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A. ISSUES PRESENTED

1. Whether the trial court ruled correctly that Harris's conduct constituted a continuing course of conduct, and thus, neither a unanimity instruction nor an election was necessary as to the act forming the basis for Harris's conviction for assault in the third degree.

2. Whether the crimes of third degree assault of a law enforcement officer and obstructing a law enforcement officer are separate crimes for double jeopardy purposes because these crimes have different elements and require proof of different facts.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Melina Harris, with assault in the third degree and obstructing a law enforcement officer based on an incident with Kent Police Officer Eric Doherty on October 29, 2011. CP 1-5, 34-35. A jury trial on these charges was held in October and November 2012 before the Honorable LeRoy McCullough.

Harris proposed a unanimity instruction, arguing that there were multiple acts that could form the basis for the assault charge.

The trial court rejected the instruction on grounds that the events in question constituted a continuing course of conduct. CP 61; RP (10/22/12) 9-15, 22, 24-26.

At the conclusion of the trial, the jury found Harris guilty of both counts as charged. CP 95-96. The trial court imposed 30 days converted to community service on the assault charge and a suspended sentence on the obstructing charge. CP 121-29; RP (12/7/12) 139. Harris now appeals. CP 130.

2. SUBSTANTIVE FACTS

October 29, 2011 was the Saturday before Halloween, and it was a very busy night for the Kent Police Department. Officers were responding to a lot of calls, including fights, DUIs, and noise complaints. RP (10/16/12) 38-39.

One of the calls that night was a noise complaint regarding a Halloween party at Melina Harris's house at approximately 11:20 p.m. RP (10/16/12) 111-13. Detective Jonathan Thompson (who was working patrol that night) and Officer Eric Doherty responded to the call. RP (10/16/12) 113. Both Thompson and Doherty could hear loud music coming from the house as they approached on foot. RP (10/16/12) 115; RP (10/17/12) 52-53.

Officer Doherty knocked on the front door while Detective Thompson stood by a short distance away. Doherty knocked several times and they waited for several minutes before Harris finally answered the door. RP (10/16/12) 117-19. Doherty started to explain why he and Thompson were there, and Harris "walked straight past him" without speaking to him. RP (10/17/12) 58. Harris insisted that the party was not that loud, and that she knew which neighbor had called the police. Harris was upset that the police were there and that someone had called to complain. RP (10/16/12) 120-21.

Harris was wearing a witch costume that included a long dress and very high-heeled shoes. RP (10/17/12) 60. Harris took off her shoes and walked to the middle of the cul-de-sac. RP (10/17/12) 60. Harris walked back and forth in the cul-de-sac and stated repeatedly that she could not hear anything and that the party was not very loud, despite the fact that Detective Thompson could hear the music playing "[v]ery loudly." RP (10/16/12) 123. Harris also told Officer Doherty that he was "obviously really new at this," and that "it's not a subservant's [sic]¹ role to be bothering

¹ Officer Doherty thought perhaps Harris was combining the words "civil servant" and "subservient." RP (10/17/12) 70.

citizens.” RP (10/16/12) 123; RP (10/17/12) 61. When Doherty tried to explain that the city of Kent had a noise ordinance and that Harris could be cited, Harris told Doherty that “she would make [him] famous” if he arrested her. RP (10/17/12) 62. Doherty kept trying to communicate with Harris, but there seemed to be a “disconnect” between what Harris was saying and doing and what Doherty was trying to tell her. RP (10/17/12) 58.

While Officer Doherty was trying to speak with Harris about the noise, Harris pointed at Detective Thompson and said, “He’s been doing this for a while. I’m talking to him instead.” RP (10/16/12) 124. Thompson told Harris that there had been a noise complaint, that the caller wanted to remain anonymous, and suggested that if Harris closed her doors and windows and turned the bass and the volume down, “everybody would be happy” and he and Doherty could leave. RP (10/16/12) 124. Harris did not respond; rather, she “turned on her heel” and walked back toward the house. RP (10/16/12) 124. Thompson assumed that the contact was over at that point and started to walk back to his car. RP (10/16/12) 124.

Officer Doherty, who was a fairly new officer, had been taught during his field training that if it appeared that a noise

complaint would continue to be an ongoing problem, that he should identify the homeowner so that the next officer to respond to the residence would have that information available. RP (10/17/12) 50. Harris had not agreed to turn her music down. RP (10/17/12) 68. Accordingly, when Harris started walking back to the house, Doherty followed her and attempted to identify her. RP (10/17/12) 69. Harris refused to give her name, and she insisted "that her name was in the call because she was the owner of the house," but this was not the case. RP (10/17/12) 71.

Officer Doherty continued to follow Harris onto the front lawn, where Harris turned and faced him. It was very dark in that location, so Doherty shined his flashlight in the direction of Harris's chin. RP (10/17/12) 73. Harris complained that the light was too bright, so Doherty aimed it in the direction of Harris's chest and asked, "Is that better?" RP (10/17/12) 73-74. Harris then stepped forward and hit Doherty in the head and chest with her shoes. RP (10/17/12) 74, 81.

Officer Doherty raised his hand to block the shoes and pushed Harris backward. Harris then grabbed Doherty's collar, and Doherty took Harris down to the ground. RP (10/17/12) 82-85. Harris landed on her back with Doherty on top of her.

RP (10/17/12) 86-87. As Doherty struggled to gain control, Harris bit the webbing of his hand. RP (10/17/12) 89. Doherty pushed Harris's head back and freed his hand. At that point, Detective Thompson arrived to assist. RP (10/17/12) 90. Doherty and Thompson turned Harris over, placed her in handcuffs, got her on her feet, and escorted her to Doherty's patrol car. RP (10/16/12) 7, 9. Harris was struggling and yelling the whole time. RP (10/16/12) 8, 11. As Harris's party guests realized what was happening, they started coming outside and yelling at the officers. RP (10/17/12) 9, 92-93. Harris told them to take pictures or videos, and she told Doherty that he was going to be on television. RP (10/17/12) 92.

At some point during the incident, Harris suffered a cut lip. Consequently, Doherty had a bloody mark on his hand where Harris had bitten him, although the bite had not broken the skin. RP (10/17/12) 87, 104-05.

Harris was treated by aid personnel at the scene, and then Sergeant J.J. Gagner instructed Doherty to drive Harris to the Kent city jail. RP (10/17/12) 103-04. During the drive to the jail, Harris told Doherty that he was going to be famous, that he was going to be on television, that she was going to sue, that he was going to lose his job, and other remarks of that ilk. RP (10/17/12) 107. She

also said, "Congratulations, you've just sucker-punched the leader of a feminist organization in the middle of a celebration." RP (10/22/12) 48, 78. When Doherty arrived at the jail, jail personnel informed him that Harris's lip needed stitches and that they would not book her until after she received treatment. RP (10/17/12) 108. Before Harris was transported to the hospital for stitches, she asked Doherty to take photographs of her and to administer a portable breath test. Doherty complied. Harris's breath alcohol measured .05 on the portable testing machine. Harris expressed surprise, and indicated that she thought it would be higher. RP (10/17/12) 109, 112.

Sergeant Gagner transported Harris to the hospital for stitches. While they were at the hospital, Harris told Gagner that Doherty needed more training on how to handcuff someone and how to use a flashlight. RP (10/16/12) 53. Harris refused to provide her name to the hospital staff and she argued with the doctor about receiving stitches. RP (10/16/12) 54, 70. When Gagner saw Harris several hours later to take a recorded statement from her, her demeanor was completely different. RP (10/16/12) 56. Nonetheless, she again referred to Officer Doherty as "subservant." RP (10/22/12) 70-71.

Harris testified at trial. She said that she did not strike Officer Doherty intentionally, and that she had no memory of biting Doherty because she could not breathe and thought she was dying while she was on the ground. RP (10/22/12) 33-37. Although Harris testified that she was terrified of Doherty, she admitted that she made the “congratulations” comment in the patrol car. RP (10/22/12) 47-48. She claimed that she was trying to “figure out what [Doherty’s] mental state was at that point[.]” RP (10/22/12) 78. Harris admitted that she was purposefully ignoring Doherty when he tried to speak with her about the noise complaint. RP (10/22/12) 69-70, 72.

C. ARGUMENT

- 1. THE TRIAL COURT RULED CORRECTLY THAT HARRIS’S ACTIONS CONSTITUTED A CONTINUING COURSE OF CONDUCT; THUS, NEITHER A UNANIMITY INSTRUCTION NOR AN ELECTION WAS NECESSARY.**

Harris first claims that her right to a unanimous jury was violated with respect to her conviction for assault in the third degree. More specifically, she argues that her conviction for third degree assault should be reversed because the trial court rejected her request for a unanimity instruction and the prosecutor did not

elect a specific act as the basis for this conviction. Appellant's Opening Brief, at 9-12. This claim should be rejected. The trial court ruled correctly that Harris's actions constituted a continuing course of conduct rather than multiple discrete acts. Accordingly, neither a unanimity instruction nor an election was necessary.

A trial court's refusal to give a jury instruction based on an evaluation of the facts of the case is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only if its decision is manifestly unreasonable or is based upon untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A defendant has the right to a unanimous jury verdict. Accordingly, when a defendant has committed multiple separate acts, each of which may serve as the basis for the charged offense, the trial court can ensure jury unanimity by instructing the jurors that they must agree on a specific act as the basis for a conviction. This is known as a "Petrich instruction." State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Alternatively, the State may elect to rely upon a single act as the basis for a conviction. This ensures unanimity as well. State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993). However, neither a Petrich

instruction nor an election is necessary to ensure jury unanimity when the charge is based on a continuing course of conduct rather than multiple discrete acts. Petrich, 101 Wn.2d at 571.

To determine whether a defendant's criminal actions constitute a continuing course of conduct or multiple separate acts, the facts must be evaluated in a commonsense manner. Id. When the evidence shows "conduct at different times and places, or different victims, then the evidence tends to show several distinct acts." State v. Garman, 100 Wn. App. 307, 313, 984 P.2d 453 (1999), rev. denied, 141 Wn.2d 1030 (2000). On the other hand, when the evidence shows conduct that occurred "in one place during a short period of time between the same aggressor and victim," this constitutes a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). The facts of Handran are instructive here.

In Handran, the defendant was charged with first degree burglary for climbing through the window of his ex-wife's apartment while she was sleeping and assaulting her. While he was in the apartment, Handran kissed the victim without her consent and also struck her in the face. Handran, 113 Wn.2d at 12. On appeal, the defendant claimed that the trial court erred in failing to give a

Petrich instruction requiring the jury to be unanimous as to the act (*i.e.*, kissing or striking) that constituted the assault element of first degree burglary. Id. at 17. The court rejected this claim because the defendant's conduct took place in one location, involved the same victim, and occurred during a brief period of time. Id.; see also State v. Crane, 116 Wn.2d 315, 328-31, 804 P.2d 10 (1991) (finding a continuing course of conduct where the defendant's fatal assault upon a child occurred within a two-hour time span). A similar case presents itself here.

In this case, the evidence relied upon by the State showed that Harris swung her shoes at Officer Doherty, grabbed Officer Doherty, and bit Officer Doherty's hand within a very brief time frame in front of Harris's house. As Officer Doherty described these events, they took place in a continuous sequence with no temporal breaks whatsoever. RP (10/17/12) 74-90. Accordingly, the trial court exercised its discretion properly by evaluating the facts in a commonsense manner and concluding that they constituted a continuing course of conduct. RP (11/1/12) 24-26.

In sum, the trial court did not err in refusing Harris's proposed Petrich instruction, and Harris's right to a unanimous jury because this case involves a continuing course of conduct rather

than multiple discrete acts. This Court should reject Harris's claim, and affirm.

2. THIRD DEGREE ASSAULT AND OBSTRUCTING ARE SEPARATE CRIMES FOR DOUBLE JEOPARDY PURPOSES.

Harris also claims that her convictions for assault in the third degree and obstructing a law enforcement officer violate double jeopardy. More specifically, Harris claims 1) that the jury should have been instructed that it had to find that "separate and distinct acts" as the basis for the third degree assault conviction and the obstruction conviction, and 2) that the absence of such an instruction means that the two convictions violate double jeopardy. Appellant's Opening Brief, at 13-17. This claim is without merit for at least two reasons. First, assault in the third degree and obstructing a law enforcement officer are not the same offense for double jeopardy purposes. Therefore, even if Harris's convictions were based on the very same act, there is no double jeopardy violation. Second, because third degree assault and obstruction are different crimes, the "separate and distinct acts" instruction does not apply. Harris's argument misses the mark.

When a single act or series of acts violates multiple criminal statutes, double jeopardy prevents multiple punishments if the legislature did not intend for the crimes to be treated separately. Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 2221, 67 L. Ed. 2d 275 (1977). Double jeopardy in this context is purely a question of legislative intent. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Accordingly, when the legislature *has* authorized separate punishments, convictions for multiple crimes based on the very same act do not violate double jeopardy. Albernaz, 450 U.S. at 343.

If the statutes in question do not expressly state that multiple punishments are authorized, courts must turn to statutory construction principles to determine legislative intent. Calle, 125 Wn.2d at 777. The law in this area is not a model of clarity, but rather “a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.” Albernaz, 450 U.S. at 343. For purposes of navigation, however, the applicable test was announced by the United States Supreme Court as follows:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). The Washington Supreme Court has expressed this principle as follows:

In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

Calle, 125 Wn.2d at 777 (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). If two crimes are not the same in law and in fact under this test, the crimes are different for double jeopardy purposes unless there is clear evidence of legislative intent to the contrary. Calle, 125 Wn.2d at 780.

As charged and found by the jury in this case, a person commits the crime of assault in the third degree if he or she assaults a law enforcement officer who was performing his or her official duties at the time of the assault. RCW 9A.36.031(1)(g); CP 86-87. An assault is an unlawful touching that is harmful or offensive. State v. Jarvis, 160 Wn. App. 111, 117-18, 246 P.3d 1280, rev. denied, 171 Wn.2d 1029 (2011); CP 84. By contrast, a person commits the crime of obstructing a law enforcement officer if

he or she “willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” RCW 9A.76.020(1); CP 88, 90.

These two crimes are not the same in law or in fact. Assault in the third degree contains the element of assault, whereas obstructing contains the element of hindering, delaying, or obstructing. Accordingly, each crime contains an essential element that the other does not, and thus, they are not the same in law. Moreover, in order to prove third degree assault, the State must prove that the defendant committed a harmful or offensive touching against a law enforcement officer who was in the midst of performing his or her duties. No proof of hindrance or delay of those duties is required. On the other hand, in order to prove obstructing, the State must prove that the defendant willfully engaged in actions that hindered, delayed, or obstructed the officer in the discharge of his or her duties. No proof of touching is required. Therefore, each crime requires proof of facts that the other does not, and thus, they are not the same in fact. In sum, these crimes are not the same for double jeopardy purposes under the well-settled test established by Blockburger and Calle.

Furthermore, under the final step in the analysis, Harris offers no evidence (let alone clear evidence) of legislative intent showing that the legislature did not intend for these two crimes to be punished separately. Indeed, the evidence is to the contrary. The third degree assault and obstructing statutes are located in different chapters of the criminal code that address very different issues (*i.e.*, “Assault” versus “Obstructing Governmental Operation”). This is evidence that the legislature intends to punish these crimes as separate offenses. See Calle, 125 Wn.2d at 780 (statutes in different chapters of the criminal code that serve different legislative purposes are intended to be separate crimes that may be punished separately).

In sum, the crimes at issue in this case are not the same in law or in fact under Blockburger and Calle, and there is no evidence that the legislature does not intend for these crimes to be punished separately. Therefore, these crimes are not the same offense for double jeopardy purposes, and accordingly, Harris may be punished for both of them even if both convictions are based on the very same act. See Calle (convictions for second degree rape and first degree incest for the very same act of sexual intercourse does not violate double jeopardy).

Nonetheless, Harris argues that the two convictions violate double jeopardy because the jury was not instructed that each conviction must be based on a “separate and distinct” criminal act. Harris cites State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), and State v. Noltie, 116 Wn.2d 831, 809 P.2d 1990 (1991), for this proposition. Appellant’s Opening Brief, at 13. But neither case is on point.

In Borsheim, the defendant was charged with four identical counts of rape of a child in the first degree, and this Court held that the “separate and distinct” language was necessary to ensure that the jury did not convict the defendant of more than one count based on a single act. Borsheim, 140 Wn. App. at 366-67. One of the authorities this Court relied upon in Borsheim was Noltie, wherein the court approved an instruction that the jury “must unanimously agree that at least one separate act of sexual intercourse pertaining to each count has been proved” because the defendant was charged with two identical counts of statutory rape. Noltie, 116 Wn.2d at 843.

In sum, both Borsheim and Noltie involve defendants who were charged with multiple counts of the same crime based on multiple separate acts. In this case, by contrast, Harris was

charged with two different crimes based on a continuing course of conduct. Borsheim and Noltie are wholly inapposite, and Harris's reliance upon them is misplaced. This Court should reject Harris's double jeopardy claim and affirm both of her convictions.

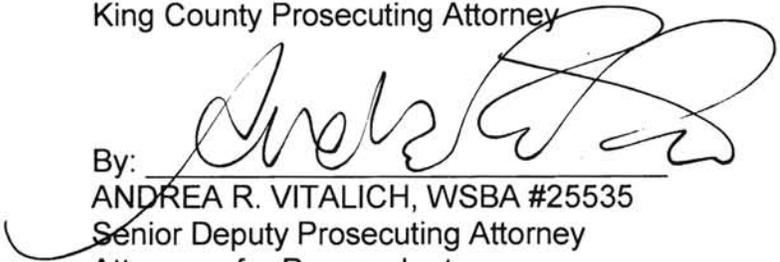
D. CONCLUSION

For the reasons stated above, this Court should affirm Harris's convictions for assault in the third degree and obstructing a law enforcement officer.

DATED this 6th day of November, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Victoria Lyons, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MELINA HARRIS, Cause No. 69648-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

11/6/13
Date