

64026-7

64026-7

No. 64026-7-I
(consolidated with 64148-4-I)

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

vs.

**JAMES LOCKREM, SR. and JAMES LOCKREM, JR.,
Appellants.**

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defendants have demonstrated that there was an unconstitutional closure of the courtroom where individual juror voir dire occurred in the courtroom, but outside the presence of the rest of the venire and where no one was ordered to leave the courtroom.
2. Whether defendants invited and/or waived error regarding an alleged violation of their right to public trial where they requested and encouraged individual voir dire and informed the court that it was necessary to ensure a fair and impartial jury and that the Bone-Club criteria had been met.
3. Whether there is a substantial likelihood that the prosecutor's improper comment in closing comparing a family's desire to protect one another to acting like a pack of wolves affected the verdict where the defendant did not object when the comment was made, but waited until after a co-defendant requested a curative instruction at a break to move for a mistrial and where the judge denied the motion for mistrial and the isolated comment occurred during an almost day's worth of summation and responded to a defense theme of blood being thicker than water.
4. Whether the trial court abused its discretion in denying defendant the ability to cross examine a deputy regarding a civil judgment on a malicious prosecution claim under ER 608(b) where the defendant failed to demonstrate that the evidence was relevant to the deputy's veracity on the stand or to the facts of the case.
5. Whether the defendant waived any issue regarding the vagueness of the obstructing a law enforcement officer charge by failing to file a motion for bill of particulars on that charge.

6. Whether a unanimity instruction was required where the charge of obstructing a law enforcement officer was based on a continuing course of conduct where the defendant's actions, of refusing to respond to officer's commands and interference in the deputy's attempt to arrest the defendant's father, took place within about a two minute time period.

C. FACTS

1. Procedural.

On May 30, 2008 James Lockrem, Sr. ("Senior"), James Lockrem, Jr. ("Junior")¹ and Jarred Zeigler were charged with Assault in the Third Degree, in violation of RCW 9A.36.031(1)(g), and Obstructing a Public Servant², RCW 9A.76.020, for their actions on May 25, 2008. SCP³ 162-63; JCP 114-15. Junior's information was subsequently amended to reflect that he was being charged as a principal and/or as an accomplice regarding the assault, and Senior's was amended to add the charge of Attempting to Disarm a Law Enforcement Officer. SCP 153-55, JCP 109-10. Senior, Junior and Zeigler were tried jointly to a jury, and Senior was found guilty of Assault in the Third Degree and Obstructing a Public

¹ The State does not intend any disrespect in using the terms "Senior" and "Junior" to refer to the Appellants, but is using it for the purpose of clarity. The State would note that Zeigler is referred in the transcript as "Pete" as well. The State refers to Senior and Junior collectively as "the Lockrems" in those sections where they assert the same issue, i.e., regarding the right to public trial.

² The statutory title for the offense is actually Obstructing a Law Enforcement Officer.

³ SCP refers to the clerk's papers in Senior's case and JCP to those in Junior's

Servant and not guilty of Attempting to Disarm a Law Enforcement Officer. SCP 34-35. Junior was found guilty of Obstructing a Public Servant and not guilty of Assault in the Third Degree. JCP 34-35.

Senior, facing a standard range of one to three months with an offender score of 0, was sentenced to one month with the possibility of work release and a \$2000 fine on the felony and 365 days, all suspended on the misdemeanor. SCP 6-7, 9; SRP 29⁴. Junior was sentenced to 365 days with all but 345 suspended with the option of work release. JCP 13; SRP 45.

2. Substantive⁵.

On Memorial Day weekend in 2008, members of the Lockrem family went camping at Mt. Baker National Forest (also known as “Baker Lake” area), which is in a remote area, with limited communication, about an hours drive from the Whatcom County line. 2RP 163-64, 167, 622. 2RP 622-24. On the Friday of that weekend, May 23rd, U.S. Forest Service Officer Jeremy Smith came into contact with Junior, Joshua Lockrem and a friend of theirs Nathan Welch at their campsite. 2RP 622-

⁴ SRP refers to the verbatim report of proceedings for sentencing that occurred on August 17, 2009. 1RP refers to the transcript for pretrial motions that were heard on May 26, 2009 and 2RP refers to the transcript for the trial, June 1st through June 18, 2009. VDRP refers to the transcripts for the voir dire proceedings. OSRP refers to the transcript of opening statements that occurred on June 3rd.

⁵ This statement of facts covers the facts of the offense. Additional facts regarding the right to public trial issue and other issues are set forth within those argument sections.

25. During this contact, Ofc. Smith took their names and dates of birth, saw that they had firearms and knives in their camp, as well as an aggressive dog. 2RP 626-27. Later Ofc. Smith checked their names for warrants and became aware that Welch was a convicted felon and that Joshua had an outstanding warrant. 2RP 628, 648. Aware that the Lockrems intended to spend the entire weekend there, Ofc. Smith decided to execute the warrant later. 2RP 649.

On Sunday May 25th, Ofc. Smith asked Dep. Freeman, a Whatcom County Sheriff's Office K-9 patrol officer working the Baker Lake area with his dog Deuce that weekend, to assist him in arresting Joshua on the warrant. 2RP 160-61, 171-71, 653-54. Ofc. Smith wanted a back-up officer because he was aware there was an aggressive dog, firearms and knives at the campsite, although he didn't have any reason to expect a negative or violent reaction. 2RP 173-74, 655. Ofc. Smith's plan was to call Joshua up to the roadside, away from the campsite where there were a number of persons, because he thought it would be safer. 2RP 175, 656, 659. Once he had Joshua inside his vehicle, he intended to inform the rest of the family where he was taking Joshua. 2RP 659.

Ofc. Smith and Dep. Freeman parked along the road above the campsite, which was down a steep trail, about 30 to 50 feet off the road next to the lake. 2RP 174, 467, 658. Ofc. Smith called down to Joshua

from the side of the road to come up to the road. 2RP 191, 658. Once Joshua got up to the road, Ofc. Smith informed Joshua that he had a warrant for his arrest and told him to turn around and put his hands behind his back. 2RP 661. Joshua didn't comply with the command, but became upset and told Ofc. Smith that he'd taken care of things and that the officer didn't know who he was. 2RP 661. Joshua resisted being arrested and Dep. Freeman had to assist Ofc. Smith in order to get the handcuffs on. 2RP 192, 662-63. Joshua started screaming for help and yelling that he was being arrested and that they didn't know who he was. 2RP 194, 662. Dep. Freeman told him to stop yelling to his family. 2RP 194.

At this point a number of persons from the Lockrem campsite, including Senior and Junior, had come up the trail and had reached the top of the bank at the road. 2RP 195, 663. Ofc. Smith told them in a loud voice that he had a warrant for Joshua, that Joshua was under arrest, and to wait at the campsite and he would let them know what was going on. 2RP 196, 664. Ofc. Smith felt like he was talking to a brick wall, no one was listening to him, Joshua was still screaming and yelling and the others were angry and upset about Joshua being arrested. 2RP 195, 665. Dep. Freeman repeatedly told the group to go back to the campsite, but nobody did. 2RP 196-97.

Ofc. Smith wanted to get Joshua into his vehicle because he thought Joshua was making matters worse. 2RP 666. Joshua continued to resist going to the vehicle and refused to get in it. 2RP 669. As Ofc. Smith dealt with Joshua, Dep. Freeman told the group to go wait and they'd get a chance to say goodbye. 2RP 199. Ofc. Smith could hear that the group was not responding to Dep. Freeman's commands to stay back, and he felt a confrontation was brewing. 2RP 666, 669-71. Ofc. Smith heard Dep. Freeman yelling at the group to stay back and go back to the campsite, 2RP.

Dep. Freeman saw that Senior had a handgun on his hip, but initially was more concerned about the family becoming increasingly hostile. 2RP 200-01. Senior's face was getting really red and his tone was angry. 2RP 201. Dep. Freeman told Senior to turn around so he could take the gun off Senior for officer safety and that Senior would get the gun back later. 2RP 201-02. Senior said no and Dep. Freeman became even more concerned about the officers' safety, given their remote location, being outnumbered and the fact that the group had access to weapons. 2RP 197, 202-03.

When Senior started to follow Ofc. Smith as he was taking Josh to his vehicle, Dep. Freeman, concerned Senior would interfere with the arrest, stepped in between Senior and Ofc. Smith. 2RP 203, 205. As Dep.

Freeman did so, he put up his hand and told Senior to stop, but Senior didn't and walked into the deputy's hand with his chest. 2RP 206. Senior looked down at Dep. Freeman's hand, looked back up at him, and slapped away his hand. 2RP 207. Growing even more concerned and intending to arrest Senior for assaulting him, Dep. Freeman grabbed onto Senior's right hand, the side Senior's gun was on, as Senior went to push him aside. 2RP 208-09. Dep. Freeman told Senior that he could stay and talk to Joshua but that everyone else needed to go back to the campsite. 2RP 209. Dep. Freeman did not tell Senior he was under arrest because he was concerned about what would happen given the family's reaction to Joshua being arrested. 2RP 209-10.

Senior started to push and pull to get free and two persons came up on either side of Dep. Freeman, grabbing at him, to help Senior. 2RP 212. Dep. Freeman started to kick on each side to get the persons to move away, ordering them to get off him and go back to the campsite and telling Senior to get on the ground. 2RP 213, 233-35, 671-72. The people backed off, and still trying to control Senior, Dep. Freeman pulled Senior a little ways away from the group. Then Senior punched the deputy in the face with his left hand and Dep. Freeman, moving from defensive tactics to self defense mode, responded by punching Senior in the face. 2RP 213-14. Senior then grabbed Dep. Freeman in the throat and Dep. Freeman

punched Senior in the stomach three times. 2RP 215, Ex. 160. Senior still wouldn't go to the ground, continued to fight, grabbed at the deputy's clothing and wrapped an arm around the deputy's neck. 2RP 215. Dep. Freeman continued to try to pull Senior away from the group and tried to get Senior to go to the ground so he could arrest him. 2RP 242-44, Ex. 160. Dep. Freeman tried to get Senior's gun, but couldn't because it was in a holster. 2RP 248, 282, 289-91, Ex. 160. Senior got back up and continued to fight, so Dep. Freeman tried to use a head/arm take-down move to get him to the ground which Senior resisted. Then Senior grabbed the deputy's face. 2RP 293-94, 296. See also, Ex. 8-23, 36-41, 56-70, 72-84.

By this time Junior had become involved in the altercation and had grabbed onto Dep. Freeman and had attempted to grab onto Senior. 2RP 311-12, 314, 316. Dep. Freeman shrugged off Junior's grasp on his left arm and ordered Junior to get back but Junior still didn't respond to his commands. 2RP 316, Ex. 72-84, 92, 160. Dep. Freeman was not able to control Senior because Junior and Junior's sister were distracting him. 2RP 319, 323. Ofc. Smith tried to get Junior out of the way so that he could assist Dep. Freeman with Senior, but Junior blocked him. 2RP 675, Ex. 160. He pulled out his taser because of the large group but decided not to use it because there were too many people. 2RP 676, 683; Ex. 160.

Ofc. Smith kept commanding Junior and others to back up in order to keep them away from Dep. Freeman, but they kept moving in. 2RP 680-81.

Ofc. Smith could hear Dep. Freeman and Senior struggling behind him but was prevented from helping Dep. Freeman because of Junior's and Zeigler's actions. 2RP 686-90, Ex. 160.

During the struggle Senior inadvertently released the door switch for the canine patrol car and Deuce was released. 2RP 326-330, 343, 619, Ex. 94-97. While Dep. Freeman was still trying to force Senior to the ground, Deuce came into the fray, went after a little dog that was there and then bit Senior's arm. 2RP 340, 343, 347, Ex. 160. Junior stepped in and grabbed Deuce's collar choking the dog, so that Deuce released his bite on Senior and couldn't help Dep. Freeman. 2RP 353, 367, Ex. 122-24, 135-38, 141-48, 160. When Ofc. Smith saw Junior grab Deuce, he felt he had to get Junior out of there so he grabbed Junior to pull Junior away from Dep. Freeman. 2RP 691. When Junior released Deuce, Deuce bit him and continued to bite him until Dep. Freeman was able to call the dog off, which took some time because Dep. Freeman was still trying to control Senior and deal with Zeigler. 2RP 370-71, 390-97, Ex. 160. Ofc. Smith eventually was able to handcuff Junior after Dep. Freeman called off Deuce. 2RP 694, Ex. 160. Ofc. Smith then was able to handcuff Senior as

well. 2RP 695, Ex. 160. The entire incident, until Deuce was called off, took not much more than two minutes. 2RP 412, 1226.

On the way to the hospital after his rights were read, Junior told another deputy his version, including that when Dep. Freeman had asked Senior and him to step back, Senior had argued with the deputy, “using his mouth,” and that he had heard Dep. Freeman ask for Senior’s gun. 2RP 805-08, 814.

At trial Senior testified that Dep. Freeman cursed at him repeatedly to go back to the campsite, that he was only asking questions about Joshua, that he showed the deputy his gun permit, that the deputy tried to push him to the ground after telling him that he could stay but everyone else had to go back to the campsite. 2RP 880-84. Senior denied ever trying to hit the deputy, that the deputy started beating him without any provocation, that he acted in self defense because he thought the deputy might do him extreme bodily harm. 2RP 884-85, 919, 1002.

Junior testified that Dep. Freeman cursed at them to get back to the campsite, that he had shown the deputy his identification as well, that Senior said “this is bullshit”, that Dep. Freeman grabbed Senior’s hand and asked Senior to come with him. 2RP 1182-86. Junior testified he didn’t stay back or go back to the campsite as the officer told him to because he was concerned for Senior. 2RP 1190-95, 1197, 1206. He said

he moved forward to try to get the fight to stop, to tell Senior to lay down, that he didn't intend to assault Dep. Freeman when he grabbed his hand, and that he was just trying to help. 2RP 1200-05. Junior admitted he grabbed the dog, but just to get the dog away from the people, that Dep. Freeman pushed him back twice and that he didn't start following commands until after he had pulled Deuce off bite. 2RP 1236, 1240-41. 2RP 1212-18. He denied that he intended to assault Dep. Freeman or to assist Senior in assaulting the deputy, but admitted that he heard the officers' commands and chose not to follow them. 2RP 1224-25.

D. ARGUMENT

Senior and Junior both assert that their constitutional right to a public trial was violated by the court's voir dire process of individual jurors. The court's procedure, however, did not involve a closure of the courtroom, only voir dire directly outside the presence of the rest of the venire. Moreover, both Senior and Junior invited any such error and/or waived it by their actions in encouraging the court to adopt the procedure the court utilized. Senior also asserts that the prosecutor committed prosecutorial misconduct in closing. While the prosecutor's reference to a family acting like a "pack of wolves" was improper, it was in response to the defense theme of "blood being thicker than water" and was an isolated

comment within almost a day's long summation that the trial court believed did not warrant a mistrial.

Junior raises the issues of trial court error regarding denial of cross-examination, denial of a bill of particulars and failure to provide a unanimity instruction. The trial court did not err regarding limiting cross-examination of the deputy because Junior failed to demonstrate how the civil judgment on a claim of malicious prosecution was relevant to the deputy's veracity on the stand and/or to the facts of the case. Junior failed to raise below either the bill of particulars or unanimity issue regarding the offense for which he was convicted, obstructing a law enforcement officer, but only raised them regarding the assault, therefore he waived any such issues. Moreover, the obstruction charge was based on a continuing course of conduct. Therefore, Junior had sufficient notice of the charge and was not entitled to a unanimity instruction.

- 1. The Lockrems invited any error related to the voir dire procedure used by the court, which procedure in fact did not involve closure of the courtroom.**

The Lockrems assert that their right to public trial under the state and federal constitutions was violated by the trial court procedure used for individual juror voir dire. The Lockrems invited and/or waived the very error they assert. They implored and encouraged the trial court to conduct

individual voir dire outside the presence of other jurors and the public. Junior specifically waived his right to a public trial, and neither Senior nor Junior have standing to assert the public's right to open proceedings. Even if the Lockrems could assert a violation of the right to public trial despite their actions, under Momah reversal would not be appropriate because the record demonstrates that the court was concerned about closing the courtroom and balanced the interests of the defendants and the public in crafting the individual voir dire procedure, even though the court did not state its findings on the record until after part of the individual voir dire had occurred. The Lockrems trial was not rendered fundamentally unfair by the individual voir dire process they sought and encouraged.

In alleging a violation of the right to public trial, the reviewing court first determines whether the trial court's ruling implicates the defendant's right to public trial, and if so, whether the trial court properly considered the Bone-Club⁶ factors. State v. Lormor, 154 Wn. App. 386, 391, 224 P.3d 857, *rev. granted*, 169 Wn.2d 1010 (2010). In determining whether there was an order closing the courtroom, the court looks at the plain language of the trial court's ruling. State v. Brightman, 155 Wn.2d

⁶ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

506, 516, 122 P.3d 150 (2005). A trial court's decision to close courtroom proceedings is subject to de novo review. Brightman, 155 Wn.2d at 514.

The right to public trial extends to jury selection. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), *cert. denied*, 131 S.Ct. 160 (2010). That right is not absolute, however, and the presumption for an open courtroom may be overcome by an overriding interest if the court finds that a closure is necessary to preserve higher values and is narrowly tailored to serve that interest. *Id.* To protect a defendant's right to public trial, a court should address and make specific findings regarding five factors:

1. The proponent of closure ... must make some showing [of a compelling interest], and where that need is based on a right *other than an accused's right to a fair trial*, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Id. at 149 (*quoting Bone-Club*, 128 Wn.2d at 258-59). A court should do the balancing and make findings before closing the courtroom. Id. at 152 n.2. The court's failure to balance the factors on the record, however, does not always necessitate reversal. Id. at 150.

a. *The Lockrems have failed to demonstrate that the courtroom was in fact closed to the public.*

The record here actually demonstrates there was no "closure" of the courtroom. Only the venire members were in fact excluded, and as officers of the court, they are not considered members of the public with standing to assert the public's right to open proceedings. While the judge thought excluding the venire constituted a closure and therefore he had to consider and address the Bone-Club findings, in fact he did not under the method of individual voir dire employed here.

A court's voir dire of individual jurors inside the courtroom apart from the rest of the jury venire does not constitute a closure of the courtroom. State v. Price, 154 Wn. App. 480, 487, 228 P.3d 1276 (2009), *rev. den.*, 169 Wn.2d 1021 (2010). Here, after counsel's repeated requests for individual voir dire of jurors given the media coverage of the case, and after inquiring if there were any persons in the courtroom who objected to conducting individual voir dire of some jurors outside the presence of the public and outside the presence of the remainder of the panel, the judge

had the venire removed to the jury room and called each juror desiring to speak privately individually back into the courtroom and seated them in the jury box. VDRP 3-4, 7; Supp CP __, Sub Nom 92 (at 3-4)⁷. After the individual voir dire of some jurors the court put on the record the process it had followed and why:

The process that we've gone through just now was to essentially close the courtroom and inquire of this group of jurors individually.

The Court did make the request whether there was anyone in the courtroom who was present who had any reason to object. There was no objection.

It's the Court's determination that this method for continuing open access was the least restrictive means available to protect the defendant's interests, and to find out if people had significant knowledge about this case, or about the other matters solving (sic) the sheriff's department.

We wanted to make sure that they didn't influence other jurors when they spoke about those things, and also the issues of privacy, which I think to some of our jurors pretty adequately attempted to express it was pretty personal to them, and that they were uncomfortable discussing them in a large group, and I think that allows the jurors the opportunity to participate in voir dire honestly and openly, and participate in the way that we hope everyone will. In weighing the competing interests of the proponent of closure, and the public, for the defense interest, and those of the jurors *against essentially the public's not being here, and not particularly showing any interest. There was no one here. I don't think it's a real issue. There was no loss to the public in terms of not being able to participate, and the rest of voir dire will be open, and they can participate if they wish and see that.*

I think the order was as narrowly tailored as possible to do this, and short duration, just long enough to ask these few questions of these jurors.

⁷ The trial minutes reflect that voir dire of certain jurors occurred outside the presence of the other jurors, but does not reflect any order to close the courtroom or to order anyone inside the courtroom to leave.

VDRP 72-74 (emphasis added).

When defense made another request for additional individual voir dire, the judge indicated his reluctance to the continued individual voir dire. Defense counsel for Zeigler suggested that they conduct the individual voir dire of the identified jurors in the courtroom, discharge the rest of the jurors until the next morning and leave the door open to the public, *i.e.*, not close the courtroom. VDRP 83-84. The judge indicated his concern that the process would close the courtroom to the remaining jurors. VDRP 84. When Zeigler's counsel indicated he didn't think that they qualified as members of the public, the judge acknowledged that he didn't know if they did as the courts hadn't dealt with the issue yet. *Id.* The judge then decided to excuse the venire panel, except for the twelve at issue, until the following morning and instructed that additional individual voir dire should occur only regarding question nine on the questionnaire. VDRP 84-85. The judge again sent the jurors who were ordered to remain into the jury room and called jurors individually back into the courtroom for individual voir dire. VDRP 85-86.

The judge did not order the public in the courtroom to leave. No one was present for the first round of individual voir dire. The only persons ordered to leave and to not be present were other members of the

venire panel. Although the judge was concerned that holding individual voir dire in the courtroom outside the presence of the rest of the venire constituted a closure, the process for individual voir dire that was conducted did not constitute a closure of the courtroom.

b. Any closure of the courtroom was invited error or waived.

Even if the individual voir dire process conducted here constituted a closure of the courtroom, this closure was invited and as such the Lockrems may not challenge it on appeal. The invited error doctrine “prohibits a party from setting up an error ... and then complaining about it on appeal.” In re Personal Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The doctrine requires some affirmative action on the part of the defendant. *Id.* at 724. Generally, where a defendant takes knowing and voluntary actions to set up the error, the invited error doctrine applies; where the defendant’s actions are not voluntary, it does not. In re Thompson, 141 Wn.2d at 724. The doctrine applies even in the context of constitutional error. *See, State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (counsel may not request an instruction and then later challenge the instruction on appeal); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defendant who participated in drafting of jury instruction may not challenge the instruction on appeal). This rule

recognizes that “[t]o hold otherwise would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

While the court in Momah decided that case did “not present a classic case of invited error,” it did discuss the invited error doctrine in the context of a right to public trial case with approval. Momah, 167 Wn.2d at 153-55. The court there held that while it would not bar appellate review under the circumstances presented in that case, the court found the factors courts have used in applying the invited error doctrine helpful in determining the appropriate remedy in that case. *Id.* at 154.

Junior also specifically waived the ability to assert a violation of his right to public trial by defense counsel affirmatively stating that defense did not object to the individual questioning process. A defendant’s failure to object to a courtroom closure will not in and of itself constitute a waiver of the right to public trial. Brightman, 155 Wn.2d at 517. In general in order for a waiver to be effective, it must be knowing, intelligent and voluntary. State v. Castro, 141 Wn. App. 485, 490, 170 P.3d 78 (2007). “The requirements for a valid waiver differ based on the nature of the right at issue.” *Id.* For example, there is no need for an on-the-record colloquy with a defendant regarding whether he is waiving his constitutional right to testify. *See, State v. Thomas*, 128 Wn.2d 553, 557,

559, 910 P.2d 475 (1996). To require an on-the-record waiver can result in the trial court unnecessarily, and perhaps detrimentally, intruding upon the attorney-client relationship and defense counsel's strategy with respect to voir dire. *See, State v. Singleton*, 28 P.3d 1124, 1129 (N.M. 2001), *cert. den.* 28 P.3d 1099 (2001) ("the right to excuse or retain a juror is a right tied closely to a tactical decision."). The right to public trial need not be waived expressly and personally by the defendant on the record.

Other courts have held that a defendant's attorney can waive the defendant's right to a public trial. *See, Berkuta v. State*, 788 So.2d 1081, 1082-83 (Fla. 2001), *rev. den.*, 816 So.2d 125 (2002) ("A defense counsel's affirmative representation to the court that the defendant consents to excluding persons otherwise entitled to be present in the courtroom is sufficient to effectively waive the defendant's right to a public trial"); *People v. Webb*, 642 N.E.2d 871, 958-59 (Ill. 1994), *rev. den.* 647 N.E. 2d 1016 (1995) (defense counsel can waive defendant's right to public trial); *State v. Butterfield*, 784 P.2d 153, 156-57 (Utah 1989); *cf., Singleton*, 28 P.3d at 1128 (defense attorney can waive fundamental constitutional right to fair and impartial jury, waiver need not be on the record); *U.S. v. Durham*, 139 F.3d 1325, 1333 (10th Cir. 1998), *cert. den.*, 525 U.S. 866 (1998) ("[w]hen a defense attorney decides for reasoned strategic purposes not to make a constitutional or statutory

objection to the composition of a petit jury, the defendant is bound even if the attorney fails to consult him or her about the choice”).

In this case, defense counsel for Senior and Junior urged the court to conduct individual voir dire of certain jurors, due to their concern regarding tainting the rest of the jury pool, even if it meant closing the courtroom. This issue was initially raised by Senior’s counsel during pretrial motions where she informed the court that due to the media coverage of the case, she was going to ask that there be voir dire of some jurors “in chambers to test their ability to sit and be fair and impartial.” 1RP 31. In response the judge noted there were problems with that proposal and that if there were persons in the courtroom who objected, then they wouldn’t be able to do that. *Id.* Senior’s counsel then asserted that under Bone-Club that there were ways to do that. 1RP 32.

The issue was raised again by Senior’s counsel with respect to the jurors’ knowledge of recent issues in the Sheriff’s office. She suggested that the court do in chambers or private setting voir dire of jurors responding to two of the questions in the questionnaire and release the rest of the jurors. 1RP 73, 75. The court then indicated it would direct those jurors who answered questions 16 and 23 to come back at 1 p.m. and the remainder of the panel to return at 2:30 p.m. 1RP 81.

On the day the trial began, it came to the court's attention that one of the counsel for Junior had discussed the case with the media, and an article regarding the case had been published over the weekend. 2RP 3-9. The other counsel for Junior indicated that he thought the article might impact the jury selection process. 2RP 9-10. The court indicated its concern that the article might have tainted the panel, but left that issue for the voir dire process. 2RP 13.

After dealing with some other trial issues, the judge returned to the voir dire issue. 2RP 117. It appeared eight jurors had answered the questions at issue. The judge informed counsel that he would need to see if anyone objected to voir dire being done in chambers and the prosecutor reminded the judge that the court would need to conduct an analysis of the Bone-Club factors. 2RP 117-18. The judge indicated he had the Bone-Club case in front of him. 2RP 118.

At the time of voir dire, the judge informed the courtroom that some jurors had indicated a preference to be heard privately on some questions and inquired if anyone in the courtroom objected to those jurors being questioned outside of the public and other jurors. No one objected. VDRP 3. Counsel for Senior again raised the issue of jurors who responded to question nine regarding familiarity with the case. VDRP 5-6. During the first questioning of jurors, Junior's counsel invited individual

jurors to discuss other issues aside from questions 23 and 16 in private.

VDRP 12-13, 19, 64, 71-72.

The judge then stated its findings regarding Bone-Club on the record. VDRP 73-74 (see *infra* at 16). Counsel for Senior then urged the court to conduct the same individual voir dire it had just done with those jurors who had either seen the video that would be introduced in the case or had read the articles about the case and bring the rest of the panel back the next day. VDRP 74-76. Junior's counsel echoed Senior's counsel's concern and asserted that the rest of the panel could be tainted by what the other jurors had read if they inquired of those jurors in front of the whole panel. VDRP 77. He indicated that his experience was to interview those jurors in private. *Id.* When the prosecutor expressed concern regarding additional individual voir dire, counsel for Senior responded that to do the voir dire in front of the whole panel would "serve to contaminate the entire panel" which is what they were seeking to avoid. VDRP 78.

Junior's counsel reiterated his concern about contaminating the panel. *Id.*

After taking a recess, the judge expressed concern about being able to meet the Bone-Club factors, and counsel for Senior responded that the potential contamination was a bigger problem that could result in a mistrial and asserted that the situation did meet the Bone-Club criteria.

VDRP 82-83. After explaining the process and its parameters the court

would follow, the judge asked if any of the defendants had an objection to that process and Junior's counsel stated no. VDRP 84-85. After the venire panel was brought back in, the court explained the process and inquired if anyone in the courtroom objected to it, and no one did. VDRP 85-86.

The Lockrems requested the court to employ the very process it did in examining individual jurors regarding the questions they were concerned would taint the venire if the questioning occurred in public, and they did so in order to ensure that they obtained a fair and impartial jury. As such, they invited the very error they assert on appeal. In addition, they waived their right to a public trial in the process. Counsel for the Lockrems participated and helped to create the process the court ultimately used to conduct individual voir dire. When specifically asked if they objected to the process, neither one objected. The Lockrems should not be permitted to raise this issue on appeal where their attorneys' actions below urged the court to employ the procedure it did.

c. The Lockrems do not have standing to assert the public's right to open proceedings.

The Lockrems also assert a violation of the public's right to open proceedings under Art. I §10,⁸ but they do not have standing to raise the public's right of access. "The general rule is that a person does not have

⁸ Art. 1 §10 states: "Justice in all cases shall be administered openly, and without unnecessary delay."

standing to vindicate the constitutional rights of a third party.” State v. Gutierrez, 50 Wn. App. 583, 591-592, 749 P.2d 213, *rev. den.* 110 Wn.2d 1032 (1988); *accord*, State v. Wise, 148 Wn. App. 425, 441-42, 200 P.3d 266 (2009), *rev. granted*, 236 P.3d 207 (2010); State v. Paumier, 155 Wn. App. 673, ¶39, 230 P.3d 212, *rev. granted*, 169 Wn.2d 1017 (2010) (“standing doctrine generally prohibits a party from suing to vindicate another’s rights”) (J. Quinn-Brintnall dissenting); *cf.*, U.S. v. Hickey, 185 F.3d 1064 (9th Cir. 1999) (government did not have third party standing to assert public’s interest in right to access sealed documents). A defendant’s interest is not necessarily co-extensive with the public’s right to open proceedings. *See*, Wise, 148 Wn. App. at 436 (defendant could not assert public’s open proceedings right because defendant was not just an observer in the trial, but had participated in the private voir dire and had benefitted from that questioning and therefore his interest diverged from that of the public’s); *see also*, Commonwealth v. Horton, 753 N.E.2d 119, 128 (Mass. 2001) (defendant could not assert public’s interest in open public proceedings as that interest is distinct from defendant’s and defendant had not demonstrated that he had standing to assert the public’s right). As is reflected in the Bone-Club balancing test, sometimes a compelling interest, the defendant’s or otherwise, may supersede the public’s interest and access to an open proceeding.

Only the plurality opinion in Strode would permit the Lockrems to assert the public's right in order to obtain a new trial. The concurrence in Strode specifically rejected the plurality's merging of the public's right to open proceedings under Article 1 §10 and the defendant's right to a public trial under Article 1 §22. *See, Strode*, 167 Wn.2d 222, 232, 236, 217 P.3d 310 (2009) (J. Fairhurst concurring). In Momah, the majority only addressed whether there was a violation of and structural error regarding a violation of the defendant's right to public trial under Art. 1 §22. *See, Momah*, 167 Wn.2d at 147 . While the opinion referenced Art. 1 §10, it did so only in the context of the development of the Bone-Club factors test, which was borrowed from civil cases addressing allegations of Art. 1 §10 violations. *Id.* at 147-48.

Here, the Lockrems very explicitly desired that voir dire of certain jurors occur individually, outside the public, and outside the rest of the venire panel. They should not be permitted to waive their public trial right, participate in and encourage the individual voir dire process employed, and then turn around on appeal and assert a violation of the public's right to open proceedings. *See, Wise*, 148 Wn. App. at 436; Hutchins v. Garrison, 724 F.2d 1425, 1431-32 (4th Cir. 1983), *cert. den.*, 464 U.S. 1065 (1984) (defendant could not raise First Amendment right of public and press to attend the closed hearing where he waived his Sixth

Amendment right to a public trial because the defendant could not rely on the rights of third parties to bring an issue before the court). The Lockrems have failed to demonstrate that they have standing to assert the public's interest in open proceedings and they should not be permitted to raise a violation of Article 1 §10 for the first time on appeal. Furthermore, it is difficult to see how the public's right was violated when there was *no one* in the courtroom at the time the court made its decision to proceed with individual voir dire and no one was excluded from the courtroom.

d. The remedy is not a new trial under the circumstances.

If the court on appeal “determines that the defendant’s right to public trial has been violated, it devises a remedy appropriate to the violation.” Momah, 167 Wn. 2d at 149. If the error is structural, automatic reversal is warranted. *Id.* An error is only structural though if the error “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Id.* (*quoting Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). In previous cases where a new trial has been ordered on appeal, prejudice was sufficiently clear from the record, the closures impacted the fairness of the proceedings and were ordered without seeking input from the defendant. *Id.* at 151.

Although the trial court did not make specific findings regarding the Bone-Club factors before the first individual voir dire was conducted, it was cognizant of those factors and concerned about meeting those factors. In addition it did announce its findings immediately after the first round of individual jury voir dire and before the second round. The record is clear that the judge considered the public's right to open proceedings and balanced that against the defendants' right to a fair trial.

In that respect this case is virtually identical to the Momah case. There the court considered defense counsel's actions in determining what remedy would be appropriate and did not require a new trial because the court conducted the individual voir dire process in the manner it did in order to protect the defendant's right to a fair trial. Momah, 167 Wn.2d at 151-52.

We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 interests in this case. The court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. Thus, the underlying facts and impact of the

closure in *Momah* are significantly different from those presented by our previous cases. Reversal of Momah's conviction and remand of his case cannot be the remedy under these circumstances.

Id. at 156.⁹ The Momah case dictates the result in this case. No structural error occurred here rendering the trial fundamentally unfair or requiring reversal.

2. The prosecutor's comment while improper was isolated and it is not substantially likely the comment affected the verdict.

Senior asserts that one lone comment from the prosecutor during closing was so prejudicial that his convictions should be reversed. While the prosecutor's remark was improper, it was stated in the context of a recurring theme in the case, that blood is thicker than water when it comes to family, and any prejudice from the comment could have been alleviated by a curative instruction which counsel specifically rejected. The trial court was in the best position to determine the effect of the comment and did not abuse its discretion in denying the motion for mistrial.

⁹ While the Lockrems reference Presley v. Georgia, __ U.S. __, 130 S.Ct. 721, __ L.Ed.3d __ (2010), the State would note that the U.S. Supreme Court denied certiorari in the Momah case in October of this year. Presley was a per curiam decision in which the Supreme Court held the Georgia trial court violated the defendant's right to a public trial by excluding the public from the voir dire proceedings *over the defendant's objection*. Presley, 130 S.Ct. at 722 (emphasis added). As a per curiam decision, Presley did not announce any new law and did not redefine the scope of the right to public trial beyond that which had previously existed. .

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998); *see also*, State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (court gives deference to the trial court's ruling on motion for mistrial "because the trial court is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant").

Absent an objection, a claim of misconduct is waived unless it is so flagrant or ill intentioned that it creates an incurable prejudice. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993); State v. Russell, 125 Wn.2d 24, 82, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Misconduct does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a

properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Defense counsel's decision not to object or move for mistrial is strong evidence that the prosecutor's argument was not critically prejudicial to the appellant. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. Russell, 125 Wn.2d at 85-86. A prosecutor's remarks, even if improper, are not grounds for reversal if they were provoked by the defense as long as the remarks did not go beyond that which was necessary to respond to the defense argument, did not bring matters before the jury that were not in the record, and were not so prejudicial that a curative instruction could not be effective. State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Here, "blood is thicker than water" was a recurrent theme during the trial. During defense voir dire, in discussing how blood can be thicker than water in the context of family dynamics, one of the juror's mentioned that family can act like a pack of wolves because the members love each other so much and try to support one another even if one of them is doing

something that isn't right. VDRP 125. In opening statement Junior's counsel stated that weekend that family "had the makings of how blood becomes thicker than water"; and in Zeigler's testimony on cross examination he stated that he was sticking up for his family, agreed that "blood was thicker than water" and that he would be there for his family regardless of the consequences. OSRP 53; 2RP 1289. In closing in discussing the charges against Junior, the prosecutor acknowledged Junior's desire to assist his father and defense's implications that "blood is thicker than water," but reminded the jury that that was not a defense to the crime. 2RP 1562. The prosecutor then argued Zeigler's liability as an accomplice because of his desire to help his father-in-law and continued:

Again consequences – strike that. Choices, choices, we live with our, we live with the consequences. Intent, motive doesn't matter. Family – yes, blood is thicker than water, but it doesn't entitle (sic) us to act like a pack of wolves. It doesn't entitle us to disregard the laws and hide behind it was a family weekend. We were sending our son off to war. We had grandchildren there, because you know what? That's not the evidence. That's an improper appeal.

2RP 1574. No defense counsel objected to the statement by the prosecutor at the time it was made. After the prosecutor finished his closing, the court took a break and Senior's counsel raised a different issue regarding instructions. 2RP 1575. After that discussion *Junior's* counsel made a perfunctory objection to the prosecutor's reference to a "pack of wolves"

and requested a curative instruction, noting that if it were repeated, they would seek a mistrial. 2RP 1578. The prosecutor did not object, and Senior's counsel then joined in the objection, indicating she did not want a curative instruction. 2RP 1578-79. The court suggested that rather than give a curative instruction, which it was concerned would only highlight the issue, it could give an instruction at the end of closing arguments. *Id.* After the break, the issue was revisited and Junior's counsel withdrew the request for a curative instruction and moved instead for a mistrial. 2RP 1579-80. Senior's counsel joined in the motion. 2RP 1580. The court found that the one limited comment was an insufficient basis upon which to grant a mistrial, but cautioned that inflammatory language by any party would not be acceptable. *Id.*

The prosecutor's comment was not an attempt to pander to the passion and prejudice of the jury as Senior claims. The prosecutor was attempting to address defense counsel's argument that the defendants' actions were reasonable because "blood is thicker than water," and to argue that was not an excuse to commit a crime. While the words were improper, the comment was not repeated, and no other improper language was used in the prosecutor's closing or rebuttal. This comment was made prior to argument of the other three defense counsel during lengthy summations that took the better part of a day. Supp CP __, Sub Nom. 92

(at 28). Senior did not even initially object to the argument, and the trial court, the one in the best position to decide the effect of the comment, found it did not warrant a mistrial.

Senior likens this case to State v. Rivers, 96 Wn. App. 672, 981 P.2d 16 (1999), however that case involved repeated inflammatory comments during the prosecutor's closing, not an isolated comment during summations that took almost an entire day. In that case the prosecutor commented that the defendant was a vicious rocker, part of a pack that attacked the victims, called him a predator, a hyena and a jackal. *Id.* at 673. The prosecutor even read the definition for jackal into the record and made derogatory comments about defense witnesses. *Id.* at 673-74. The appellate court found the comments to be particularly egregious and specifically designed to inflame the passions of the jury. *Id.* at 676.

That is not the case here. This case is more akin to the allegations of prosecutorial misconduct in State v. Barajas, 143 Wn. App. 24, 177 P.3d 106 (2007), *rev. den.*, 164 Wn.2d 1022 (2008), where the court held that while the prosecutor's derogatory comments in closing were improper, they were not prejudicial. There the prosecutor tried to use an analogy to a dog in order to convey the concept of intent, stated that a mangy mongrel mutt will bite the hand of anyone who comes too near its food. *Id.* at 39. The court found the prosecutor's reference to mongrel

mutt, given the defendant's nationality, was improper. Id. at 39-40. The court found that the analogy, an indirect one, one that was limited and only a small part of the State's overall argument, were not so flagrant that a curative instruction could not have cured the prejudicial effect.¹⁰ Id. at 40.

Here the prosecutor's isolated comment was not designed to inflame the passions or prejudices of the jury, but to convey the argument that even though the family was trying to protect one of its members, it did not excuse their criminal conduct. The prosecutor did not call Sr., nor any of the defendants, a wolf, but used an indirect analogy regarding family dynamics. The judge did not give a curative instruction solely because he thought it would unduly emphasize the brief, isolated comment, and instead offered to remind the jury at the end of closings that the arguments of counsel are just that, argument. Senior's counsel did not request the judge to so instruct the jury, and that instruction was already a part of the court's concluding instructions to the jury. CP 40 (Inst. No. 1). No substantial likelihood exists that prosecutor's comment, although improper, affected the jury's verdict and this Court should defer to the trial court's decision to deny the motion for a mistrial.

¹⁰ The court also found that defense counsel's use of the analogy in his closing indicated that counsel probably did not find the comments highly prejudicial.

3. The trial court did not abuse its discretion in restricting cross examination of the deputy where Junior failed to demonstrate how the unrelated civil judgment was relevant to the deputy's veracity and/or the facts of the case.

Junior asserts that the trial court erred in limiting the cross-examination of Deputy Freeman and precluding him from confronting him with a verdict in the malicious prosecution civil case of *Weiderspohn v. Freeman, Vanderveen and Whatcom County*. Junior specifically asserts that the civil case provided "relevant, recent information about Freeman's willingness to lie about circumstances of his encounters as a law enforcement officer." Junior's Brief at 7. On appeal Junior asserts that such cross-examination was permissible under ER 608(b), although below defense initially asserted it was admissible under ER 404(b). The trial court did not abuse its discretion in limiting cross examination under ER 608(b) because the impeachment material was not relevant either to veracity or the case.

The right to cross-examine and to impeach the credibility of a complaining witness against a criminal defendant is a fundamental constitutional right. Wash. Const. Art 1, §22 (amend 10), *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right to present evidence on one's behalf is not absolute however, and does not guarantee the right to present irrelevant or inadmissible evidence. *State v. Maupin*, 128

Wn.2d 918, 924-25, 913 P.2d 808 (2003); *accord*, State v. O'Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005). It is within a trial court's discretion to refuse to allow cross-examination that will only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Roberts, 25 Wn.App 830, 834, 611 P.2d 1297 (1997). The trial court may consider whether the misconduct is relevant to the witness's veracity *on the stand* or relevant to issues presented at trial. O'Connor, 155 Wn.2d at 349 (emphasis added). A court's decision to limit cross-examination is reviewed for manifest abuse of discretion and should only be reversed "if no reasonable person would have decided the matter as the trial court did." *Id.* at 351.

The proponent of the evidence sought to be introduced must first show that the evidence is relevant to the witness's veracity and to the facts at issue at trial. O'Connor, 155 Wn.2d at 350-52. Relevant evidence is evidence that tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. If relevant, the court must then balance the defendant's right to introduce the evidence "against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process." *Id.*

Under general rules of evidence, specific instances of conduct of a witness cannot be proved through extrinsic evidence in order to attack the witness's credibility. ER 608(b). ER 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule ER 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(emphasis added). A witness cannot be impeached on matters that are collateral to the issues at trial. State v. Oswald, 62 Wn.2d 118, 120-21, 381 P. 2d 617 (1963); State v. Alexander, 52 Wn. App. 897, 901, 765 P.2d 321 (1988). Not every instance of misconduct is probative of a witness's truthfulness or untruthfulness. O'Connor, 155 Wn.2d at 350.

In State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996) relied upon by Junior, the court found that the defendant should have been permitted to cross-examine the victim regarding an admitted lie she made under oath as to the recency of her drug use in a related civil proceeding. Her drug use was relevant to her ability to perceive the events and to her motive to lie in the criminal proceeding because she was on probation at the time and precluded from using drugs. The court found the fact of the

admitted lie and the motivation for that lie highly relevant to the case. *Id.* at 186. McDaniel is distinguishable because here there was no admission regarding lying and any motivation the deputy had to lie in the unrelated civil case was not relevant to this case.

State v. Wilson, 60 Wn. App. 887, 808 P.2d 754, *rev. den.*, 117 Wn.2d 1010 (1991) is likewise distinguishable. That case also involved an admitted lie under oath that was relevant to the issues in the case. There the lie was relevant because the witness, defendant's wife, testified that the defendant resided in her household at the time of the sexual abuse and that she would have known about any abuse. Her lie was that she had stated under oath in a DSHS form that her husband did *not* live in her household at the time. The court determined that the impeachment was within the court's discretion because not only was the false statement relevant to veracity but it was also relevant to the issues in the case. *Id.* at 893.

This case is more similar to the Griswold case in which the court upheld the trial court's decision to preclude the cross examination because it was collateral and not germane to the issues at trial finding that to permit the cross examination would have involved a mini-trial in order to establish the impeachment evidence. State v. Griswold, 98 Wn. App. 817, 831, 991 P.2d 657 (2000), *abrogated on other grounds by State v.*

DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003). The trial court there limited the defendant's attempts to cross-examine the child victim and her mother about an alleged lie regarding why the child had stopped delivering papers. *Id.* at 822-23. The mother had stated at a previous hearing that the child had stopped because of her fear of the defendant, while the child had admitted during an interview that she had lost the job because she sometimes she didn't deliver the papers. *Id.* The defendant wanted to show that either the mother had lied or that the child had lied to her mother. On appeal, even assuming that the false statement was relevant to the child's credibility, the court held that the trial court did not err because the false statement was not germane to the issues in the case. *Id.* at 831.

On appeal here Junior fails to demonstrate what specific impeachment evidence should have been permitted and how it was relevant to the issues in this case. This is not a situation in which the deputy admitted that he lied under oath – the civil case involved a jury finding that the deputy's foot had crossed the threshold of the home without consent of the plaintiff before he decided to arrest the plaintiff, that the deputy did not have probable cause to arrest the plaintiff and therefore the jury found against him in the malicious prosecution suit. Supp CP ___, Sub Nom 25 (Ex. A). The jury specifically found that the

deputy did not use excessive force in that case. Id. Junior asserts he should have been able to impeach the deputy with his untruthfulness in that case, but in order to determine if the deputy had been untruthful and in what respect would have involved a mini-trial regarding the issues raised and testimony given in the civil case.

At trial Junior's counsel indicated it did not intend to bring up the impeachment regarding the *Weiderspohn* case in its case in chief, but reserved the right to inquire if the door was opened by the deputy's testimony. 1RP 28-29. The court indicated it didn't see any relevance to the alleged impeachment evidence unless the deputy was presented as having a reputation for writing honest reports and testifying honestly. 1RP 30. The court was concerned that it would end up trying a case within a case and confusing the jury. 1RP 34.

At trial, Senior's counsel argued that the fact that the deputy had been found financially responsible in a malicious prosecution case made it relevant, not the specifics of the case. 2RP 425. Junior's counsel argued that the deputy's training to become a K-9 officer presented an image that the officer was "special" and therefore the civil judgment would impeach that impression. 2RP 445-60. The court ruled: that the prosecutor's opening statements were not evidence; 2) no evidence had been presented that the deputy was a good, honest and infallible deputy; 3) that ER 607

concerns impeachment regarding the witness's testimony on the stand, not other bad acts; 4) the impeachment must relate to the case and no evidence of reputation had been presented and the testimony was just that the deputy had competed for the K-9 position, was chosen for the position and had received training regarding the position. 2RP 453-60. The judge found that the *Weiderspohn* judgment only indicated that a federal jury had found the deputy involved in an arrest outside appropriate standards. 2RP 458.

The trial court did not abuse its discretion in not permitting the deputy to be cross-examined regarding the judgment against him in the *Weiderspohn* civil case. Even if the court had erred, any error would have been harmless even under the constitutional "overwhelming untainted evidence test". *McDaniel*, 83 Wn. App. at 187-88. Junior admitted on the stand that he disobeyed the officers' orders to stay back and return to the campsite, he admitted that he got involved in the altercation between his father and the deputy and admitted that he pulled the dog off his father. The video and photographs also show this. Junior's defense was only that he didn't intend to assault the deputy or to willfully hinder the officers, that he only intended to help his father and to stop the altercation. His admissions and the video evidence overwhelmingly show that his actions

were purposeful and resulted in the officers being hindered and delayed in trying to arrest Senior.

4. Junior waived any challenge to the vagueness of the information regarding the obstruction charge by failing to file a motion for bill of particulars as to that charge.

Junior argues the trial court abused its discretion by denying his motion for a bill of particulars. Junior did not file a motion for a bill of particulars regarding the obstruction charge, and the court's denial related to the filed motion on the assault charge. Junior waived any issue regarding vagueness of the obstruction charge by failing to file a request a bill of particulars regarding that charge.

Due process requires that an accused be informed of the nature and cause of the accusation against him in order to place the defendant on notice of the charges against him and to give him a meaningful opportunity to respond. State v. Cozza, 71 Wn.App. 252, 254-55, 858 P.2d 270 (1993). Washington courts distinguish charging documents which are constitutionally deficient from those charging documents which are merely vague. State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991). If an information states each statutory element of the crime but is otherwise vague as to some other matter significant to the defense, a bill of

particulars to correct the defect may be appropriate. State v. Bergeron, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985).

The function of a bill of particulars is to clarify particular matters considered essential to the defense. Noltie, 116 Wn.2d at 843. Granting a motion for a bill of particular rests within the discretion of the trial court and its ruling will not be disturbed on appeal absent a showing of abuse of discretion. Noltie, 116 Wn.2d at 840. A defendant waives the right to challenge the information as vague by failing to file a timely motion for bill of particulars. State v. Hayes, 81 Wn. App. 425, 440, 914 P.2d 788, *rev. den.* 130 Wn.2d 1013 (1996); *see also*, State v. Russell, 69 Wn. App. 237, 248, 848 P.2d 743, *rev. den.*, 122 Wn.2d 1003 (1993) (court would not consider challenge on appeal that defendant was not adequately informed as to which acts constituted the pattern of assault because defendant had failed to file motion for bill of particulars).

Junior argues that the court erred in denying his motion for bill of particulars. However, the motion for bill of particulars that Junior filed related *solely* to the assault charge against Dep. Freeman. Supp CP ___, Junior Sub Nom. 48. Junior never filed a motion for bill of particulars related to the obstruction charge and the State was never placed on notice regarding such a motion. At the hearing, Junior's defense counsel informed the court that "it's unclear what physical acts the government

intends to rely on in its claim that Mr. Lockrem, Junior *assaulted* a deputy in the course of the deputy's performance of his official duties." 1RP 16 (emphasis added). Counsel indicated his concern was with the possibility of the government intending to establish any physical acts that were not referenced in the probable cause affidavit. 1RP 16-17. The prosecutor indicated he would rely upon the probable cause statement and the video that everyone had already seen. 1RP 17. In response defense counsel requested additional specificity as to which act constituted the *assault*. 1RP 18 (emphasis added). In fact, Junior never argued any ambiguity or vagueness concerning the obstruction charge to the court, asserting that "certainly, obstructing can be used to define everything that takes place," but arguing that determining where or when the assault occurred within the incident was their concern. 1RP 25-26. The court denied the motion for a bill of particulars regarding the assault. 1RP 25-26.

Junior acknowledges that the information was otherwise sufficient. He waived any issue of vagueness regarding the charge of obstruction by failing to raise the issue below.

5. A jury unanimity instruction was not required where the State's theory of the case was that Junior's obstructing a public servant was a continuing course of conduct.

Junior also asserts that the lack of a unanimity instruction regarding his obstructing a public servant charge prejudiced him and that he should be permitted to assert this error for the first time on appeal.

While the State recognizes that the failure to provide a unanimity instruction when one is required normally constitutes a manifest error of constitutional magnitude, in this case the alleged error was not manifest and Junior should not be permitted to raise it for the first time on appeal.

A unanimity instruction was proposed by Junior but was specifically limited to the charge of Assault in the Third Degree. Whether under a theory of waiver, failure to demonstrate manifest error or invited error, Junior should be precluded from raising this issue on appeal. He specifically chose not to seek a unanimity instruction regarding the obstruction charge. Even if he is permitted to raise this issue on appeal, no unanimity instruction was required here where the statute contemplates, and the charge of obstruction was based on, a continuous course of conduct that occurred within a two to three minute period.

a. *Junior waived this issue by failing to raise it below.*

Junior asserts in a footnote that he is entitled to raise the lack of a unanimity instruction for the first time on appeal. While juror unanimity is a constitutional issue, Junior is obligated to demonstrate on appeal how his alleged error is a manifest one. *See, State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (it is the defendant's burden to show how the alleged constitutional error was manifest, *i.e.*, how it actually prejudiced his rights).

[Defendant] is entitled to a new trial only if his claimed errors are manifest constitutional errors. RAP 2.5(a)(3) ... Even if the claimed error is constitutional in nature, we will not review it unless it is also manifest. An error is manifest when the defendant shows "the asserted error had practical and identifiable consequences in the trial of the case." ... "[M]anifest" means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. 'Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." ...

State v. Naillieux, ___ Wn. App. ___, 2010 Westlaw 4643842 (Nov. 18, 2010), ¶10 (caselaw citations omitted).¹¹ Moreover, Junior invited the error in this case. (See legal argument *infra* at 18-19.)

¹¹ The court in *Naillieux* expressed its frustration at the increasing tendency of defendants to raise issues, and couch them as constitutional issues, for the first time on appeal:

We sit as a court of review which, of course, means that we do not preside over trial proceedings de novo. Our function is to review the validity of claimed errors by a trial judge who presided over a trial. That function assumes that counsel preserve the error by objecting to something the trial judge did or did

The issue regarding a unanimity instruction initially came up in the context of Senior's request for a bill of particulars on May 26, 2009. 1RP 20-25. Junior's counsel at that time indicated his concern that the jury be unanimous as to which actions make up which charge. 1RP 25-26. The court indicated it believed the issue would be best addressed in the context of jury instructions. 1RP 26. *After that discussion*, on June 15, 2009 Junior proposed a unanimity instruction that was specifically limited to the charge of assault in the third degree. CP 80.

At the time of the discussions regarding instructions, Junior did not object to the definition of obstructing a law enforcement officer or the to-convict instruction regarding it. 2RP 1483-84, 1505-06, 1533¹². When Senior requested a unanimity instruction regarding the assault charge, Junior's counsel did not request a unanimity instruction on the obstruction charge. 2RP 1530-31. In fact when asked if he wanted to weigh in on the issue, Junior's counsel stated: "No." 2RP 1531. When Senior renewed his request for a Petrich instruction claiming confusion between the

not do. We do not, and should not, be in the business of retrying these cases. It is a wasteful use of judicial resources. ... And it encourages skilled counsel to save claims of constitutional error for appeal so a defendant can get a new trial and second chance at a not guilty verdict if the first trial does not end in his favor. ... Most errors in a criminal case can be characterized as constitutional. ...

Id. at ¶9 (citations omitted).

¹² The court handled disputed jury instructions separately from the undisputed ones. Undisputed ones were address in 2RP 1417-27 and disputed ones in 2RP 1432-1533.

obstructing charge and the assault charge concerning Senior, Junior's counsel did not request such an instruction. 2RP 1575-78.

Junior's counsel made a specific decision not to request a unanimity instruction regarding the obstructing charge and made this decision after the court decided the issue was best dealt with in the context of the instructions. Under the legal theory of invited error, counsel cannot set up the error and then complain about it on appeal. The issue of a unanimity instruction had been broached with the court, Junior had even requested such an instruction with respect to the assault charge. Through his actions, not only did counsel not alert the court to a need for such an instruction regarding the obstructing charge, but led the court to believe that one was not necessary regarding that charge. Junior has also failed to demonstrate *specifically* how his alleged constitutional error is manifest. Junior should be precluded from raising this issue on appeal.

b. A unanimity instruction was not necessary because the obstructing charge was based on a continuous course of conduct.

A criminal defendant has a right to a unanimous jury verdict. State v. Kitchen, 110 Wn. 2d 403, 409, 756 P2 105 (1988). When the State presents evidence of multiple acts, any of which could form the basis of the crime charged, the State must elect which act it is relying upon or the court must instruct the jury that it must be unanimous as to which act has

been proven beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), *cert. den.*, 501 U.S. 1237 (1991). The rule, however, only applies where there is evidence of several distinct acts, and does not apply where the evidence implicates a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). “[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts.” State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995); *see*, State v. Love, 80 Wn. App. 357, 908 P.2d 395, *rev. den.*, 129 Wn.2d 1016 (1996) (defendant’s possession of drugs on his person as well as at his residence when considered with other evidence of drug trafficking reflected single objective of trafficking in drugs and therefore unanimity instruction was not required regarding charge of possession of a controlled substance with intent to deliver). In determining whether conduct constitutes a continuing course of conduct, the court reviews the evidence in a common sense manner. Handran, 113 W.2d at 17. The fact that a crime can be charged as a continuing course of conduct is also relevant in determining whether a unanimity instruction was required. Fiallo-Lopez, 78 Wn. App. at 725; *accord*, State v. Furseth, 156 Wn. App. 516, 233 P.3d 902 (2010) (no unanimity instruction required in possession of child pornography case

where unit of prosecution allows only one charge for possession of multiple images).

The obstructing a law enforcement officer statute states:

A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

RCW 9A.76.020. While the statute does not necessarily require a course of conduct, the use of the terms “hinder” and “delay” certainly contemplates a course of conduct and the offense frequently involves more than one act by the defendant. *See, e.g., State v. Ware*, 111 Wn. App. 738, 46 P.3d 280 (2002) (defendant’s repeated approaching of officers while they were trying to arrest the defendant’s friend despite officers’ warnings to stay back and his challenge to their actions was sufficient evidence that the defendant hindered, delayed or obstructed the officers); *State v. Contreras*, 92 Wn. App. 307, 966 P.2d 915 (1998) (defendant’s refusal to put his hands up, refusal to exit the vehicle, refusal to keep his hands on top of the car, and refusal to provide his real name constituted obstructing a law enforcement officer); *State v. Lalonde*, 35 Wn. App. 54, 665 P.2d 421, *rev. den.*, 100 Wn.2d 1014 (1983) (defendant’s repeated attempts to approach the officers to stop their actions in controlling a crowd responding to their attempts to arrest someone, in order to calm things down, and the officers’ repeated warnings to get back and use of physical

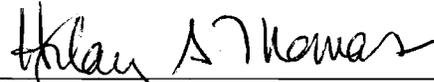
force to make him stay back was sufficient to constitute obstructing a public servant).

Even if Junior is not barred from raising the issue on appeal, the obstructing charge was clearly based on a continuing course of conduct. The entire altercation took place within two to three minutes, and according to Junior's counsel, Junior's involvement in the altercation was limited to 30 seconds. 2RP 1643. The prosecutor argued that Junior was guilty of the charge based on a continuing course of conduct, that he failed to follow the officers' orders to stand back, that his refusal to obey those orders hindered the officers' ability to arrest Senior, and that his involvement in the altercation prevented Ofc. Smith from helping Deputy Freeman arrest Senior. 2RP 1566-68, 1573, 1682. Junior's defense theory generally was that he acted without intent, and specifically regarding the obstructing that Junior was only trying to help and did not willfully obstruct the officers, although he admitted he refused to comply with their orders. 2RP 1454, 1642-43. The court found that a unanimity instruction was not necessary regarding the assault in the third degree because it was a continuing course of conduct that was charged. 2RP 1530-33. A common sense evaluation of the facts here also indicates that the obstruction charge was based on a continuous course of conduct and therefore no unanimity instruction was necessary or appropriate.

E. CONCLUSION

The State requests that the jury's verdicts convicting Senior of Assault in the Third Degree and Obstructing a Law Enforcement Officer and Junior of Obstructing a Law Enforcement Officer be affirmed.

Respectfully submitted this 24th day of November, 2010.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellants' counsel, addressed as follows:

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