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When One Assault Ends and Another Begins: The Challenge for Domestic Violence Victims After *State v. Dew*

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When One Assault Ends and Another Begins: The Challenge for Domestic Violence Victims After *State v. Dew*[*]

INTRODUCTION

If a person hits somebody five times, are they charged with one assault or five? Is an assault charge for a four-minute attack the same as an assault charge for a four-hour one? How many times can you charge repeat abusers for their repeated assaults on one victim? The questions surrounding the delineation between assaults are difficult ones, and they teeter on the line between advocating for assault victims and protecting constitutional rights against double jeopardy. On the one hand, charging several assaults can be crucial for both supporting and protecting assault victims, particularly those who are victims of domestic violence. On the other hand, individuals should not be charged multiple times for the same crime. So, how *do* courts decide whether multiple physical acts constitute one continuing assault offense or multiple assault offenses?

In October 2021, the Supreme Court of North Carolina, in a case of first impression, determined what test to use in answering this question. In *State v. Dew*,[1] the court found that the defendant assaulted his girlfriend over the course of four hours in one night, both in a trailer and in a car.[2] The court used this as an opportunity to choose between two commonly used tests to delineate between assaults. Before *Dew*, some North Carolina courts applied a "distinct

1. 379 N.C. 64, 2021-NCSC-124.
2. *Id.* ¶¶ 5–9.

interruption" test to differentiate between assaults for charging and conviction purposes, while other courts applied the three-factor test from *State v. Rambert*.[3] Now, after the court's decision in *Dew*, all North Carolina cases will use the distinct interruption test to determine when one assault ends and another begins.

There are certainly benefits of having a uniform test to decide whether multiple physical acts constitute multiple assaults. This Recent Development argues, however, that the court's decision to apply the distinct interruption test as it is currently understood neglects to account for the differences in assault cases and, further, fails to provide a means of achieving justice for many assault victims, particularly those in domestic violence situations. Since individuals receive sentences for each charge they are convicted of, whether a person is charged for one assault or two can effectively determine whether their victims will have enough time to leave the abusive relationship or if their abuser will return home within hours of their court date to inflict further harm. In making this argument, this Recent Development proceeds in four parts. Part I provides an overview of *State v. Dew* and details the distinct interruption test adopted in the case. Part II then analyzes the three-factor test from *Rambert* and explains how it differs from the distinct interruption test. Part III discusses the negative implications of *Dew* and how sentencing for assaults can greatly affect victims of domestic violence. Finally, Part IV argues that the combination of a statutory definition of assault and an adjusted version of the *Rambert* factors would better provide justice in assault cases—particularly in cases of domestic and intimate partner violence.

I. *STATE V. DEW* AND THE DISTINCT INTERRUPTION TEST

The Supreme Court of North Carolina, in deciding *State v. Dew*, resolved the question of how North Carolina courts should decide when one assault ends and another begins. The court chose to use—and in turn set the precedent for all North Carolina courts to use—the distinct interruption test.[4] This part describes the facts of *Dew* and outlines how the court defined and applied the distinct interruption test in analyzing the case.

3. 341 N.C. 173, 459 S.E.2d 510 (1995). *Compare* State v. Brooks, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000) (applying the distinct interruptions test to an assault with a deadly weapon case), *with* State v. Wilkes, 225 N.C. App. 233, 239–40, 736 S.E.2d 582, 587–88, *aff'd*, 367 N.C. 116, 748 S.E.2d 146 (2013) (applying the *Rambert* factors to differentiate assaults in a domestic violence case).

4. *Dew*, 2021-NCSC-124, ¶ 27 ("We agree with the Court of Appeals that the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults.").

A. *Factual Background of* State v. Dew

Mindy Ray Davis was in a relationship and living with defendant Jeremy Wade Dew.[5] In July 2016, the two, along with Dew's daughter, took a trip to visit Davis's parents and stay in their trailer.[6] According to Davis, on July 30, Dew became angry after Davis danced with her cousin.[7] While Davis was changing in their bedroom, Dew came from behind and hit her in the head.[8] In her testimony, Davis explained that Dew "hit her 'over and over,'—a continuous, nonstop beating—for at least two hours."[9] She further described that "he hit her 'upside the head and ear, on each side,' 'kicked [her] in the chest,' bit her nose and her ear, 'punched [her] in the nose,' 'head-butted [her] twice,' and 'strangled [her] until [she] vomit[ed].'"[10] Throughout the beating, Dew called her names, blamed her for his actions,[11] threatened to throw her into a reservoir, and threatened to kill everyone in the trailer if she made a noise.[12]

After the beating, which lasted over two hours,[13] Dew forced Davis to clean the blood-stained sheets and pack up their car[14] and then drove Davis and his daughter home.[15] According to Davis, Dew hit her on the side of her head for the entire two-hour car ride, rupturing her eardrum.[16] He also pulled over several times to strangle her, threatened to push her out of the car, and threw her phone out of the window.[17] When they finally reached their home, Dew threatened Davis by telling her that he would cut himself and claim she did it if she tried to call the police or leave.[18] As a result of Dew's abuse, Davis suffered a concussion, a nondisplaced nose fracture, and a ruptured eardrum for which

5. *Id.* ¶ 2.

6. *Id.*

7. *Id.* ¶¶ 3–4.

8. *Id.* ¶ 5 ("Davis testified that defendant 'just hauled off and hit [her] upside the head.'").

9. *Id.*

10. *Id.* (alterations in original).

11. For instance, "during the attack defendant called her a 'slut' and told her that she embarrassed him and that she was making him do this." *Id*.

12. *Id.* ¶ 6.

13. *Id.* ¶ 5.

14. *Id.* ¶ 7 ("He made Davis take the sheets off the bed, which were stained with her blood, and clean the mattress cover. Davis wiped down the mattress cover and took the sheets off the bed and put them on the dresser. Davis grabbed their bags and took them out to the car.").

15. *Id.* When they first got to the car, Dew made Davis get in the driver's seat. However, he changed his mind and had her sit in the passenger seat while he drove. *Id.*

16. *Id.* ¶ 8.

17. *Id.*

18. *Id.* ¶ 9.

she had to undergo two surgeries to preserve her hearing.[19] Dew denied Davis's account of the events.[20]

Dew was ultimately charged with five discrete assault charges: (1) assault by strangulation; (2) assault with a deadly weapon inflicting serious injury through fists and hands resulting in a ruptured eardrum; (3) assault on a female through a kick to the head; (4) assault on a female through a headbutt to the forehead; and (5) assault with a deadly weapon inflicting serious injury through fists, hands, and teeth resulting in a fractured nose.[21] He was convicted by a jury of all of these charges except for two: assault by strangulation and assault on a female through a kick to the head.[22] In other words, Dew was charged with five separate assaults but was found guilty of just three of the five assaults: the assault in the car in which Dew hit Davis repeatedly, the assault in the trailer in which Dew headbutted Davis in the forehead, and the assault in the trailer in which Dew beat Davis with his hands.[23] The court of appeals subsequently found no error with these verdicts, reasoning that Dew "had to employ separate thought processes in his decisions to punch, slap, kick, bite, and head-butt the victim[,] . . . the assaults did not occur simultaneously, with one strike, or in rapid succession[,] . . . [and that] [e]ach assault also resulted in different injuries to the victim."[24]

B. *The Distinct Interruption Test*

The Supreme Court of North Carolina granted Dew's petition for discretionary review to determine whether the evidence permitted a finding of multiple assaults.[25] The crux of the analysis focused on whether there was substantial evidence of every element of all three assault charges Dew was convicted of.[26] Because North Carolina does not have a statutory definition of assault, the court had to decide first on a definition of an assault and then decide

19. *Id.* ¶ 10.

20. *Id.* ¶¶ 11–14. Dew, who also testified at trial, claimed that Davis attacked him—scratching, biting, and hitting him—and that he hit her nose with his head while trying to get her off. *Id.* ¶ 13. He claimed the whole fight lasted merely two minutes. *Id.*

21. *Id.* ¶ 15. He was also charged with two nonassault charges: first-degree kidnapping and communicating threats. *Id.*

22. *Id.* The jury also found Dew guilty on the first-degree kidnapping and communicating threats charges. *Id.*

23. *Id.*

24. *State v. Dew*, 270 N.C. App. 458, 462–64, 840 S.E.2d 301, 304–05 (2020), *modified and aff'd*, 379 N.C. 64, 2021-NCSC-124 ("Even if we assume Defendant preserved his new argument [that the evidence establishes there was only one assault], the State presented sufficient evidence of each assault for which Defendant was convicted.").

25. *Dew*, 2021-NCSC-142, ¶ 17.

26. *Id*. ¶ 21.

how a court should determine if there is evidence of multiple assaults.[27] Pulling from case law and dictionary definitions, the court decided that "assault is a broad concept that can include more than one contact with another person," meaning that an assault could "refer to a deluge of punches in a single fight and still be called a single assault."[28]

Although this was the first time the Supreme Court of North Carolina had to delineate between individual assaults, the court of appeals has dealt with the question on several occasions.[29] In many circumstances, the court of appeals has said that convicting a person of "two separate counts of assault stemming from one transaction" requires evidence of a "'distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first."[30]

This is the essence of the distinct interruption test, but it is not always as easy to apply as it may seem. One challenge is that the test attempts to differentiate assaults, which still are not in and of themselves fully defined in North Carolina.[31] How trial judges choose to define assault—whether they view assaults broadly or very narrowly—could single-handedly determine how an application of the distinct interruption test would result.[32] Furthermore, it begs the question: What constitutes a transaction? *Black's Law Dictionary* has several definitions of "transaction"; however, the most applicable would simply be "[a]ny activity involving two or more persons."[33] This ambiguous definition poses the same question that exists for assaults—what makes a transaction a continuous one or two separate ones? Not only does the court have to differentiate between one or two assaults, but now there is the added question of when one transaction ends and another begins. Or are these two questions

27. *Id.* ¶ 22. The crime of assault in North Carolina is governed by common law rules. *Id.* ¶ 23. The common law definition in the state is generally "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Id.* (quoting State v. Roberts, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). The court also looked to *Black's Law Dictionary*'s definition of assault. *Id.*

28. *Id.*

29. *Id.* ¶ 24; *see, e.g.*, State v. Brooks, 138 N.C. App. 185, 189–90, 530 S.E.2d 849, 852–53 (2000); State v. Littlejohn, 158 N.C. App. 628, 635–37, 582 S.E.2d 301, 307 (2003); State v. McCoy, 174 N.C. App. 105, 115–17, 620 S.E.2d 863, 871–72 (2005).

30. *Dew*, 2021-NCSC-124, ¶ 24 (alteration in original) (quoting *Littlejohn*, 158 N.C. App. at 635, 582 S.E.2d at 307).

31. *See supra* note 27 and accompanying text.

32. Some states without statutory definitions of assault base it off tort theory. This way of defining assault views an assault as "made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *See* Rollin M. Perkins, *An Analysis of Assault and Attempts To Assault*, 47 MINN. L. REV. 71, 74 (1962) (quoting People v. Wood, 199 N.Y.S.2d 342, 347 (1960)). Courts that define assaults narrowly in their application of the distinct interruption test may come out with different results than courts that define assault more broadly.

33. *Transaction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

one and the same?[34] Clearly, the court's application of the distinct interruption test leaves a lot of unanswered questions.

In an effort to provide clarity and context to the definition of a "distinct interruption" between assaults, the court provided a nonexhaustive list of distinct interruption qualifiers: "[A]n intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another."[35] This list itself is rife with ambiguities,[36] and the need for providing such a nonexhaustive list in the first place further exemplifies how unhelpful the distinct interruption test is in practice.

Next, the court said, "[T]he fact that a victim has multiple, distinct injuries alone is *not* sufficient evidence of a distinct interruption such that a defendant can be charged with multiple counts of assault."[37] It further added that evidence of different methods of attack (for example, punching the victim versus headbutting the victim) is not alone sufficient to satisfy the distinct interruption test either,[38] and whether "each blow" was charged is irrelevant to the analysis.[39] Aside from these specific qualifiers and nonqualifiers, the court failed to provide any guidance on specifics of the test, such as how long the intervening event must last, what is considered an interruption in the attack's momentum, how far of a distance constitutes a change in location, etc.

Applying this test to the facts of *Dew*, the court concluded that the evidence was sufficient to find a distinct interruption between Dew's actions in the trailer and those in the car.[40] In making this decision, the court reasoned that the two hours of continuous beating in the trailer constituted one assault and that there was a distinct interruption between the beating in the trailer and the second assault in the car.[41] The court utilized the intervening event route to find a distinct interruption between the two assaults, finding that Davis vomiting in the trailer and then beginning to wash the sheets and pack the car

34. Some courts have used the two interchangeably. *See, e.g.*, State v. Wilkes, 225 N.C. App. 233, 240, 736 S.E.2d 582, 588, *aff'd*, 367 N.C. 116, 748 S.E.2d 146 (2013) ("Because the two assaults were distinct in time and involved separate thought processes, the fact that both assaults were aimed at the head does not merge the offenses. Because there were multiple transactions, we find no error.").

35. *Dew*, 2021-NCSC-124, ¶ 27.

36. For example, how long of a period is necessary for a person to calm down? What constitutes an interruption? Is moving from one room to another considered a location change?

37. *Dew*, 2021-NCSC-124, ¶ 28 (emphasis added).

38. *Id.* ¶ 29 (reasoning that "allowing for a separate charge for each nonsimultaneous contact would erase any limiting principle and allow the State to charge a defendant for every punch in a fight").

39. *Id.* ¶ 30.

40. *Id.* ¶ 31.

41. *Id.* ¶ 33.

constituted an intervening event that was sufficient to create a distinct interruption between the assaults.[42]

However, the court held that there was no distinct interruption during the events that took place in the trailer to warrant multiple assault charges for Dew's conduct in the trailer alone.[43] The court reasoned that because the attack was continuous and ongoing, the different injuries and different methods of attack were insufficient to constitute a distinct interruption.[44]

II. THE *RAMBERT* FACTORS

Although many pre-*Dew* courts applied another analysis—the *Rambert* factors—instead of the distinct interruption test,[45] the *Dew* court ultimately refused to apply the *Rambert* factors, concluding that they did not easily apply to assault analyses.[46] This means that North Carolina courts may no longer apply the commonly used *Rambert* factors to delineate between assaults. To show how this change will affect domestic violence litigation, this part explains what the *Rambert* factors are, how they affect the outcomes of cases, and why the court in *Dew* declined to apply them to assault cases.

A. State v. Rambert

The *Rambert* factors hail from a 1995 Supreme Court of North Carolina decision.[47] In *State v. Rambert*, in May of 1992, Tiaseer Janil Rambert was a passenger in a car that parked next to the car of John Dillahunt.[48] Rambert and Dillahunt had previously been in several verbal arguments.[49] On this day, however, the two had only briefly interacted before Rambert pulled out a gun and shot into Dillahunt's front windshield.[50] Dillahunt attempted to drive forward when Rambert shot a second bullet into Dillahunt's passenger door, and then a third into his rear bumper[51] followed by several more shots that did

42. *Id.* ("The process of cleaning up and packing up was an intervening event interrupting the momentum of the attack. In addition, the beating in the trailer was distinct in time and location from the beating in the car. The jury could have found that there was a distinct interruption between when the first assault concluded with Davis vomiting on the bed and when defendant resumed his attacks in the car during the drive home.").

43. *Id.* ¶ 35 ("The State presented no evidence indicating that a distinct interruption occurred in the trailer. Even in the light most favorable to the State, all of the evidence indicated that it was an ongoing, continuous attack. Accordingly, there is substantial evidence of only one assault in the trailer.").

44. *Id.*

45. *Id.* ¶ 25.

46. *Id.* ¶ 26.

47. State v. Rambert, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*, 459 S.E.2d at 512–13.

not hit the car.[52] The trial court convicted Rambert of three separate counts of discharging a firearm into occupied property.[53]

On appeal, Rambert argued that the evidence showing that he fired three shots within such a short period of time supported only a single conviction.[54] However, the Supreme Court of North Carolina held that the three shots that hit the car were "three separate and distinct acts."[55] Therefore, it did not violate double jeopardy for Rambert to be charged with and convicted of three counts of discharging a firearm into occupied property.[56] In making this determination, the court relied on three main factors: (1) Rambert employed his thought processes each time he fired the weapon, (2) each act was distinct in time, and (3) each bullet hit the vehicle in a different place.[57] The accumulation of these factors—now coined the *Rambert* factors—led to the decision that each discharge of the firearm was a separate offense and, therefore, separately punishable.[58]

B. *The* Rambert *Factors in Assault Cases*

The court in *State v. Dew* declined to apply the *Rambert* factors to cases of assault by attempting to differentiate multiple gunshots from multiple punches.[59] However, many North Carolina courts successfully applied the *Rambert* factors to physical assault cases pre-*Dew*—a fact that is very important for sentencing purposes, as it would allow for abusers to be sentenced for more than one assault when the facts of the attack warrant it.[60] For example, in *State v. Wilkes*,[61] the North Carolina Court of Appeals applied the *Rambert* factors to the physical assault of Julie Bush by her husband, Timothy Wilkes.[62] Shortly after Bush had asked for a divorce, Wilkes entered her home and began

52. *Id.*, 459 S.E.2d at 513.

53. *Id.*, 459 S.E.2d at 513 ("[D]efendant's actions were three distinct and, therefore, separate events.").

54. *Id.* at 174–77, 459 S.E.2d at 511.

55. *Id.* at 176–77, 459 S.E.2d at 512–13.

56. *Id.* at 177, 459 S.E.2d at 513 ("[D]efendant's conviction and sentencing on three counts of discharging a firearm into occupied property did not violate double jeopardy principles.").

57. *Id.*

58. *Id.* The fact that each shot is a separate offense becomes important in the sentencing stage, as a separate sentence for each shot could, in theory, triple the defendant's overall sentence. For a greater discussion on the implications of sentencing (or not) multiple offenses and how that translates to domestic violence scenarios, see *infra* Section III.B.

59. State v. Dew, 379 N.C. 64, 2021-NCSC-124, ¶ 26 ("*Rambert* resolved an issue involving the discharge of a firearm, an act which differs from the physical assaults here in important ways. Discharging a firearm means firing a shot; each distinctly fired shot is a separate discharge of a firearm. The same is not true of assault which . . . might refer to a single harmful contact or several harmful contacts within a single incident.").

60. *See infra* Section III.B.

61. 225 N.C. App. 233, 736 S.E.2d 582, *aff'd*, 367 N.C. 116, 748 S.E.2d 146 (2013).

62. *Id.* at 239–40, 736 S.E.2d at 587–88.

punching her in the face, blackening her eyes, breaking her nose, and loosening all of her teeth.[63] When their twelve-year-old son ran into the room with a baseball bat and hit Wilkes with it to protect his mom, Wilkes almost went after their son, but Bush grabbed him by the waist and held onto him.[64] Instead of hitting their son, Wilkes took the bat and began beating Bush with it until she lost consciousness.[65]

A jury found Wilkes guilty of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, and misdemeanor child abuse.[66] Wilkes appealed, arguing in part that the conviction of two felony assaults violated double jeopardy since the assault was one singular transaction.[67] The court of appeals, applying the *Rambert* factors, decided otherwise. In considering the first factor—separate thought processes—the court reasoned that "[i]f the brief amount of thought required to pull a trigger again constitutes a separate thought process, then surely the amount of thought put into grabbing a bat from a twelve-year-old boy and then turning to use that bat in beating a woman constitutes a separate thought process."[68] As to the second factor—distinct in time—the court determined that the time it took for Wilkes to turn away and grab the bat and for Bush to fall to her knees and grab him was sufficient to satisfy this factor.[69] Finally, the third factor—injuries in different locations—was met because she had injuries to both her head and arms.[70]

The court of appeals again applied the *Rambert* factors to an assault situation in *State v. Harding*.[71] In this case, the defendant, Harding, followed a young woman from a bus stop, grabbed her hair, and tossed her to the ground.[72] As she attempted to get away, he grabbed and beat her, pinned her to the ground and choked her, and hit her in the head multiple times.[73] In applying the *Rambert* factors, the court of appeals determined that Harding could be convicted of both assault on a female and assault by strangulation, reasoning

63. *Id.* at 234–35, 736 S.E.2d at 584.

64. *Id.* at 235, 736 S.E.2d at 584–85 ("Ms. Bush grabbed Defendant around the waist and held on to him for 'a while.'").

65. *Id.* at 235, 736 S.E.2d at 585 (detailing what parts of Bush's body were struck with the bat and what injuries she sustained).

66. *Id.* at 236, 736 S.E.2d at 585.

67. *Id.* at 238, 736 S.E.2d at 586–87.

68. *Id.* at 239–40, 736 S.E.2d at 587.

69. *Id.* at 240, 736 S.E.2d at 587 ("The jury was specifically instructed that 'to find the defendant guilty of two separate assaults[,] you must find first that there was a distinct interruption in the original assault followed by a second assault.' There was sufficient evidence from the above facts for a jury to determine that the two assaults were distinct in time." (alteration in original)).

70. *Id.* at 240, 736 S.E.2d at 588. The court also clarified that Bush's use of her arms to protect herself from blows to the head was irrelevant to the analysis, so long as the injuries were sustained. *Id.*

71. 258 N.C. App. 306, 813 S.E.2d 254 (2018).

72. *Id.* at 309, 813 S.E.2d at 258.

73. *Id.* at 309–10, 813 S.E.2d at 258.

that the assault by strangulation conviction was supported by Harding "pinning [her] down . . . and choking her throat with his hands" while the assault on a female conviction was supported by Harding "grabbing [her] by her hair, tossing her down the rocky embankment, and punching her face and head multiple times."[74]

The court further explained that certain assault conduct essentially requires separate thought processes, and Harding's choice to grab her by the hair, throw her to the ground, and punch her repeatedly "required a separate thought process than his decision to pin [her] down . . . while she was on the ground and strangle her throat to quiet her screaming."[75] Next, the court determined that Harding's stopping to tell her that he was a mob boss and threaten her and her child's life was enough of a "break" for two assaults to be distinct in time.[76] Finally, the court noted that she suffered injuries to several parts of her body, meeting the final *Rambert* factor.[77]

Wilkes and *Harding* are just two examples of cases in which North Carolina courts have applied the *Rambert* factors to cases of assault; however, they are evidence that the factors can be and are analogous to assault scenarios. Furthermore, it is clear from these cases that using the *Rambert* factors can lead to multiple assault convictions without violating double jeopardy.

III. THE NEGATIVE IMPLICATIONS OF *DEW*

The court in *Dew* reasoned that it would be improper to allow the State to "charge a defendant for every punch thrown in a fight,"[78] but the court's analogy is merely a red herring in the context of these cases. Certainly, charging a defendant for every individual punch in a fight would cross a line; however, using the court's analysis, there is no difference in the charge for the person who punches their partner once and the person who beats their partner for three hours straight without mercy. By reasoning with an unlikely hypothetical, such as a person being charged for every individual punch, the court uses an extreme and implausible theoretical circumstance to avoid dealing with the actual case at hand—a case in which the defendant was *not* charged for every single punch and in which a woman was beaten and attacked for two hours straight, leaving her with various injuries and needing two surgeries.

74. *Id.* at 317, 813 S.E.2d at 263 ("The trial court specifically instructed the jury on assault on a female based on this evidence.").

75. *Id.* at 317–18, 813 S.E.2d at 263 (explaining why the actions required different thought processes).

76. *Id.* at 318, 813 S.E.2d at 263.

77. *Id.* ("The evidence showed that Anna suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation.").

78. State v. Dew, 379 N.C. 64, 2021-NCSC-124, ¶ 30.

The court stated that "[m]ultiple contacts can still be considered a single assault, even though each punch or kick would require a different thought process, would not occur simultaneously, and would land in different places on the victim's body" in an attempt to justify the rejection of the *Rambert* factors.[79] But in reality, this should promote the rejection of the distinct interruption test and the adoption of the *Rambert* factors for the reasons set out below.

A. *The* Rambert *Factors Do Not Over-Convict*

Wilkes and *Harding* are evidence that the *Rambert* factors do not lead to the defendant being convicted for *every* blow in assault cases, but rather for various types of assault conduct within an overarching attack.[80] In *Wilkes*, for example, the defendant "started punching [his victim] in the face," throwing enough punches to give her two black eyes, break her nose, and loosen all the teeth in her mouth.[81] Then, after obtaining a bat, he hit her with it, "first on her arms" and then "on her head 'over and over,'" crushing two of her fingers, breaking several bones in both of her arms and hands, and cracking her skull.[82] Although nobody knows the *precise* number of blows Bush suffered, it is clear that there were a significant number of them both from Wilkes's fists and the bat.[83] However, Wilkes was convicted of just two assault charges—assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury.[84] Therefore, the *Rambert* factors did not elicit a charge for "each blow" as the *Dew* court insinuated.[85] Rather, the *Rambert* factors provided leeway to charge fairly and appropriately based on the nature and gravity of the overall attack.

79. *Id.* ¶ 26.

80. *See supra* Section II.B.

81. State v. Wilkes, 225 N.C. App. 233, 235, 736 S.E.2d 582, 584, *aff'd*, 367 N.C. 116, 748 S.E.2d 146 (2013).

82. *Id.* at 235, 736 S.E.2d at 585. It is worth noting here the extent of the injuries suffered. After the beating

> Ms. Bush was rushed to the hospital for care, which included multiple surgeries inserting metal plates into her left arm and right hand. From conversations with EMS, Detective Williams "was uncertain . . . if [Ms. Bush] was going to make it through the night." It took several months for the open wound on Ms. Bush's head to heal and for Ms. Bush to fully recover her hearing, vision, and writing ability. At the time of the trial, Ms. Bush continued to suffer from non-positional proximal vertigo, and to this day, she has no sense of smell due to severed nerves.

Id. at 235–36, 736 S.E.2d at 585 (alteration in original).

83. *See id.*

84. *Id.* at 236, 736 S.E.2d at 585.

85. *See supra* notes 37–39 and accompanying text.

Similarly, in *Harding*, the defendant beat his victim, choked her, punched her in the face, and then "hit [her] again in the head multiple times."[86] Again, although the exact number of punches is unknown, the evidence insinuates that there were many. However, Harding was convicted of only two assault charges: assault on a female and assault by strangulation.[87] Instead of charging for every single contact, the court applied the *Rambert* factors to differentiate types of assault conduct in the overall encounter.[88] Once again, this shows that the *Rambert* factors do not over-convict in assault cases, but rather take a more holistic approach to the encounter and convict accordingly.

B. *The Distinct Interruption Test Fails To Protect Abuse Victims*

Under the distinct interruption approach, there is no difference between a six-hour-long beating and a single punch, so long as the assailant does not take a bathroom break. What is even more appalling is that this approach views the stories of all victims in the same light—a very dangerous habit that fails to recognize underlying patterns of abuse and manipulation. No two victims' experiences are the same, and this must be considered when charging and sentencing abusers. This is particularly true considering eighteen percent of women who experience abuse are victims of systemic or continuous abuse, and "[r]arely does the reported abuse incident represent a single isolated, atypical act."[89]

The need to give assault charges greater consideration is clear based on how sentence lengths can impact victims of abuse. In *State v. Wilkes*, for example, the North Carolina Court of Appeals authorized multiple sentences by affirming multiple assault convictions.[90] Wilkes's case was sent back to the trial court for resentencing, where he would face seventy-three to ninety-seven months for the assault with a deadly weapon with intent to kill inflicting serious injury conviction, plus an additional thirty-one to forty-seven months for the assault with a deadly weapon inflicting serious injury conviction.[91] This distinction is crucial for victims of domestic violence, like Bush, as the additional conviction could potentially give her four more years to find access

86. State v. Harding, 258 N.C. App. 306, 309–10, 813 S.E.2d 254, 258 (2018) (alteration in original).

87. *Id.* at 315, 813 S.E.2d at 261.

88. *Id.* at 317, 813 S.E.2d at 263.

89. ANDREW R. KLEIN, U.S. DEP'T OF JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 4 (2009) ("Appropriate charges should be filed that cover the range of criminal behaviors of abusers. . . . Although called upon to respond to discrete criminal charges, judges must insist that they receive sufficient information to reveal any pattern of systemic, abusive behaviors in order to accurately understand the victim's vulnerability.").

90. *See* 225 N.C. App. 233, 241, 736 S.E.2d 582, 588 (2013), *aff'd*, 367 N.C. 116, 748 S.E.2d 146 (2013); *supra* Section II.B.

91. *Wilkes*, 225 N.C. App. at 236, 736 S.E.2d at 585.

to housing for her and her son, to leave her marriage, and to live without fear of retaliation by her abusive husband. Note, however, that the sentences here are more extreme than many, given the "intent to kill" aspect of Wilkes's conviction.[92] Sometimes, the difference between one assault conviction and two can be the only thing that sentences a repeat abuser to any detention time at all and, therefore, gives the victim any chance to get away from their abuser.[93]

For example, if a person in North Carolina inflicts serious injury upon someone that they have a personal relationship with, and the assault occurred in the presence of a minor (like in *Wilkes*), they may merely be sentenced to a community punishment and placed on supervised probation.[94] This means they may not serve any jail time and could, in theory, simply return to the home of their victim and harm them again. This is a likely possibility as approximately forty percent of abuse defendants "reabuse[] their victims within one year" and "[m]ultiple prosecution and arrest studies broadly concur that abusers who come to the attention of the criminal justice system who reabuse are likely to do so sooner rather than later."[95] However, if the person committed a *second* violation of this nature, or for our purposes was convicted of two assaults, they would automatically be sentenced to a minimum of thirty days of active jail time.[96]

For a victim of domestic violence, those thirty days could quite literally save their life. That is because "[a]busers repeatedly go to extremes to prevent the[ir] victim from leaving."[97] Right when a person leaves or attempts to leave is the most dangerous time for domestic and intimate partner violence victims.[98] In fact, "interviews with men who have killed their wives indicate that either threats of separation by their partner or actual separation are most often the precipitating events that lead to the murder."[99] Therefore, the determination

92. Crimes done with an intent to kill tend to conjure much more severe sentences than crimes done without such an intent. A finding of an intent to kill can even lead to the death penalty in certain circumstances. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1301–03 (1997).

93. One study found that "where almost three-quarters of the suspects were charged with some form of assault and/or battery, about one-quarter of the defendants were diverted after a plea to sufficient facts, another quarter were sentenced to probation, and a little over one-tenth were imprisoned." KLEIN, *supra* note 89, at 46. Another study, which looked at over 1,000 domestic violence arrests in three states, found that of all the defendants convicted, "three-quarters were incarcerated, sentenced to probation and/or fined. A little less than half (46.7 percent) were ordered into either anger management or batterer programs." *Id.*

94. N.C. GEN. STAT. § 14-33(d) (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.).

95. KLEIN, *supra* note 89, at 40. Another study in Indianapolis found that "almost a quarter of the defendants reabused their victims before the pending trial." *Id.*

96. § 14-33(d) (LEXIS).

97. *Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay [https://perma.cc/6WBZ-AHFK].

98. *Id.*

99. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 37 (2000).

that two assaults took place, as opposed to one, could be the formative factor in whether a victim of domestic violence has the time and resources to get out of the relationship and find a safe space or not. Furthermore, there is a significant correlation between sentence severity and reduced recidivism in domestic violence cases.[100] However, courts using the distinct interruption test as described in *Dew* may fail to find a distinct interruption in an extensive assault, merely charge for one assault that would only lead to probation when more was warranted and, therefore, deny victims a chance to escape.

IV. HOW ASSAULTS SHOULD BE ANALYZED

The *Dew* court was not completely irrational in criticizing the *Rambert* factors, as the vagueness of what constitutes independent thought processes and what makes two things distinct in time could make application of the factors a bit difficult and arbitrary. However, compared to the distinct interruption test and its implications for domestic violence victims, the *Rambert* factors are, for lack of a better term, the lesser of two evils in that they are more flexible and allow for multiple ways to differentiate assaults from the same encounter.[101]

Therefore, North Carolina courts should adopt a version of the *Rambert* factors that would apply specifically to assault cases. Physical assaults are ripe to have their own test to delineate when an assault warrants more than one assault charge because of the inherently physical and personal qualities of the charges, the unique circumstances surrounding victims of domestic violence, and the unfortunately prominent rates of systemic abuse.[102]

Instead of having a mere list of factors, assault cases should instead involve a balancing test that considers the *Rambert* factors without any of them being dispositive on their own. This would be particularly valuable because the effect of one of the factors may be so egregious as to warrant multiple charges, even if another factor is not as strong. For example, it is possible that a person may be brutally beaten to the point that they have multiple broken bones and a head injury; however, the beating may have happened without any evidence of a pause in the attack. The lack of pause in the attack alone should not determine

100. One study found that

> more intrusive sentences — including jail, work release, electronic monitoring and/or probation — significantly reduced rearrest for domestic violence as compared to the less intrusive sentences of fines or suspended sentences without probation. The difference was statistically significant: Rearrests were 23.3 percent for defendants with more intrusive dispositions and 66 percent for those with less intrusive dispositions.

KLEIN, *supra* note 89, at 47.

101. *See supra* Part III.

102. *See supra* note 89 and accompanying text.

whether the abuser may be charged with more than one assault charge if all the other factors weigh in favor of multiple charges.[103]

In addition to balancing the defendant's apparent thought processes, the distinction in time between two potential assaults, and the areas of injury, the court should also consider the length of time of the overall assault. This would help to differentiate between assaults that take place over several hours and ones that only last a few minutes. If both assaults involve injuries to the same parts of the victims' bodies and both seem to have been constant, the total length of time of the course of the beating could be the factor that weighs in favor of the former assault warranting two charges but the latter warranting just one. This is further advanced by the arbitrariness of the distinct interruption test relied on in *Dew*, in which a brief pause in physical force to threaten someone may be enough time to warrant two charges, regardless of how long the overarching assault was.[104] Nothing as important and serious as assault convictions should rest on such a mere happenstance.

However, lower courts are no longer at liberty to apply such a test, given the Supreme Court of North Carolina's decision in *Dew*.[105] Therefore, until the Supreme Court of North Carolina reconsiders its decision in *Dew*, the most feasible option for change would be from the state legislature.[106] The North Carolina state legislature could (and should) adopt a well-considered definition of assault to abrogate *Dew*, which would essentially change the analysis courts must use to differentiate between assaults. North Carolina lawmakers, in seeing the results from the distinct interruption test, now have a reason to reconsider criminal assault and define it similarly to other states.[107] A definition similar to that of California's Penal Code—which considers an assault to be an unlawful

103. "Domestic violence sentencing should reflect defendants' prior criminal histories as well as abuse histories, as both indicate risk of reabuse as well as general criminality." KLEIN, *supra* note 89, at 48.

104. *See supra* Section III.B.

105. John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, STAN. L. SCH. CHINA GUIDING CASES PROJECT, Feb. 29, 2016, at 1, 2 ("Each district court thus follows precedents handed down by the Supreme Court and by the court of appeals in the circuit encompassing the district court. Each court of appeals follows its own precedents and precedents handed down by the Supreme Court.").

106. *Id.* at 3 ("Congressional action by statute may overturn judicial decisions on statutory issues.").

107. *See, e.g.*, CAL. PENAL CODE § 240 (Westlaw through Ch. 997 of the 2022 Reg. Sess.) ("An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."); OKLA. STAT. ANN. tit. 21 § 641 (Westlaw through legislation of the Second Reg. Sess. and First and Second Extraordinary Sesss. of the 58th Leg. (2022)) ("An assault is any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another."); FLA. STAT. § 784.011(1) (2022) ("An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."); KAN. STAT. ANN. § 21-5412(a) (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022) ("Assault is knowingly placing another person in reasonable apprehension of immediate bodily harm.").

attempt with present ability to "commit a violent injury on the person of another"[108]—would likely warrant the distinct interruption test unworkable, as each "violent injury" could constitute its own assault. Likewise, more conservative states, such as Florida and Kansas, define assault as merely requiring fear of the imminence of bodily harm.[109] Under such a definition, each incident causing fear of imminent bodily harm could constitute its own assault, similarly voiding the workability of the distinct interruption test. Defining assault in such a way could force the North Carolina Supreme Court's hand to reconsider *Dew*. With such a definition, a two-hour, nonstop beating would surely warrant more than one assault charge (given there was more than one "violent injury" or "fear of imminent bodily injury")—an outcome that would have been appropriate in *Dew*.

CONCLUSION

The court in *Dew* determined how all courts in North Carolina should approach assault cases and, in doing so, required all courts to use a test that is unlikely to lead to just results for domestic violence victims. The distinct interruption test fails to consider factors such as the length of time of the beating and, as such, does not take into consideration the full picture of any assault. Rather, it allows for mere coincidences to determine if an assault warrants one conviction or two.

By taking a balancing approach to the *Rambert* factors and further considering the length of time of an overarching assault, courts would be able to consider assault cases more effectively in general. Such an approach would allow courts to consider the totality of the circumstances, differentiate between assaults in a nonarbitrary fashion, and most importantly, provide relief for victims whose safety may depend on the court's ultimate decision. Considering assaults on a case-by-case basis in such a manner would make North Carolina courts much more equipped to consider all of the surrounding circumstances of an assault and properly convict individuals based on the gravity of their conduct overall, rather than allowing the analysis to rely on mere flukes, such as if there was an infinitesimal pause in a beating for a defendant to take a sip of water. However, until the Supreme Court of North Carolina reconsiders its position, it is ultimately up to the legislature to right this wrong and provide victims of domestic violence an opportunity to escape from the grasp of their abusers before it is too late.

108. CAL. PENAL CODE § 240 (Westlaw).

109. *See* FLA. STAT. § 784.011(1); KAN. STAT. ANN. § 21-5412(a) (Westlaw).

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