how she may have been affected by [Hinze] during their marriage.
>
> You may not consider the evidence of alleged misconduct for any other purpose.

The record does not show that Hinze challenged this instruction or proposed any alternative instruction.

Hinze testified to the incident at the Everett gas station, that he went out to a bar with coworkers, he agreed to stay at his mother's house that night, and he left with two women he met at the bar to go to another bar. On cross-examination, the State read text messages between the couple from that night, with N.S. asking Hinze to call her and Hinze not replying. Hinze testified he moved out of the house following the Everett incident and it was "strongly suggested" that Hinze obtain counseling. Hinze agreed there were two other instances where he went out and N.S. was messaging him about his whereabouts.

B

Generally, evidence of a defendant's prior misconduct is inadmissible to demonstrate the accused's propensity to commit the crime charged. ER 404(b); State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). However, ER 404(b)

allows the introduction of prior misconduct evidence for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before the admission of other act misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). "If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request." State v. Gresham, 173 Wn.2d 405, 423, 269 P.3d 207 (2012). Evidence is relevant if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

When the trial court has correctly interpreted the rule, we review a trial court's ruling to admit or exclude evidence for an abuse of discretion. State v. Foxhaven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). " 'A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.' " State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). Furthermore, "[a] reviewing court may not find abuse of discretion simply because it would have decided the case differently." State v. Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017).

The trial court admitted the marital relationship evidence for two reasons: (1) to explain N.S.'s delayed reporting and state of mind, and (2) to prove Hinze's motive.

"When an alleged victim acts inconsistently with a disclosure of abuse, such as by failing to timely report the abuse or by recanting or minimizing the accusations, evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act." State v. Cook, 131 Wn. App. 845, 851, 129 P.3d 834 (2006) (footnote omitted). Such evidence may be admissible to also "assist the jury in judging the credibility of a recanting victim." State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). The victim's credibility does not need to be an element of the charged offense. See, e.g., State v. Harris, 20 Wn. App. 2d 153, 158, 498 P.3d 1002 (2021) (evidence of prior assaults admissible to help jury determine recanting witness's credibility in case involving violation of no-contact order).

In State v. Gunderson, the defendant was charged with domestic violence felony violation of a court order stemming from an altercation with his ex-girlfriend. 181 Wn.2d 916, 919, 337 P.3d 1090 (2014). The complaining witness gave one account of events at trial, and stated there was no physical violence, which was not inconsistent with her prior statement. Id. at 920. The State sought to impeach this testimony by putting on evidence of past acts of domestic violence leading to arrest and conviction. Id. at 920-21. The Supreme Court explained,

> In State v. Magers, we took great care to specifically establish that "evidence that [the defendant] had been arrested for domestic violence and fighting and that a no-contact order had been entered

> following his arrest was relevant to enable the jury to assess the credibility of [the complaining witness] *who gave conflicting statements about* [*the defendant's*] *conduct*."

181 Wn.2d at 923-24 (alterations in original) (quoting Magers, 164 Wn.2d at 186). The court noted that the victim in Gunderson did not give any conflicting statements, and declined to extend Magers to cases where there was no evidence of injuries to the alleged victim and the witness neither recanted nor contradicted prior statements. Gunderson, 181 Wn.2d at 924-25. In doing so, the court confirmed there was no domestic violence exception for prior bad acts, and admissibility was confined to cases "where the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events." Id. at 925.

This case is more similar to Magers than Gunderson to the extent that N.S. gave a version of events the night of the incident that omitted crucial facts she supplied only later. A version of events omitting rape and strangulation and another version asserting those events amount to two different versions of events. Thus, on the relevance side of the scale, there is a greater need to suggest background motivations implying an explanation than was present in Gunderson. On the unfair prejudice side of the scale, the evidence here is somewhat less inflammatory than the other-act evidence was in Gunderson. There, the other-act evidence constituted evidence of other crimes for which the defendant was convicted bearing significant similarity to the charged conduct at issue. Id. at 920-21. In this case, the marital relationship evidence does not constitute criminal conduct and is dissimilar from the charged criminal conduct so, while the evidence

is highly negative to Hinze, it does not carry the same level of risk of a propensity inference that was present in Gunderson. Thus, compared with Gunderson, the marital relationship evidence here is both more probative given the circumstances of the evidence and less prejudicial. The real difficulty is that the evidence is not obviously probative of reasons why N.S. would limit her reporting. Nevertheless, determinations of both relevance and unfair prejudice fall within the trial court's discretion, even if both the probative value and the prejudice could have been weighed differently. We are unable to say the trial court abused its discretion in admitting the marital relationship evidence, on these facts, to help explain why N.S. gave conflicting versions of events.

Because we conclude the trial court did not abuse its discretion in admitting the marital relationship evidence pursuant to ER 404(b) to explain N.S.'s inconsistent reporting, we do not address whether the evidence was properly admitted to prove motive. See State v. Arredondo, 188 Wn.2d 244, 259, 394 P.3d 348 (2017) (internal quotation marks omitted) ("We must guard against using 'motive and intent as magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.' ") (quoting State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)). In some cases, allowing evidence for an erroneous purpose under ER 404(b) may be harmless if "the evidence was properly admitted for other, permissible purposes." State v. Crossguns, 199 Wn.2d 282, 296, 505 P.3d 529 (2022). Given N.S.'s reporting inconsistency and given that the marital relationship evidence was noncriminal in nature and dissimilar to the charged criminal conduct, and given the deferential

standard of review, we cannot say the trial court's application of Magers and Gunderson was an abuse of discretion. This satisfies us that even if we disagreed with the trial court's analysis of motive, we would not reverse as the marital relationship evidence was otherwise admissible.

IV

Hinze argues the trial court erroneously concluded that his convictions were not same criminal conduct for sentencing purposes. We disagree.

" 'Same criminal conduct' " means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). An absence of any one of the three elements precludes a finding of same criminal conduct. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Because the default method of calculating an offender score is to treat all current convictions as separate and distinct conduct, the defendant bears the burden of establishing same criminal conduct. State v. Westwood, 2 Wn.3d 157, 162, 534 P.3d 1162 (2023). We review a sentencing court's determination of same criminal conduct for an abuse of discretion. State v. Aldana Graciano, 176 Wn.2d 531, 541, 295 P.3d 219 (2013).

The parties do not dispute that the rape and assault convictions were committed at the same time and place and involve the same victim. Only the first element, same criminal intent, is disputed. The same criminal conduct test is "an objective intent analysis." Westwood, 2 Wn.3d at 162. When determining whether the crimes involve the same criminal intent, courts first identify the statutory definitions of the crimes to determine the objective intent for each crime. Id. at

167. If the objective intent for each crime is different, the inquiry ends and the convictions are not the same criminal conduct. See id. at 168-169 (after reviewing the statutory definitions of attempted rape in the first degree and assault in the first degree, the court concluded the intent necessary for the crimes differed and affirmed the sentencing court's ruling that the crimes did not involve the same criminal conduct). This analysis ignores the defendant's subjective intent. Id. at 162, 164. Westwood held that convictions for attempted rape in the first degree and assault in the first degree did not have the same objective intent under same criminal conduct analysis. Id.

Hinze was convicted of rape in the second degree and assault in the second degree. A person commits rape in the second degree, as charged here, when the person engages in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to themselves or another person. RCW 9A.44.010(3). A person commits assault in the second degree, as charged here, when the person intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another by strangulation. RCW 9A.36.021(1)(a), (g). The jury concluded by special verdict that Hinze did not commit assault in the second degree with a sexual motivation. These crimes have distinct objective intents and therefore do not encompass same criminal conduct, and the jury's special verdict clearly delineated the rape conviction from the assault conviction. The trial court

did not abuse its discretion in concluding Hinze's convictions did not constitute same criminal conduct.

Affirmed.

Birk, J.

WE CONCUR:

Feldman, J.

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

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