

69648-3

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No. 69648-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MELINA HARRIS,

Appellant.

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

The Honorable Leroy McCullough

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to require a unanimous verdict by giving a *Petrich* instruction regarding the assaultive conduct violated Article I, §§ 21, 22 of the Washington Constitution.

2. Due to lack of unanimity in the jury's verdict as to the obstruction charge the court was not authorized to impose multiple punishments for obstruction as required by the jury trial rights of the Sixth Amendment and Article I, §§ 21, 22 of the Washington Constitution.

3. Without jury authorization, the multiple punishments for the same offense violate the double jeopardy clauses of the state and federal constitutions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, § 21 and § 22 together provide the right to a unanimous jury verdict in all criminal trials. This requires that in cases in which the jury is presented with multiple acts, each of which could support the charged offense, either the State must elect which act it wishes the jury to rely on or the court must instruct the jury that it must unanimously agree upon the act or acts that establish the crime. Where there was evidence presented of two potential acts constituting assault

in the third degree did the court's failure to provide a unanimity instruction and the State's failure to elect deny Ms. Harris her right to a unanimous jury verdict?

2. The Sixth Amendment and Article I, §§ 21 and 22 require that all facts essential to the verdict must be proved to a unanimous jury beyond a reasonable doubt. In the case at bar, the court's instructions to the jurors did not inform them their verdicts for the two offenses charged must be based upon unanimous findings as to different acts. Because there were numerous acts upon which jurors could have based their verdict but no evidence the jurors unanimously agreed as to which acts they based the conviction upon, did the court's inadequate instructions deprive Ms. Harris of her right to a unanimous jury verdict?

3. When jury instructions are vague as to separate and distinct acts, the State's election of specific acts during argument may clarify the issue for the jury. Did State's failure to elect the underlying factual basis for each offense deprive Ms. Harris of her right to a unanimous jury verdict?

4. Double jeopardy principles bar the State from punishing a person multiple times for the same offense. Did the vague jury

instructions and State's failure to elect permit the jury to convict Ms. Harris twice for the same offense?

C. STATEMENT OF THE CASE

On October 29, 2011, the Saturday before Halloween, Melina Harris was throwing a party in celebration of the holiday and her nonprofit organization Sisters in the Building Trades. The organization is for women in the construction industry. 10/22/12 RP 8-10. There were people of all ages present, including children. *Id* at 11. There was a stereo playing and the windows were open so that music was audible outside. 10/22/12 RP 17.

At approximately 11:30 p.m. Officer Eric Doherty of the Kent Police Department, who had only been a police officer for a few months, knocked on the door in response to a noise complaint. Officer John Thompson arrived in a separate vehicle but accompanied Officer Doherty to the front of the house. 10/16/12 RP 118; 10/17/12 RP 47. Ms. Harris came to the door and proceeded down the steps. She was wearing a long dress as part of a Halloween costume coupled with high heel shoes. She removed her shoes and put them on the ground to make it easier to walk. 10/22/12 RP 19-20.

Ms. Harris believed she recognized Officer Thompson from a prior interaction. 10/22/12 RP 20. She walked to the cul-de-sac to see if the music could be heard there and to contemplate who had called in the complaint. The officers walked with her. *Id* at 23-24. At some point Doherty asked Ms. Harris for her driver's license and explained to her that a public disturbance was an arrestable offense. 10/22/12 RP 24. Ms. Harris was confused and taken aback by Officer Doherty's behavior so she spoke with Thompson about the complaint instead. 10/22/12 RP 26; 10/16/12 RP 124. Thompson provided suggestions as to how to correct the problem. 10/16/12 RP 124. Ms. Harris did not provide her name to Officer Doherty and spoke very little to him during their initial contact. 10/22/12 RP 23. Officer Doherty did not recall Ms. Harris' exact words, but found her speech prior to the incident insulting and testified she called him a "subservant." 10/10/12 RP 114-116.

Ms. Harris began to walk back towards her house. 10/10/12 RP 99. Officer Thompson believed the contact to be completed and did not follow her. 10/10/12 RP 50. Officer Doherty, however followed Ms. Harris and asked again for her name, but she did not respond. *Id.*

Ms. Harris proceeded back to the house with Officer Doherty following her. 10/17/12 RP 70. Officer Doherty shone his flashlight in Ms. Harris' face. Ms. Harris requested that Officer Doherty move the flashlight as it was shining directly in her eyes. 10/22/12 RP 33. When he failed to do so, Ms. Harris put her arm up to shield her eyes and took a step back. She did not have a clear recollection of whether or not she was holding her shoes at the time. She had no intention of striking, harming, or offending Officer Doherty when she raised her arm. *Id* at 33.

Officer Doherty testified that the beam was directed at Ms. Harris' chin and that when she asked him to move it he complied. 10/17/12 RP 73-74. According to Officer Doherty he moved the flashlight and pointed it at Ms. Harris' midsection, when she then closed the distance between them and hit him with her shoes. 10/17/12 RP 81. He said he pushed Ms. Harris backwards. *Id* at 82. A witness testified that it appeared Officer Doherty punched Ms. Harris in the face with his fist. 10/22/12 RP 94. Officer Thompson heard a scream from the yard and went back towards the house. 10/10/12 RP 51.

Ms. Harris recalls placing her hand up and feeling an intense flash of pain in her face and behind her eyes and she was also having

extreme difficulty breathing and was terrified. 10/18/12 RP 78; 10/22/12 RP 34. At some point Ms. Harris realized she was on the ground with severe pain in her shoulders and being grabbed roughly around her crotch. 10/18/12 RP 77, 10/22/12 RP 35. Witnesses to the incident testified that Ms. Harris was not fighting or resisting the officers. 10/18/12 RP 78, 80; 11/5/12 RP 57-58. Ms. Harris remembered very little of the incident other than her inability to breathe. 10/22/12 RP 37.

Officer Doherty testified that at this point Ms. Harris bit the webbing of his hand. 10/17/12 RP 17. Ms. Harris explained she had no memory of this time period and but did not intentionally bite anyone. 10/22/12 RP 36-37. Officer Doherty testified that he did not document the bite mark, despite training, because senior responding officer, Sergeant Joseph Gagner, told him to wash it immediately. 10/18/12 RP 14. Sergeant Gagner, however had no recollection of Officer Doherty showing him the bite mark of telling Officer Doherty to wash his hand. 11/5/12 RP 84-85. Ms. Harris was transported to the hospital for treatment of her injuries after the jail refused to book her. She received six stitches in her lip. 10/22/12 RP 53-54.

Ms. Harris was charged with Assault in the Third Degree, a felony in violation of 9A.36.031(1)(g) and Obstructing a Law Enforcement Officer, a misdemeanor in violation of 9A.76.020(1). CP 121, 124, 127 A request by Ms. Harris for a *Petrich* instruction in regards to which act constituted assault in the third degree was denied. Trial counsel argued that the strike with the shoes, and the bite were separate acts with distinct defenses. 11/1/12 RP 13-14. The court ruled that it was a continuing course of conduct. 11/1/12 RP 21, 26. Ms. Harris also proposed a jury instruction that would clarify that a charge of obstruction cannot be predicated on speech alone.¹ This request was also denied. 11/1/12 RP 16, 19.

During closing arguments the State argued that the shoe, bite or grabbing incident could be the basis for the assault conviction. 11/5/12 RP 30-31. During closing arguments the State listed any number of acts as those capable of being assault.

What other evidence do we have of this touching or striking that is harmful or offensive? We know that Ms. Harris grabbed onto Officer Doherty's uniform. After she hit him with those shoes and he pushed her back, she lunged at him again, grabbing onto his collar, those shoes still in hand, those heels swinging near

¹ Mere refusal to answer questions or provide identification cannot be the basis for obstructing a law enforcement officer. Some conduct in addition to pure speech is required to support a conviction for obstructing a law enforcement

his eyes. We also know that, once on the ground, Ms. Harris bit Officer Doherty's hand.

11/5/12 RP 30-31.

The State also argued that there was "lots of evidence" to prove that Ms. Harris "willfully hindered, delayed, or obstructed a law enforcement officer." 11/6/12 RP 44. The State listed the fact that Ms. Harris that failed to cooperate and ignored and insulted Officer Doherty. 11/6/12 RP 45. The prosecutor stated:

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

11/6/12 RP 45-46.

The jury convicted Ms. Harris of Assault in the Third Degree, a felony in violation of 9A.36.031(1)(g) and Obstructing a Law Enforcement Officer, a misdemeanor in violation of 9A.76.020(1). She was sentenced to 240 hours of community service and a suspended 364-day sentence. CP 121, 124, 127.

D. ARGUMENT

1. It is a constitutional requirement that a defendant in a criminal matter receive a unanimous verdict.

a. Ms. Harris was denied her fundamental right to a unanimous jury.

The Sixth Amendment and the Washington Constitution Article I, §§ 21, 22 requires a unanimous jury verdict in criminal matters.

When the State presents evidence of several acts that could form the basis of one charged count the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). By requiring a unanimous verdict on one criminal act, the court protects a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). The constitutional error resulting from the failure to either elect the incident relied upon for conviction or to properly instruct the jury if the reviewing court is satisfied beyond a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06.

b. The State's failure to elect one of multiple acts that could constitute assault and the court's failure to give a *Petrich* instruction denied Ms. Harris' right to a unanimous jury.

Ms. Harris was convicted of assault in the third degree contrary to 9A.36.031(1)(g). The court refused Ms. Harris's request to instruct the jury that:

The State alleges that the defendant committed acts of assault in the third degree on multiple occasions. To convict the defendant of assault in the third degree, one particular act of assault in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of assault in the third degree.

CP 61. Thus, the jury was not instructed that it must unanimously agree on the act constituting the assault.

The evidence presented multiple possible acts which could have constituted assault, including raising her hand holding her shoes, he biting Officer Doherty's hand, and a "grab" at the officer. 11/5/12 RP 30-31. Ms. Harris testified that she did not intend to strike Officer Doherty with her shoes and was simply attempting to shield her eyes from his blinding flashlight. She has no recollection of biting Officer

Doherty's hand and she did not recall falling into Officer Doherty.

10/18/12 RP 78; 10/22/12 RP 34, 37.

The court ruled that the acts were part of a continuing course of conduct. 11/1/12 RP 21, 26. Whether one continuing offense may be charged depends upon a commonsense evaluation not the facts. *State v. Craven*, 69 Wn. App. 581, 588, 849 P.2d 681 (1993). The acts in this case were clearly distinct and separate acts. The first occurring prior to Ms. Harris being tackled by Officer Doherty and the other two occurring as Ms. Harris was being manhandled on the ground as she struggled to breathe and faded in and out of consciousness. 10/18/12 RP 78, 80; 11/5/12 RP 57-58. Although close in time these acts were interrupted by an intervening event.

Nonetheless, in closing argument, the State failed to elect from any of these incidents and argue to the jury that a particular incident met the beyond a reasonable doubt burden and did not tell the jury it was required to unanimously decide on one such incident in respect to the assault charge. 11/6/12 RP 45-46. By failing to elect which act was being relied on to prove assault beyond a reasonable doubt and in the absence of an instruction to that effect to the jury, Ms. Harris' right to a unanimous verdict was denied.

c. The failure to protect Ms. Harris' right to a unanimous jury requires reversal of her convictions.

Where the prosecution fails to elect which act it wishes the jury to rely upon and the jury is not instructed that it must unanimously agree on which act supports the charge, the resulting error "is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt." *Kitchen*, 110 Wn.2d at 411 (citing *State v. Loehner*, 42 Wn.App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield concurring), *review denied*, 105 Wn.2d 1011 (1986)).

This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. This standard best ensures that when constitutional error occurs, a conviction will not be upheld unless the error is harmless beyond a reasonable doubt.

(Internal citations omitted.) *Kitchen*, 110 Wn.2d at 411-12.

Here a rational jury could have had a reasonable doubt as to whether or not Ms. Harris committed assault on the night of the incident. That doubt alone indicates the prejudice that arose from the failure to insist upon jury unanimity. Therefore, the absence of a unanimity instruction for assault requires reversal.

2. Imposing multiple punishments on Ms. Harris for convictions based on the same act violates double jeopardy.

- a. Failing to instruct the jury as to unanimity on the specific act

required to convict on obstruction violated double jeopardy.

It violates double jeopardy for a court to impose punishment for multiple convictions for the same conduct. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1977); *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. amend V; Wash. Const. art. 1 § 9. In this case the jury failed to unanimously convict Ms. Harris of obstruction because they were not instructed on separate and distinct acts and the State argued the same conduct as the basis for both the obstruction and the assault charges.

In order to insulate multiple convictions based on a single incident from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged count in a criminal case. *State v. Nolite*, 116 Wn.2d 831, 842-43, 809 P.2d 1990 (1991); *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007). Either by clear jury instructions or unambiguous charging practices, the court needs to ensure the jury's verdict rests on unanimous agreement of separate acts necessary for each conviction. *See State v. Vander Houwen*, 163 Wn.2d 25, 37, 177 P.3d 93 (2008).

(“In the absence of a unanimity jury instruction, each juror could have convicted Vander Houwen based on different criminal acts”); *see also State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) (“In ‘multiple acts’ cases, the jury must unanimously agree as to which incident constituted the crime charged.”).

b. The absence of a clarifying instruction along with the prosecutor’s failure to elect any particular acts was confusing to the jury.

When the State elects a specific act or acts in argument it connotes a clear and unambiguous pronouncement that other allegations are not to be considered when deliberating. *See State v. Sargent*, 62 Wash. 692, 695, 114 P. 868 (1911). Instead of explaining to the jury what evidence it should rely on to find separate and distinct acts for both assault and obstruction, the State argued that any of the assaultive acts could be the basis for either assault or obstruction.

11/5/12 RP 30-31.

Ms. Harris was convicted of assault in the third degree contrary to 9A.36.031(1)(g). The jury was given the standard WPIC instructions for obstruction.² CP 121, 124, 127

Failure to give the instruction stating that the elements of the crime of obstruction require more than mere refusal combined with the State's argument it was any number of assaultive acts combined with Ms. Harris's refusal confused the jurors and prevented unanimity in the verdict. Because the State argued that these same acts could be used to support the assault and obstruction charges, this Court cannot be convinced that Ms. Harris was convicted of assault and obstruction based on "separate and distinct" acts.

Where jury instructions are vague, the resulting ambiguity of the factual basis for a jury's multiple guilty verdicts "potentially exposed

² "A person commits the crime of obstructing a law enforcement officer when he or she willfully hinders, delays, or obstructs any law enforcement officer in the discharge of the law enforcement officer's official powers or duties." CP 88.

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

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

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

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

[the defendant] to multiple punishments for a single offense.” *State v. Mutch*, 171 Wn.2d 646, 662, 254 P.3d 803 (2011) (quoting *State v. Berg*, 147 Wn.App. 923, 935, 198 P.3d 529 (2008)). In Ms. Harris’s case this confusion resulted in a conviction for both obstruction and assault most likely based on the same conduct in violation of double jeopardy.

c. The double jeopardy violation requires reversal.

Double jeopardy violations are manifest constitutional errors, and they should be corrected. *Berg*, 147 Wn.App. at 931. Here the failure to properly instruct the jury violated Ms. Harris’s right to a unanimous jury, which in turn resulted in the court punishing her multiple times for the same acts. Reversal is required where there is an error of constitutional magnitude and the State fails to prove beyond a reasonable doubt that the error could not have affected the verdict. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); *see also California v. Chapman*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). The remedy for such double jeopardy violations is to vacate the potentially redundant convictions. *State v. Mutch*, 171 Wn.2d at 664.

A trial court's instructions must set forth all essential legal requirements in a manner easily understood by the average juror. Because the trial court failed to explain the requirement that unanimity for each count must be based upon a different underlying act, jurors were not clearly and manifestly apprised of the correct legal standard. There is no basis to infer that the jurors individually based their verdicts upon distinct acts for the obstruction and assault convictions. Thus, due to the violation of Ms. Harris's right to a fair trial by a unanimous jury her convictions must be reversed. *See Borsheim*, 140 Wn. App. at 377-78.

E. CONCLUSION

For the foregoing reasons, Ms. Harris respectfully requests this Court order all convictions reversed and remanded for a new trial.

DATED this 15th day of August 2013.

Respectfully submitted,



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DIVISION ONE**

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Respondent,)	
)	NO. 69648-3-I
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MELINA HARRIS,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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