

No. 45383-5-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

MICHAEL S. VAUGHN, APPELLANT

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Appeal from the Superior Court of Mason County  
State of Washington  
The Honorable Judge Amber L. Finlay

No. 12-1-00482-0

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**BRIEF OF RESPONDENT**

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A. STATE'S RESTATEMENT OF APPELLANT'S ASSIGNMENTS OF ERROR

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

B. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The State charged Vaughn with only one count of obstructing a law enforcement officer, but the State presented evidence of two separate acts that constituted the offense. There was no unanimity instruction in regard to the two acts, and the State did not choose between the two acts when arguing to the jury. On Appeal, Vaughn avers for the first time that these facts give rise to an "alternative means" unanimity issue. The State avers that these facts give rise to a "multiple acts" unanimity issue rather than an "alternative means" issue.
2. Vaughn raises three separate issues on appeal. Two of these issues are related to the charge of obstruction of a law enforcement officer, and the third issue is related to the charge of driving under the influence. Each of the three issues raised by Vaughn relies on an argument that the evidence was insufficient to sustain the jury's guilty verdict in regard to these issues. Accordingly, the State provides the following argument in regard to the standard of review applicable to challenges to the sufficiency of the evidence.

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3. Vaughn avers that the evidence at trial was insufficient to sustain the jury's verdict of guilty for the crime of obstruction of a law enforcement officer because the evidence was insufficient in regard to either one or both incidents of obstruction for which the State presented evidence. The State counters that the evidence was sufficient in regard to both incidents.
4. The State provided evidence to the jury in regard to two separate incidents of obstruction of a law enforcement officer but charged only one count of obstruction. The State did not choose which act of obstruction that it was relying on for the single count of obstruction that it charged and tried to the jury, and no unanimity instruction was provided to the jury. Therefore, a unanimity error occurred in this case, but the error was harmless beyond a reasonable doubt on the facts of this case.
5. Vaughn contends that there was no evidence that he was driving and that, therefore, the evidence at trial was insufficient to sustain the jury's verdict of guilty for the crime of driving under the influence. But, there was both direct and circumstantial evidence that proved that Vaughn was driving while impaired; therefore, the evidence was sufficient to sustain the jury's verdict.

B. FACTS AND STATEMENT OF THE CASE

With the exception of the following additional facts, as needed to develop the State's arguments, below, the State accepts Vaughn's statement of facts.

The additional facts include the following:

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Vaughn drove away from Kenneth Raney's house at about 10:00 in the evening on November 18, 2012, when Raney called 911 to report "a rukus." RP 116-17. Vaughn had been at Raney's house all day, and he had been drinking whiskey. RP 114-15. When he drove away in his white, Ford Fusion, he was very intoxicated. RP 116-17.

Vaughn arrived at Sandy's Deli in Belfair, Washington, about 18 minutes later. RP 122, 125-126. Charlotte Beltran, a clerk at the store, saw Vaughn's car pull up at the store and saw Vaughn immediately enter the store. RP 35-36. She did not see anyone with him. RP 39. Beltran called 911 because Vaughn was causing a disturbance. RP 32, 35, 38-39, 43-44.

The timing was established because officers heard the 911 call from Raney's house at 31 NE Sail Court in Belfair and then heard the 911 call from Sandy's Deli 18 minutes later. RP 122, 125, 126. Vaughn testified and admitted that he left Raney's house and went to Sandy's Deli, but he denied driving. RP 153. Raney testified that Vaughn drove away from his house. RP 117.

When Deputy Heilman arrived, he placed Vaughn under arrest. RP 45-46, 48. When he was arrested, Vaughn was highly intoxicated. RP 50.

Vaughn did not drink any alcohol between the time he arrived at the deli and when he was arrested or after his arrest. RP 39, 51.

Trooper Richardson arrived and obtained a search warrant for a sample of Vaughn's blood to determine his blood alcohol content. RP 54-55. Trooper Richardson testified that when he told Vaughn that he had a search warrant for his blood and tried to obtain a sample of his blood, Vaughn "basically curled up his left arm, the arm that was free that we were planning on drawing blood from, curled it up to his face like this and said no, you're not taking my blood." RP 144. Trooper Richardson was forced to pull Vaughn's arm to the gurney, and while officers and a nurse tried to hold Vaughn's arm down to the gurney, Vaughn began kicking and flailing his legs. RP 144-45. Trooper Richardson testified that he "had to jump up on the gurney and sit on [Vaughn's] legs to hold him down as well as sit on his arm." RP 145.

The blood test revealed that Vaughn's blood alcohol content was 0.203 grams per 100 milliliters of blood. RP 75-76. The blood was collected 1:30 a.m. on November 19, approximately three to three and half hours after Vaughn drove to Sandy's Deli. RP 66. Extrapolating to the time of driving showed that Vaughn's blood alcohol content was approximately 0.23 grams per milliliter at the time of driving. RP 79.

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When Vaughn was booked into the jail, officers had to physically remove him from the booking area and place in a separate isolated cell before they could search him, because when they tried to search him he became uncooperative, and rather than place his hands on the wall like he was supposed to, he instead “turned around and demanded a cup of water.” RP 148-49.

C. ARGUMENT

1. The State charged Vaughn with only one count of obstructing a law enforcement officer, but the State presented evidence of two separate acts that constituted the offense. There was no unanimity instruction in regard to the two acts, and the State did not choose between the two acts when arguing to the jury. On Appeal, Vaughn avers for the first time that these facts give rise to an “alternative means” unanimity issue. The State avers that these facts give rise to a “multiple acts” unanimity issue rather than an “alternative means” issue.

At the outset, the State avers that the instant case is not an alternative means case. At issue in the instant case is one count of the charge of obstructing a law enforcement officer, which was charged as follows:

In the County of Mason, State of Washington, on or about the 19<sup>th</sup> day of November, 2012, the above-named defendant, MICHAEL S. VAUGHN, did commit OBSTRUCTING A LAW

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ENFORCEMENT OFFICER, a Gross Misdemeanor, in that said defendant did willfully hinder, delay, or obstruct a law enforcement officer in the discharge of his/her official powers and duties; contrary to RCW 9A.76.020(1),...

CP 43 (Count III, Third Amended Complaint).

At trial, the State presented evidence of two separate incidents that it later argued in closing argument supported the charge of obstructing a law enforcement officer. RP 145-46, 148-49, 180. The first of these incidents occurred when Vaughn balled up his arm rather than allow officers to execute a search warrant and obtain a sample of his blood. RP 145-46. The second incident occurred when Vaughn refused to submit to a search of his person when being booked into the jail. RP 148-49. The means of committing the offense of obstructing a law enforcement officer in each case is identical because in each case Vaughn hindered, delayed or obstructed a law enforcement officer in the discharge of his or her official powers and duties. *See*, RCW 9A.76.020(1). Thus, the instant case is not an alternative means case but is, instead, a separate criminal acts case. *See, e.g., State v. Bobenhouse*, 166 Wn.2d 881, 892-94, 214 P.3d 907 (2009); *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405-06,

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756 P.2d 105 (1988) (discussing the difference between an alternative means case and a separate criminal acts case).

2. Vaughn raises three separate issues on appeal. Two of these issues are related to the charge of obstruction of a law enforcement officer, and the third issue is related to the charge of driving under the influence. Each of the three issues raised by Vaughn relies on an argument that the evidence was insufficient to sustain the jury's guilty verdict in regard to these issues. Accordingly, the State provides the following argument in regard to the standard of review applicable to challenges to the sufficiency of the evidence.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the

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evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004),  
*abrogated on other grounds by Crawford v. Washington*. 541 U.S. 36, 124  
S.Ct. 1354, 158 L.Ed.2d 177 (2004).

3. Vaughn avers that the evidence at trial was insufficient to sustain the jury's verdict of guilty for the crime of obstruction of a law enforcement officer because the evidence was insufficient in regard to either one or both incidents of obstruction for which the State presented evidence. The State counters that the evidence was sufficient in regard to both incidents.

Vaughn argues that the evidence that he resisted a blood draw at the hospital was insufficient to sustain his conviction for obstructing a law enforcement officer because he was resisting the blood draw technician rather than resisting a law enforcement officer. Br. of Appellant at 6. But the evidence shows that Vaughn became belligerent and balled up his arm before the blood draw technician attempted a blood draw, when officers informed him of the search warrant. RP 144-45. The logical inference from this evidence is that Vaughn was attempting to hinder, delay, or obstruct the officer's execution of the search warrant; thus, the evidence is sufficient to support the jury's conviction. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

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Vaughn also argues that the evidence was insufficient to support a conviction for obstruction of a law enforcement officer where the evidence arises out of his refusal to submit to a search of his person when being booked into the jail. Br. of Appellant at 6-7. Vaughn contends that all that he did was to ask for a cup of water and that asking for a cup of water cannot constitute the charge of obstruction. *Id.*

But Vaughn's request for a cup of water was merely incidental to his act of obstructing. RP 148-49. The facts may appear trivial given that the crime arises out of the irrational antics of a highly intoxicated man who was being booked into a county jail, but the question on review is not whether the offense is *de minimis* – instead, the question is whether the evidence is sufficient to support a conviction for obstructing a law enforcement officer.

The evidence shows that when Vaughn was booked into the jail, he refused to put his hands on the wall and submit to a search as required. RP 148-49. Instead, he spun around rather than put his hands on the wall. *Id.* At the same time, he may have demanded a cup of water. *Id.* But, arguably, there is a rational limit to what might be judged to be a rational time and place to demand a cup of water.

Here, it was within the jury's province to weigh the evidence and infer that Vaughn had no legitimate basis for making demands or setting conditions to his compliance with the search procedure when being booked into the jail and that he willfully hindered, delayed or obstructed the law enforcement officers in the discharge of their official powers or duties. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Vaughn's refusal to comply with the search process forced jail officers to place him in a separate, isolated cell before they could carry on and complete their duties. RP 148-49. Even if Vaughn's acts may be judged to have been trivial or *de minimis*, his acts nevertheless hindered, delayed and obstructed law enforcement officers in the discharge of their powers and duties, constituting the offense of obstruction of a law enforcement officer. RCW 9A.75.020(1).

4. The State provided evidence to the jury in regard to two separate incidents of obstruction of a law enforcement officer but charged only one count of obstruction. The State did not choose which act of obstruction that it was relying on for the single count of obstruction that it charged and tried to the jury, and no unanimity instruction was provided to the jury. Therefore, a unanimity error occurred in this case, but the error was harmless beyond a reasonable doubt on the facts of this case.

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Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of multiple acts that could constitute the crime charged, “the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act.” *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. *Kitchen* at 411. “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.” *Id.*

In the instant case, the State presented evidence and argument in regard to two separate acts that constitute the offense of obstructing. RP 144-45, 148-49, 180. Although Vaughn did not raise the issue of unanimity in the trial court, he may raise it for the first time on appeal because it concerns a manifest constitutional error. *State v. Bobenhouse*, 166 Wash.2d 881, 892 n. 4, 214 P.3d 907 (2009) (citing *State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008)). In multiple acts

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cases, “when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt,” the error is harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

The State avers that in the instant case the error was harmless because each of the two acts constituting obstruction were proved beyond a reasonable doubt. In regard to the obstruction charge, the defense argued in closing argument as follows:

Now, on the obstruction charge, certainly you’ve heard the evidence on that. Again, Mr. Vaughn testified that his conduct was rude. If you find that that rose to the level of obstructing the officer then I guess you would have to find him guilty. But, deliberate on the matter, of course, and do your job and discuss the facts that you’ve heard and make a determination based on that.

RP 186. Vaughn chose to testify at trial, and during his testimony, Vaughn offered no evidence on direct examination to contradict the obstruction charge. RP 152-53. On cross examination, when asked generally about his behavior during the time that he was with Trooper Richardson, Vaughn answered: “I would say I was antagonistic and rather

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rude.” RP 159. Thus, the State’s evidence in regard to both acts of obstruction was uncontroverted.

A reasonable jury might have viewed the evidence of obstructing as *de minimis*, but the State contends that on the facts of this case (RP 144-45, 148-49), a rational jury could not have had reasonable doubt that both incidents of obstruction were established beyond a reasonable doubt; thus, the State contends that the failure to give a unanimity instruction in the instant case was harmless beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988); RCW 9A76.020(1).

5. Vaughn contends that there was no evidence that he was driving and that, therefore, the evidence at trial was insufficient to sustain the jury’s verdict of guilty for the crime of driving under the influence. But, there was both direct and circumstantial evidence that proved that Vaughn was driving while impaired; therefore, the evidence was sufficient to sustain the jury’s verdict.

Vaughn contends that there is insufficient evidence to sustain the jury’s verdict of guilty of driving under the influence because, he contends, there is insufficient evidence to prove that he “drove his white Ford Focus into the parking lot of Sandi’s Deli...” Br. of Appellant at 10. But the offense of driving under the influence is committed when a person drives anywhere in the State while impaired or when the person has an

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alcohol concentration (BAC) of .08 or higher within two hours of driving.  
RCW 46.61.502(1).

The evidence in this case shows that Vaughn was under the influence when drove away from Kenneth Raney's house after drinking whiskey. RP 114-17. Vaughn drove away from Raney's house at approximately 10:04 p.m. RP 116-17, 122, 125-26. He arrived at Sandy's Deli approximately 18 minutes later, and when he arrived at the deli, he was highly intoxicated. RP 39, 50-51, 122, 125, 126, 153. A sample of his blood taken about three and half hours after driving showed, through retrograde extrapolation, showed that at the time of driving, Raney had a BAC of 0.23. RP 66, 75-76, 79. Thus, Vaughn had a BAC of higher than .08 within two hours of driving. RP 79.

RCW 46.61.502(3)(a) provides for an affirmative defense to a charge of driving under the influence, as follows:

It is an affirmative defense to a violation of subsection (1)(a) of this section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

But Vaughn did not attempt to assert this defense.

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There is circumstantial evidence that Vaughn was driving when he arrived at Sandy's Deli. RP 32-44. There is direct evidence that Vaughn was driving when he left the Raney residence 18 minutes before he arrived at Sandy's Deli. RP 117. There is direct evidence that Vaughn was under the influence of alcohol and that his BAC was higher than .08 both when he left the Raney residence and when he arrived at Sandy's Deli. RP 39, 50-51, 66, 75-76, 79, 114-17, On these facts the evidence is sufficient to sustain the jury's verdict finding Vaughn guilty of driving under the influence in violation of RCW 46.61.502. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

D. CONCLUSION

The evidence presented at trial was sufficient to prove beyond a reasonable doubt that Vaughn willfully obstructed a law enforcement officer when he willfully rolled his arm up in a ball to prevent Trooper Richardson from executing a search warrant for a sample of Vaughn's blood to determine the alcohol content of his blood.

There was also sufficient evidence to sustain a jury verdict for obstruction that was based upon Vaughn's act of willfully spinning around

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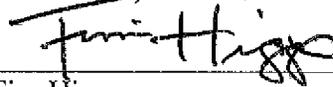
and refusing to submit to a search of his person as he was being booked into the jail.

However, there was no unanimity instruction provided to the jury, and the State did not elect which one of the two acts of obstruction that it was relying upon to support the charge of obstruction. Therefore, a unanimity error occurred in this case, but the error was harmless beyond a reasonable doubt because there was ample, uncontroverted evidence to support both of the alternative acts that constituted obstruction, and a rational jury could not have found that either one of the acts was not proved beyond a reasonable doubt.

Finally, because an eye-witness, Raney, saw Vaughn driving while impaired, the evidence is sufficient to sustain the jury's verdict of guilty for driving under the influence.

DATED: April 30, 2014.

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# MASON COUNTY PROSECUTOR

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