

69648-3

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NO. 69648-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MELINA HARRIS

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**1. The trial court erroneously ruled that Ms. Harris's actions the night of the party were a continuing course of conduct.**

- a. Ms. Harris's actions were separate and distinct acts, which required a unanimity instruction or an election of an act or the purposes of a conviction.

Ms. Harris was convicted of assault in the third degree contrary to 9A.36.031(1)(g). The jury was given the standard WPIC instructions for obstruction.<sup>1</sup> CP 121, 124, 127. The trial court denied Ms. Harris's request for a jury instruction that required the jury to indicate which specific act constituted assault in the third degree. 11/1/12 RP 13-14. This is referred to as a *Petrich* instruction. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). During closing arguments the State

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<sup>1</sup> "A person commits the crime of obstructing a law enforcement officer when he or she willfully hinders, delays, or obstructs any law enforcement officer in the discharge of the law enforcement officer's official powers or duties." CP 88.

"To convict the defendant of the crime of obstructing a law enforcement officer in count two, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 29, 2011, the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official power or duties;
- (2) That the defendant knew that the law enforcement officer was discharging official duties at the time; and
- (3) That the acts occurred in the State of Washington.

If you find the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count two.

On the other hand, if, after weighing all the of the evidence, you have a reasonable doubt as to anyone of these elements, then it will be your duty to return a verdict of not guilty as to count two. CP 90.

argued that the shoe, bite or grabbing incident could be the basis for the assault conviction. 11/5/12 RP 30-31.

What else did she do?... She hit Officer Doherty. We already walked through that, walked through the assault. She hit him with shoes to his head and chest. Certainly this is hindering or delaying a law enforcement officer. She grabbed onto Officer Doherty. We talked in detail about this as well. Once the contact was broken, she grabbed him again. She bit Officer Doherty.

11/6/12 RP 45-46.

The State argues that the trial court was correct in its ruling regarding Ms. Harris's conduct and therefore she was not entitled to a *Petrich* instruction or an election by the State. State's Response Brief (SRB) 9-10. The State relies on *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). However, *Handran* did not have an intervening event between actions that broke the chain of continuing conduct. *Id.*

In *Handran* the defendant broke into his ex-wife's apartment and was charged with first-degree burglary for assaulting her. The court ruled that the defendant's actions, both kissing and hitting the victim, did not warrant a *Petrich* instruction because they took place in one location, involved the same victim and occurred in a short period of time. *Handran*, 113 Wn.2d at 17. In contrast, Ms. Harris's acts were clearly distinct and separate as they were interrupted by a separate

action of Officer Doherty's. Ms. Harris raised her hand holding her shoes in an attempt to shield her eyes from Officer Doherty's blinding flashlight. 10/18/12 RP 78; 10/22/12 RP 34, 37. Officer Doherty grabbed Ms. Harris after she raised her arm for protection and she has no memory of her conduct following that act. She allegedly fell into and bit Officer Doherty as she was manhandled to the ground. Ms. Harris's only recollection of the event being her struggle to breathe and fading in and out of consciousness. 10/18/12 RP 78, 80; 11/5/12 RP 57-58. Although close in time these acts were interrupted by an intervening event, which easily distinguishes this case from *Handran*.

- b. The trial court's failure to instruct and the State's failure to elect and act resulted in a violation of Ms. Harris's right to a unanimous jury.

The right to a unanimous jury verdict is fundamental. U.S. Const. amend. VI; Wash. Const. Art., I, §§ 21, 22. A jury must unanimously agree on the act that underlies a conviction. *Petrich*, 101 Wn.2d at 565; *State v. Workman*, 66 Wash. 292, 294-95, 119 P.2d 751 (1911). When multiple acts are charged that could independently prove one count, the court should explain to the jury that its verdict must be based on a unanimous finding that a certain act was proven beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 572.

Here the jury failed to unanimously convict Ms. Harris of assault in the third degree because the trial court erroneously found that Ms. Harris's conduct was not a series of separate and distinct acts. Because of this ruling the jury was not instructed on the issue. In addition the State failed to elect a specific act during closing arguments.

Either by clear jury instructions or unambiguous charging practices, the court needs to ensure the jury's verdict rests on unanimous agreement of separate acts necessary for each conviction. *See State v. Vander Houwen*, 163 Wn.2d 25, 37, 177 P.3d 93 (2008). ("In the absence of a unanimity jury instruction, each juror could have convicted Vander Houwen based on different criminal acts"); *see also State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) ("In 'multiple acts' cases, the jury must unanimously agree as to which incident constituted the crime charged.").

Contrary to the State's argument Officer Doherty's intervening actions created distinct and separate acts and Ms. Harris's actions were not a continuing course of conduct. Therefore she was denied a unanimous jury when the trial court refused to give her proposed *Petrich* instruction and the State failed to elect an act.

B. CONCLUSION

For the reasons stated above and in her opening brief, Mr. Harris respectfully asks this Court to reverse her convictions and remand for a new trial.

DATED this 6<sup>th</sup> day of January 2014.

Respectfully submitted,

  
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