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Supreme Court No._____
COA No. 59381-5-II

Case #: 1044925

THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ALEXANDER MEDSKER,
Petitioner.

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

PETITION FOR REVIEW

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A. Identity of Petitioner

Alexander Medsker asks this Court to accept review of the Court of Appeals' opinion filed in *State v. Medsker*, 59381-5-II.

B. Opinion Below

The State charged Mr. Medsker with one count of attempting to elude a pursuing police vehicle but presented evidence of three instances of driving and argued all to the jury. The jurors could have relied on any of the three instances to convict Mr. Medsker of the single charged count. But, the court did not instruct the jury it had to be unanimous on which of the three acts it relied on to convict. And the prosecution did not make a clear election. Mr. Medsker argued this denied him the right to a unanimous verdict and compelled reversal of his conviction and remand for a new trial.

The Court of Appeals refused to review the constitutional claim under RAP 2.5 claiming Mr. Medsker failed to preserve the issue by not raising the unanimity in the lower court. And the Court reasoned he failed to show the constitutional error was manifest because it agreed with the State's contention that the acts were a continuing course of conduct. The Court of Appeals conflated the procedural and substantive claims and ultimately refused to review this claim of constitutional magnitude. Review is necessary to instruct lower courts on the proper application of RAP 2.5 and for a de novo review of Mr. Medsker's claim that his conviction violated the constitutional right to a unanimous verdict. RAP 13.4(b)(1),(3), (4).

C. Issues Presented

When the State presents evidence of multiple criminal acts, any one of which could satisfy the

charge, article I, section 22 and the Sixth Amendment require the court to instruct the jury it must unanimously agree on a particular act. The State presented evidence of three acts, any of which could satisfy the single charge of eluding. In closing, the State argued each act established eluding. But the court did not instruct the jury it must unanimously agree on a particular act. And the prosecution did not elect one act in closing argument. On appeal, Mr. Medsker argued the conviction for attempting to elude a pursuing police vehicle violated his constitutional right to a unanimous jury verdict. The Court of Appeals refused to review under RAP 2.5 claiming the error was not manifest or preserved.

D. Statement of the Case

On February 24, 2023, Officer Sophal Heang was on patrol in Lacey and saw a gold PT Cruiser he

believed did not have a license plate affixed to the bumper even though it was visible.[1] 1RP 182-84. Officer Heang activated his emergency lights, but the vehicle did not stop. 1RP 186. Because of department policy, Officer Heang did not follow the vehicle and terminated his pursuit. *Id*. at 186.

Twenty minutes later, Officer Heang saw the same vehicle and notified dispatch he had probable cause to stop the vehicle for eluding. *Id*. at 186. This time, Officer Heang followed the car without activating his lights or siren. *Id*. at 184. Officer Heang's patrol car was a couple of cars behind the PT Cruiser. 1RP 188. When the PT Cruiser sped up and passed a few more cars, Officer Heang activated his emergency lights for

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[1] The record shows the license plate was visible from behind the car, it was just not on the bumper plate. 2RP 327-28 (The defense showing the jury a picture of the vehicle and its license plate as seen after the PT Cruiser was stopped by Yelm Police Department officers.).

30 seconds. *Id*. at 184, 188. The PT Cruiser pulled into a gravel lot and stopped. *Id*. When Officer Heang exited his patrol car to approach on foot, the vehicle drove away with head lights off. *Id*. at 184-85.

Officer Heang again notified dispatch he had probable cause to arrest the motorist for eluding. *Id*. at 186-87.

Nisqually Police Officer Noelle Winchell heard the dispatch alert and saw a vehicle matching the description. 2RP 255-56. She activated her lights and sirens and followed behind the vehicle. 2RP 257-58. According to Officer Winchell, the PT Cruiser was "way ahead of" her patrol car and she sped up from 48 mph to 78 mph to try to catch up. *Id*. The PT Cruiser eventually ran over spike strips set up by the police. 2RP 260-61. The PT Cruiser slowed down when the spikes shredded the tires. 2RP 281. The Yelm police

used their patrol cars to ram into the PT Cruiser to stop it. Id. Police arrested Mr. Medsker. *Id*.

The State charged Mr. Medsker with one count of attempting to elude a pursuing police vehicle.[2] CP 1.

The State argued in its closing that Mr. Medsker committed three distinct acts that could satisfy the elements of attempting to elude. 3RP 322. ("It happened first in Lacey when Officer Heang attempted to stop the vehicle twice, and it happened again when Officer Winchell turned on her lights and sirens near the Red Wind Casino.") The trial court did not instruct the jury it had to be unanimous on which act it relied on to convict Mr. Medsker. The jury convicted Mr. Medsker of one count of attempting to elude. 2RP 356-57; CP 73.

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[2] The State gave notice it intended to prove a special allegation of endangerment by police vehicle. CP 1. Though instructed it could return a special verdict of endangerment, the jury refused to do so.

On appeal, Mr. Medsker argued a jury unanimity error occurred at his trial and it was reversible error because the prosecutor made no election as to which of the three acts a jury should rely on in its deliberations and the trial court did not give a unanimity instruction. Br. of Appellant at 9-14. The State countered that even if a jury could not rely on the first act, the second and third act were a continuing course of conduct. Br. of Resp. at 19-20. The State also contended even though it did not make an explicit election, it effectively elected therefore a *Petrich* instruction was unnecessary. Resp. Br. at 19-21.

The Court of Appeals affirmed claiming that Mr. Medsker's failed to preserve the issue below and agreed the instructions were correct. Slip. Op at 5. The Court of Appeals noted that the unanimity issue Mr. Medsker raised on appeal "does implicate a constitutional right,"

but claimed there was no showing the error was manifest because it believed he had not demonstrated "actual prejudice." Slip. Op. at 6-7. The Court of Appeals' opinion conflates the procedural and substantive considerations.

E. Argument

Review is necessary because the Court of Appeals misapplies RAP 2.5 and refused to review a violation of the right to jury unanimity guaranteed by article I, section 22 and the Sixth Amendment.

a. The accused has a right to a unanimous verdict.

An accused may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). If the prosecution presents evidence of multiple acts that could support the charge, the State must either tell the jury which act to rely on in its deliberations, or the

court must instruct the jury they all must agree the same underlying criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984).

Failure to follow one of these options is "violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial." *Kitchen*, 110 Wn.2d at 409; Const. art. I, § 22; U.S. Const. amend VI.

"The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen*, 110 Wn.2d at 411. Failure to provide a unanimity instruction when required is a manifest constitutional error that may be raised for the first time on appeal.

State v. Moultrie, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3).

To avoid error and ensure jury unanimity in a multiple acts[3] case, one of two things must occur: either (1) the State may elect the act the jury should rely in its deliberations or (2) the court may give a *Petrich* instruction telling the jury that it must unanimously rely on a specific criminal act to support its conviction. *State v. Aguilar*, 27 Wn. App. 2d 905, 924, 534 P.3d 360, 372 (2023) (*citing Kitchen*, 110 Wn.2d at 411).

To protect unanimity and eliminate the need for a unanimity instruction, the prosecution must "clearly and explicitly" elect a particular act. *State v. Carson*, 184 Wn.2d 207, 228, 357 P.3d 1064 (2015). "[C]learly

[3] "Multiple acts" case are those in which "the prosecution presents evidence of several acts that could each form the basis of one count charged." *Kitchen*, 110 Wn.2d at 409.

and explicitly" electing an act requires not only "specifying exactly" on what the State is relying, but also "disclaiming the State's intention to rely on other acts." *Id*. at 228-29. Disclaiming reliance on other acts "is essential to a clear election." *Id*. at 228 n.15. To do so, the prosecution must direct the jury to disregard the other acts. *State v. Coleman*, 159 Wn.2d 509, 515, 150 P.3d 1126 (2007).

b. The State presented three instances of conduct but made no election.

Mr. Medsker argued a jury unanimity error because the prosecutor made no election of the single act the jury should rely on in its deliberations and the trial court did not give a unanimity instruction. Br. of Appellant at 9-14. The State countered that although it did not make an explicit election, it effectively elected therefore a *Petrich* instruction was unnecessary. Resp. Br. at 19-21.

As to the first act, Officer Heang testified he attempted to initiate a traffic stop the vehicle, "it just failed to obey -- it wasn't speeding. It wasn't driving recklessly." 1RP 186. "[I]t just refused to stop for me, and I terminated pretty quickly." *Id*. The prosecutor told the jury it could rely on the first act to support an essential element of the offense. RP 322.

On appeal, the State changed course and argued even if a court can construe the first time Officer Heang activated lights behind the PT Cruiser as a "separate act," the last two acts, the second time Officer Heang activated his emergency lights behind the PT Cruiser and when Officer Winchell's activated her emergency lights, were a continuing course of conduct. Resp. Br. at 20-22. The State claimed the evidence and the prosecutor's argument made it clear to the jury that it was not relying on the first time

Officer Sophal Heang activated his lights to stop Mr. Medsker's car to convict. The State admitted this act "did not rise to the level of attempt to elude." The State claimed that the prosecutor also told the jury driving normally was insufficient to show recklessness. Resp. Br. at 20.

Concerning the third conduct, Officer Winchell said she activated her lights and sirens when she saw the PT Cruiser changing lanes at a roundabout. 2RP 257-58. But Officer Winchell also said the car "way ahead of" her patrol car -- maybe an eighth of a mile. 2RP 257. At first Officer Winchell's patrol car had to speed up 78 miles per hour for a while to try to catch up to the vehicle. *Id*.

Even if, a court construes the last two acts as continuing course of conduct, there is still a lack unanimity issue as to the first. The evidence showed

multiple acts with no election or unanimity instruction. A rational jury could have entertained reasonable doubt about Mr. Medsker's failure to stop when Officer Heang first activated his emergency lights and still convicted him of attempting to elude for the second and third acts charged and argued. The lack of unanimity had a practical and identifiable consequence.

On appeal, the State said it effectively elected and no *Petrich* instructions were necessary because the evidence and the prosecutor clarified that the second and third acts were a continuing course of conduct. Resp. Br. 19-21.

Unlike the prosecutor in *Carson*, this prosecutor did not specify the State was relying on the second and third acts as a continuing course of conduct and did not disclaiming the State's intention to rely on the first act. *Carson*, 184 Wn.2d at 229. The State's claim that it

effectively elected the second and third acts does not pass muster. *See Id.*

The State's evidence showed that the PT Cruiser did not stop on two separate occasions when Officer Heang activated his lights. 1RP 184-86. And the PT Cruiser did not stop when Officer Winchell activated her lights and sirens. 2RP 158-59. The jury heard three separate and distinct acts that could constitute the act of attempting to elude.

The prosecutor argued in closing, that the State proved Mr. Medsker did not stop for a uniformed pursuing officer three times. 3RP 322. "It happened first in Lacey when Officer Heang attempted to stop the vehicle *twice*, and *it happened again* when Officer Winchell turned on her lights and sirens near the Red Wind Casino." 3RP 322. On appeal, the State abandoned its trial court position and argued Officer

Heang initial attempt to stop Mr. Medsker's car involved "just" failure to obey and did not involve reckless driving and was not criminal. Resp. Br. at 20 citing RP 185-86.

The prosecutor did not elect nor explicitly direct the jury to disregard either the first, second, or third act. *Coleman*, 159 Wn.2d at 515; 3RP 322. The prosecutor did not disclaim reliance any of the three acts which "is essential to a clear election." *Carson*, 184 Wn.2d at 228 n.15.

Contrary to the holding of the Court of Appeals, the error was manifest the trial evidence and the prosecutor's lack of election and arguments violated Mr. Medsker's right to a unanimous verdict.

c. The Court of Appeals incorrectly construes RAP 2.5 to avoid a meritorious lack of unanimity claim.

The Court of Appeals disregards the unanimity error because Mr. Medsker's defense counsel was given several opportunities to review the jury instructions and agreed they were sufficient,"legitimate and legal." Slip. Op. 5. The Court of Appeals incorrectly concluded the error is not manifest because Mr. Medsker did not raise it below.

This Court has held the lack of unanimity can be challenged the first time on appeal because this issue concerns a manifest constitutional error. *State v. Bobenhouse*, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009) (reviewing issue about lack of unanimity instruction). The Court of Appeals ignores Mr. Medsker's showing the error was manifest under RAP 2.5(a)(3). Br. of Appellant at 7-8.

The Court of Appeals also fails to acknowledge that a reviewing court determines whether a

unanimity instruction was required de novo. *Aguilar*, 27 Wn. App. 2d at 924. The Court of Appeals claims Mr. Medsker has not proved manifest error because he has not showed the error had practical and identifiable consequence in the trial. Slip. Op. 6-8. But if a first act was "separate" and alone insufficient to convict Mr. Medsker of the charged crime, then the error is manifest. *Id.* at 20. If the two subsequent acts were not a continuing course of conduct then the trial court committed reversible error. Mr. Medsker has shown a rational jury could have entertained reasonable doubt that not stopping the first time for Officer Heang was not a crime. Yet the jury convicted Mr. Medkser because the prosecutor argued the three acts were all criminal. 3RP 322. The error had a practical and identifiable consequence. Contrary to the holding of the Court of Appeals, the error is of a constitutional

magnitude because it deprived Mr. Medsker of his right to a unanimous verdict.

d. Review is necessary to give guidance to lower courts that election must be explicit, not implicit.

The State claimed on appeal that the Court of Appeals should conclude no election or a *Petrich* instruction was necessary because first, the jury heard evidence that made it clear that the first act did not rise to the level of attempt to elude. Resp. Br. 19. And second, the evidence and the prosecutor made it clear that the second and third act were a continuing course of conduct and the only acts that could prove the offense. Resp. Br. 19-20.

The prosecutor had to tell the jury that it was relying only on the second and third act as a continuing course of conduct and explicitly disclaim reliance on the first act. *Id*. The prosecutor did not do so. This

theory of implicit election has potential to eviscerate the constitutional right to a unanimous jury verdict and is an issue of substantial public importance. RAP 13.4(b)(3), (4).

This Court should accept review and remand to reverse and remand for a new trial. *Id.*; *Kitchen*, 110 Wn.2d at 411-12.

F. Conclusion

This Court should accept review and vacate Mr. Medsker's conviction for attempting to elude a pursuing police vehicle because it violates the constitutional right to a unanimous jury verdict. RAP 13.4(1), (3), (4).

This pleading complies with RAP 18.7 and contains 3,196 words.

DATED this 22nd day of August, 2025.

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APPENDICES

Filed
Washington State
Court of Appeals
Division Two

August 19, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALEXANDER MICHAEL MEDSKER, Appellant.	No. 59381-5-II UNPUBLISHED OPINION

VELJACIC, J. — Alexander Medsker appeals his conviction for one count of attempting to elude a police officer. For the first time on appeal, Medsker argues that the trial court erred by failing to provide a unanimity[1] instruction, which violated his right to a unanimous jury verdict. Because Medsker failed to show that there was a manifest error affecting a constitutional right, his claim of error was not preserved for review. Accordingly, we affirm.

[1] A unanimity instruction is also referred to as a *Petrich* instruction. *E.g.*, *State v. Petrich*, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984) (holding that a jury must unanimously agree "that the criminal act charged in the information has been committed"), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988), *abrogated on other grounds by In re Stockwell*, 179 Wn.2d 588, 316, P.3d 1007 (2014); *State v. Aguilar*, 27 Wn. App. 2d 905, 924, 534 P.3d 360 (2023).

FACTS

I. THE PURSUIT[2]

On February 24, 2023, Officer Sophal Heang was doing a routine patrol in Lacey. Heang was working the graveyard shift and was driving a marked police vehicle. Around 10:00 p.m., Heang observed a gold Chrysler PT Cruiser[3] driving without a rear license plate affixed to the bumper. Heang got behind the vehicle and initiated his emergency lights, but the vehicle did not pull over. The vehicle "wasn't speeding[,]. . . it just refused to stop." Report of Proceedings (RP) (Feb. 13, 2024) at 186. Pursuant to department policy, Heang terminated the pursuit shortly thereafter.

Twenty minutes after first encountering the gold PT Cruiser, Heang saw the same vehicle. Heang proceeded to pull behind the vehicle. This time, however, the vehicle began to drive "erratically," accelerating its speed and "weaving in and out of traffic." RP (Feb. 13, 2024) at 184. After Heang initiated his lights, the vehicle pulled over into a gravel parking lot. But when Heang exited his patrol vehicle, the gold PT Cruiser "sped away" with its headlights off. RP (Feb. 13, 2024) at 185. Heang notified dispatch that he had "probable cause for eluding," which was communicated to other police departments on different radio frequencies. RP (Feb. 13, 2024) at 186.

Sergeant Knute Lehmann,[4] who was also on patrol that evening, was notified of a vehicle eluding the Lacey Police Department after an unsuccessful traffic stop. Lehmann pulled over and

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[2] This section summarizes the evidence presented at trial during the State's case. Medsker did not present any evidence at trial, nor did he choose to testify.

[3] It was later determined that Medsker was the driver of the gold PT Cruiser.

[4] At the time of the incident, Lehmann was a patrol deputy with the Thurston County Sheriff's office and was promoted to sergeant afterward.

waited to see if the vehicle was coming his direction. Approximately two to three minutes later, Lehmann observed a gold PT Cruiser (without its headlights on and no rear license plate) enter a roundabout. After Lehmann began to follow the gold PT Cruiser, the vehicle began to speed up. Utilizing the radar mounted in Lehmann's vehicle, he determined the gold PT Cruiser was going around 70 miles per hour in a 35 miles-per-hour zone.

Lehmann continued to follow the vehicle, maintaining speeds around 40 to 45 miles per hour. The gold PT Cruiser slowed down for a short period due to other vehicles on the road, which allowed Lehmann to catch up and maintain a visual of the vehicle.[5] During this period, Lehmann was communicating with surrounding law enforcement, attempting to coordinate spike strips to be deployed and flatten the gold PT Cruiser's tires.

Again, the suspect's vehicle slowed down, and Lehmann observed that one of the brake lights was broken. The gold PT Cruiser turned its lights off for a short period, but proceeded to turn them back on shortly thereafter. At this point, there was not a lot of traffic on the roads. Lehmann continued to pursue the vehicle and was joined by Deputy Shawn Graves who was following behind Lehmann. The gold PT Cruiser continued to maintain speeds around 70 miles per hour in a 50 miles-per-hour zone.

The gold PT Cruiser proceeded to drive toward the Nisqually Reservation, maintaining speeds around 70 miles per hour. Upon reaching the reservation, the gold PT Cruiser entered a roundabout, illegally changed lanes, and Officer Noelle Winchell, who was with the Nisqually Police Department and was in a marked police vehicle, joined the pursuit. Winchell activated her

[5] Department policy authorized Lehmann to trail the vehicle, which "encompasses maintaining normal speeds, obeying laws of the road and trying to keep the violator within eye distance." RP (Feb. 13, 2024) at 198. Lehmann was "not authorized to use [his] lights and sirens to move traffic out of [his] way to continue to view [the] person or [the]vehicle" he is following. RP (Feb. 13, 2024) at 198.

lights and sirens and followed immediately behind the gold PT Cruiser. In order to catch up to the suspect's vehicle, Winchell was traveling at 78 miles per hour, and both vehicles were headed toward the Red Wind Casino, the busiest part of the reservation.

When the gold PT Cruiser reached the Red Wind Casino, there were many pedestrians out and several vehicles on the road. The suspect's vehicle was driving in both the right and left lanes, entering into oncoming traffic, and running a red light. At one point, there were vehicles that honked and swerved away from the gold PT Cruiser as it attempted to pass traffic on the left. Officers successfully deployed a spike strip, and rubber from the suspect's vehicle's tires could be seen "flying everywhere." RP (Feb. 13, 2024) at 260. Despite this, the gold PT Cruiser continued at a reduced speed, but the spike strip "did not change the way the driver was driving the vehicle." RP (Feb. 13, 2024) at 261.

After leaving the Red Wind Casino area, the gold PT Cruiser headed toward a residential area. Radio communications indicated that officers had been authorized to execute a PIT[6] if speeds were under 25 or 35 miles per hour. Because Winchell was not authorized to perform the maneuver under her department's policies, she "pulled off and let the other officers behind [her] go ahead." RP (Feb. 13, 2024) at 262. Officer Joseph Murphy with the Yelm Police Department pulled immediately behind the suspect's vehicle and successfully executed a PIT, causing the gold PT Cruiser to run off the side of the road and crash into a fence.

After the gold PT Cruiser had come to a stop, officers ordered the driver to exit the vehicle. Medsker was identified as the suspect driving the gold PT Cruiser and was taken into custody. There was no one else in the vehicle. Medsker was transported to a medical facility after he alleged that he had swallowed fentanyl.

[6] A pursuit intervention technique (PIT) is used by officers to apprehend fleeing vehicles.

Medsker was charged with one count of attempting to elude a pursuing police vehicle in violation of RCW 9.94A.834. The State also charged Medsker with an enhancement for endangering "one or more persons other than the defendant or the pursuing law enforcement officer." Clerk's Papers at 1.

II. TRIAL

After both the State and Medsker rested their case, there was no discussion regarding the need for a unanimity instruction. Before closing arguments, the court asked whether defense counsel had any exceptions or objections to the State's proposed instructions. In response, defense counsel stated, "No objections, Your Honor. I had sufficient time to go over them which is why I did not submit my own instructions because what [the State] has submitted I believe is sufficient and everything appears to be legitimate and legal." RP (Feb. 13, 2024) at 296.

The next day, the court provided another opportunity for the parties to review the instructions. Again, the court asked defense counsel if it had any objections or exceptions to the proposed instructions to which defense counsel replied, "Nothing from the defense." RP (Feb. 14, 2024) at 304.

The jury found Medsker guilty of one count of attempting to elude a pursuing police officer. The jury did not render a verdict on the "endangerment" enhancement. The trial court sentenced Medsker to 12 months and 1 day of confinement.

Medsker appeals.

ANALYSIS

I. MEDSKER FAILED TO PRESERVE HIS ARGUMENT

For the first time on appeal, Medsker argues that the court erred by failing to provide a unanimity instruction, depriving him of his right to a unanimous jury verdict. Because there is no

manifest error affecting a constitutional right, and the issue was not raised at trial, Medsker's claim is not preserved for appeal.

A. RAP 2.5

Generally, courts do not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). An issue, however, may be raised for the first time on appeal if there is (1) a "lack of trial court jurisdiction," (2) a "failure to establish facts upon which relief can be granted," or (3) a "manifest error affecting a constitutional right." RAP 2.5(a); *McFarland*, 127 Wn.2d at 332-33. Critically, RAP 2.5(a)(3) "is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)). Instead, the exception "encompasses developing case law while ensuring only certain constitutional questions can be raised for the first time on review." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). And even when a defendant satisfies RAP 2.5(a)(3), the error is still subject to review under the constitutional harmless error standard. *Scott*, 110 Wn.2d at 687 (explaining that RAP 2.5(a)(3) "does not help a defendant when the asserted constitutional error is harmless beyond a reasonable doubt").

To satisfy RAP 2.5(a)(3) "and raise an error for the first time on appeal, [a defendant] must" first demonstrate that "the error is truly of constitutional dimension." *O'Hara*, 167 Wn.2d at 98. Then, a defendant must prove that the error was manifest. *Id.* Stated differently, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). If a

party raising an argument for the first time on appeal fails to satisfy the exception articulated in RAP 2.5(a)(3), the claim of error is not reviewable.

Courts "do not assume the alleged error is of constitutional magnitude;" instead, "[w]e look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error." *O'Hara*, 167 Wn.2d at 98.

"'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Kirkman*, 159 Wn.2d at 935. Actual prejudice requires a "'plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* (internal quotation marks omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

B. Analysis

Here, Medsker failed to argue a need for a unanimity instruction at multiple opportunities. Therefore, Medsker cannot raise this claim for the first time on appeal unless he demonstrates that the issue implicates a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Medsker's claim does implicate a constitutional right, *see, e.g.*, *Kitchen*, 110 Wn.2d at 411, but he cannot demonstrate that there was a manifest error.

In Medsker's opening brief, he appears to suggest that this alleged error is *automatically* reviewable because it implicates the constitutional right to unanimity. He is incorrect. An alleged error must do more than implicate a constitutional right to be reviewable for the first time on appeal; it must also be *manifest*, which means that it must have caused him actual prejudice. This, in turn, means that the error must have had practical and identifiable consequences at trial. *O'Hara*, 167 Wn.2d at 99. Consequently, this inquiry is *fact specific* to each case. *Id.* at 99-100.

Medsker also fails to explain or demonstrate that the failure to give a unanimity instruction had practical and identifiable consequences to his trial.[7] This is especially pertinent when the facts of the case show that Medsker's actions were part of a continuing course of conduct.[8] Unlike offenses considered in other unanimity instruction cases, the nature of Medsker's actions show that he attempted to elude police officers during a continuous pursuit that took place over a period of time and several locations while his underlying purpose—avoiding police contact—remained the same.[9]

Therefore, we conclude that Medsker failed to show that there was a manifest error affecting a constitutional right. The issue was not preserved, and we decline to review it for the first time on appeal. RAP 2.5(a).

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[7] Medsker explains how the court's omission had practical and identifiable consequences to his trial in his reply brief, but that is too late to warrant review. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a), (c).

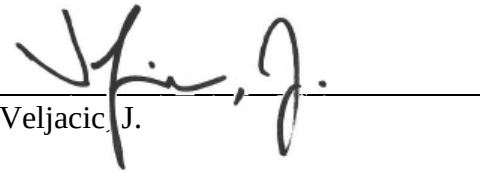
[8] Medsker asserts the State conceded there were at least two distinct acts on the night of the incident. In its brief, the State commented, "*Even if* the first attempt to stop the vehicle could be construed as a separate act, the witnesses and the prosecutor made it clear that the act did not rise to the level of attempt to elude." Br. of Resp't at 20 (emphasis added). Clearly, this was not a concession, and the court would advise Medsker to more closely read the briefing before inaccurately representing the State's arguments.

[9] *See, e.g.*, *State v. Workman*, 66 Wash. 292, 293-94, 119 P. 751 (1911) (considering a defendant charged with statutory rape); *Petrich*, 101 Wn.2d at 568-72 (considering a defendant charged with one count of indecent liberties and one count of statutory rape); *Kitchen*, 110 Wn.2d at 406, 409-12 (considering one defendant charged with one count of statutory rape in the second degree and another defendant charged with three counts of indecent liberties); *State v. Coleman*, 159 Wn.2d 509, 510-14, 150 P.3d 1126 (2007) (considering a defendant charged with two counts of child molestation); *State v. Bobenhouse*, 166 Wn.2d 881, 886, 891-95, 214 P.3d 907 (2009) (considering a defendant charged with two counts of rape of a child in the first degree and two counts of incest in the first degree); *State v. Carson*, 184 Wn.2d 207, 212, 218-22, 357 P.3d 1064 (2015) (considering a defendant charged with one count of rape of child in the first degree and one count of child molestation in the first degree).

CONCLUSION

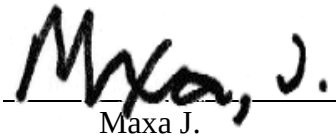
Accordingly, we affirm Medsker's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

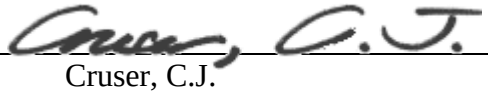


Veljacic, J.

We concur:



Maxa J.



Cruser, C.J.

WASHINGTON APPELLATE PROJECT

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Appellate Court Case Title:	State of Washington, Respondent v. Alexander Michael Medsker, Appellant
Superior Court Case Number:	23-1-00831-0

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