

NO. 45383-5-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL S. VAUGHN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR MASON COURT  
The Honorable Amber L. Finlay, Judge  
Cause No. 12-1-00482-0

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count III, obstructing a law enforcement officer, from the jury for lack of sufficient evidence.
02. The trial court erred in not instructing the jury that it had to be unanimous as to the specific act constituting the offense of obstructing a law enforcement officer.
03. The trial court erred in not taking count II, driving under the influence, from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Vaughn committed the offense of obstructing a law enforcement officer by both of the means the prosecutor submitted to the jury?  
[Assignment of Error No. 1].
02. Whether the trial court erred by failing to instruct the jury that it had to be unanimous as to the specific act constituting the offense of obstructing a law enforcement officer where the prosecutor argued two means of committing the offense to the jury?  
[Assignment of Error No. 2].
01. Whether there was sufficient evidence that Vaughn drove his motor vehicle while under the influence of or affected by intoxicating liquor?  
[Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Michael S. Vaughn was charged by third amended information filed in Mason County Superior Court July 3, 2013, with malicious mischief in the first degree, count I, driving under the influence, count II, and obstructing a law enforcement officer, count III, contrary to RCWs 9A.48.070(1)(b), 46.61.502(1), and 9A.76.020(1). [CP 42-43].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 50]. Trial to a jury commenced July 3, the Honorable Amber L. Finlay presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 102-06].

Vaughn was found guilty as charged, sentenced within his standard range and timely notice of this appeal followed. [CP 2-22].

02. Substantive Facts

Sometime after dark on November 18, 2012, Vaughn drove away from Kenneth Raney's house in a white Ford Focus. [RP 113, 116, 120]. Raney described Vaughn's condition as "very intoxicated." [RP 117]. Later that evening, a white Ford Focus registered to Vaughn was observed pulling into the parking lot of Sandi's Deli in Belfair. [RP 32, 36-37]. Vaughn entered the store alone and caused a disturbance, which resulted in Deputy Erik Heilman responding to the

scene at 10:30. [RP 33, 36-37, 39, 45, 47]. Trooper Adam Richardson arrived separately at 10:58. [RP 127].

Vaughn was unsteady on his feet and “reeked of intoxicants.” [RP 131]. When questioned by Richardson, he became “very agitated.” [RP 131]. He admitted to drinking alcohol in his car but refused to submit to either a field sobriety or breath test. [RP 132, 134, 136-37]. A search of his person incident to his arrest produced keys to the Ford, which was registered to him. [RP 132]. Several empty beer cans were observed in his car. [RP 128]. There were two large objects in the back seat that would prohibit anyone from occupying the space, and it appeared no one had been sitting in the front passenger’s seat. [RP 128-29]. Vaughn was transported to the hospital for treatment of an unrelated injury and for the taking of a blood sample pursuant to a warrant. [RP 48, 129, 138].

While in the patrol car, Vaughn yelled and screamed and continually banged his head against the plastic partition between the front and back seats before slamming his head into the right rear door window, which eventually broke the window seal, causing the window to pop out of its frame. [RP 54-55, 138-142, 148]. It took “a few days or so to get the parts, so the vehicle had to be taken out of service basically because that seal’s broken and it’s a rainy time of the year. You can’t place a subject in your back seat with a leaky window.” [RP 148].

When the laboratory assistant at the hospital attempted to take Vaughn's blood, he "spun up and had to be restrained" by the police. [RP 56, 145]. A sample was collected at about 1:30 a.m. [RP 66]. Vaughn's blood alcohol level was between .183 and .217, and determined to be .23 two hours earlier. [RP 77-79].

When Vaughn was taken inside the jail, he demanded a cup of water and as a result was "placed in a separate isolated cell that's reserved for uncooperative people(,)" which Richardson claimed extended his time in performing his duties. [RP 149].

Vaughn denied driving to Sandi's Deli [RP 153], saying he arrived with a person named Ted, who "handed me the keys and walked off." [RP 159-60].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT VAUGHN COMMITTED THE OFFENSE OF OBSTRUCTING A LAW ENFORCEMENT OFFICER BY BOTH OF THE MEANS THE PROSECUTOR SUBMITTED TO THE JURY.

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of

the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

To establish obstruction of a law enforcement officer, the State had to prove that Vaughn willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of his or her powers or duties. RCW 9A.76.020(1).

The prosecutor argued to the jury that it could convict Vaughn of the offense by two means:

You know, it’s happened both at the hospital when he had to have his arm pulled down and he had to be held down by three officers – three officers had to hold him down while his blood was drawn. When they got to the jail he was uncooperative, wouldn’t do what they said, extended

Trooper Richard's presence there. He certainly hindered and delayed Trooper Richardson in both of these matters.

[RP 180].

#### 01.1 Hospital Incident

At the hospital, evidence established that “when the tech came in to draw the blood(,)” Vaughn “spun up and had to be restrained” by three officers. [RP 56]. He said “no, you’re not taking my blood.” [RP 144].

“Law enforcement officer” means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those items are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life safety codes.

RCW 9A.76.020(2).

Technically, Vaughn was resisting the efforts of the laboratory assistant to withdraw his blood, and for a brief moment he was successful. In this context, he was not willfully hindering or delaying or obstructing the efforts of the officers who were present, who, as it turns out, hindered Vaughn's efforts to resist the intended actions of the laboratory assistant.

#### 01.2 Jail Incident

Richardson explained that after arriving at the jail, Vaughn became uncooperative when asked to put his hands on the wall,

as you're suppose to when they conduct a search, I believe he turned around and demanded a cup of water. They had to physically remove him from the area before they could even search him and place him in a separate cell that's reserved for uncooperative people.

[RP 149].

A cup of water, even if obnoxiously requested, is not the basis for an obstruction charge, and any claim to the contrary is just silly and only adds a level of absurdity to the charge. This is simple.

### 01.3 Conclusion

If this court finds the State failed to carry its burden of proof on both alleged means, then dismissal is the remedy. However, if it is determined the State was successful on only one of the alleged means, then remand for a new trial is the solution. In the latter instance, since there is no way of knowing whether any of the jurors relied on the "hospital incident" instead of the "jail incident" or vice versa, it cannot be concluded that the verdict was unanimous on the means by which the offense was accomplished. See State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994) ("if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.").

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02. A CONVICTION FOR OBSTRUCTING A  
LAW ENFORCEMENT OFFICER MUST BE  
SET ASIDE WHERE THE PROSECUTOR  
ARGUED TWO MEANS OF COMMITTING  
THE OFFENSE AND THE COURT FAILED  
TO GIVE A UNANIMITY INSTRUCTION.

Criminal defendants have a constitutional right to a unanimous jury verdict. WASH. CONST. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d at 707. “The right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury; it may be raised for the first time on appeal.” State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988); See also RAP 2.5(a)(3). This assignment of error is reviewed de novo. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

A defendant’s constitutional right to a unanimous jury verdict includes the right to express unanimity as to the means by which the defendant committed the offense. State v. Ortega-Martinez, 124 Wn.2d at 707-08 (citing Const. art. 1 sec. 21). Unanimity is not required as to the means of committing an offense if substantial evidence supports each of the alternative means of committing the crime. State v. Whitney, 108 Wn.2d 506, 508, 739 P.2d 1150 (1987).

Where one of the alternative means fails for lack of evidence and there is only a general verdict, the verdict cannot stand unless the

reviewing court can determine that the verdict was founded on one of the means supported by substantial evidence. State v. Bland, 71 Wn. App. 345, 358, 860 P.2d 1046 (1993). When the State presents evidence of multiple acts of similar misconduct, any one of which could form the basis of the count charged, the State must either elect which of these acts it relies on for a conviction or the trial court must instruct that all 12 jurors must agree that the State has proved the same underlying act beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). Where, as here, there is neither an election nor a unanimity instruction in a multiple act case, a constitutional error occurs. Id. at 512. This type of error requires a new trial unless shown to be harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

As illustrated in the proceeding section, the prosecutor argued that the jury could convict Vaughn of obstruction of a law enforcement officer by two means: (1) hospital incident, (2) jail incident. He made no election and no unanimity instruction was given. In consequence, since, as previously argued, there is a question as to the sufficiency of each of the two acts argued by the prosecutor, and since there is no way to determine which if not both of the means the jurors relied on in reaching their

verdict, a unanimity instruction was required and reversal of the conviction follows.

03. THERE WAS INSUFFICIENT EVIDENCE THAT VAUGHN DROVE HIS MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF OR AFFECTED BY INTOXICATING LIQUOR.<sup>1</sup>

The State was required to prove that Vaughn drove his vehicle while under the influence of or affected by intoxicating liquor or where he had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving. [CP 32, 43].

The narrow question is whether there is sufficient evidence to establish that Vaughn drove his white Ford Focus into the parking lot of Sandi's Deli before entering the establishment? What happened after that is of no consequence or assistance in solving this question. Whether Vaughn was going to drive away after leaving the deli or whether he told Richardson there was no proof he had been driving serves little purpose, for the evidence is what it is. Vaughn was last seen driving his car earlier that evening leaving Kenneth Raney's house. [RP 120-21]. Sometime later, Vaughn's car was driven into the parking lot at Sandi's Deli. No one

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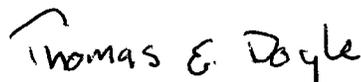
<sup>1</sup> The prior discussion relating to the test for the sufficiency of the evidence is incorporated herein for the sole purpose of avoiding needless duplication.

saw who was driving the car and there was no direct evidence to establish the person's identity. Anything else is mere speculation. Sure, Vaughn was seen near the car that evening and there was testimony that it would have been difficult for two people to arrive in the car given the nature of its contents, but there was also his assertion that another person had been the driver and that he didn't recall items stacked on the seats in his vehicle. [RP 154-55]. Either way, this does not establish who drove the vehicle into the parking lot. Vaughn was correct when he told Richardson that there was insufficient proof that he was the driver [RP 156], with the result that his conviction for driving under the influence must be reversed.

E. CONCLUSION

Based on the above, Vaughn respectfully requests this court to dismiss his conviction for driving under the influence and to reverse his conviction for obstructing a law enforcement officer and remand for retrial.

DATED this 28<sup>th</sup> day of February 2014.



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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 28<sup>th</sup> day of February 2014

Handwritten signature of Thomas E. Doyle in black ink.

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# DOYLE LAW OFFICE

**February 28, 2014 - 4:48 PM**

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