IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES LOCKREM, SR., Appellant.	)	NO. 64026-7-I DIVISION ONE
STATE OF WASHINGTON, Respondent, v. JAMES LOCKREM, JR., Appellant.	)	NO. 64148-4-I UNPUBLISHED OPINION FILED: August 15, 2011

Leach, A.C.J. — In this consolidated appeal, James Lockrem Sr. and James Lockrem Jr.[1] appeal their convictions for obstructing a police officer. Senior also appeals his conviction for third degree assault. Each contends the trial court violated his constitutional right to a public trial by interviewing

[1] To avoid confusion, the opinion refers to James Lockrem Sr. as Senior and James Lockrem Jr. as Junior. The court intends no disrespect.

prospective jurors in a closed courtroom without first applying and weighing the five factors required by State v. Bone-Club.[2] Senior also claims the prosecutor committed misconduct by making inappropriate remarks during closing statements. Junior also claims that the trial court improperly excluded impeachment evidence, denied his motion for a bill of particulars, and refused to give a unanimity instruction on the obstruction charge.

Because the trial court, in consultation with the parties, carefully considered the defendants' rights under article I, section 22 of the Washington State Constitution, closed the courtroom to protect their right to an impartial jury, and narrowly tailored the closure to protect that right, no error warranting relief occurred. Additionally, Senior failed to establish prejudice from the prosecutor's comment. Because the proposed impeachment evidence was not relevant to truthfulness, the trial court did not err in excluding it. Junior had adequate notice of the charges against him and was able to prepare his defense. He was not entitled to a bill of particulars. Finally, no rational trier of fact could have had a reasonable doubt that Lockrem Jr. obstructed a police officer. Therefore, any error in failing to give a unanimity instruction was harmless. We affirm.

FACTS

On May 25, 2008, Officer Jeremy Smith of the United States Department of Agriculture Forest Service and Deputy Jeremy Freeman of the Whatcom

[2] 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

County Sheriff's Office drove to a campsite on Baker Lake Road where several members of the Lockrem family were camping. Smith asked Freeman to accompany him to arrest Joshua Lockrem, who had an outstanding arrest warrant. Joshua's arrest, however, did not go smoothly.

When Smith and Freeman attempted to take Joshua into custody, Joshua resisted and called out for his family's assistance. When several family members responded, Smith and Freeman ordered the family to step away and calm down. When Freeman noticed a handgun holstered at Senior's hip, he asked Senior to turn away so that he could confiscate the gun for officer safety. After Senior refused to comply with Freeman's order, the two began physically fighting. Smith was unable to assist Freeman because Junior refused to stand back. Junior eventually stepped around Smith to grab Freeman's arm while Freeman fought on the ground with Senior. At some point, Freeman's police dog was inadvertently released. When Junior grabbed the dog's collar, it turned and bit Junior on the bicep. Because Freeman continued to fight with Senior, he could not call the dog off. Eventually, both Senior and Junior were arrested.

By amended information, the State charged Senior with assault in the third degree, obstructing a public servant, and attempting to disarm a law enforcement officer. The State charged Junior with assault in the third degree, either as a principal or as an accomplice, and obstructing a public servant. The defendants were tried jointly.

Local media publicized the case. Before trial, Senior's counsel grew concerned that the media coverage might contaminate the jury pool. She stated,

> I know some of those people in the community who have opinions on the articles that have been written recently, personally, people who have followed the issue intently. If we have those people, I'm going to be suggesting to the court that we do a voir dire of them in chambers to test their ability to sit and be fair and impartial.

The court advised counsel that the venire would be given a questionnaire to complete on the following Monday morning. Depending on how jurors responded, select jurors would be directed to appear that afternoon to allow the court to "deal" with any request for private questioning.

Over the weekend, a local paper published an article purportedly quoting one of Junior's attorney's comments about the case. The following Monday, defense counsel, the prosecutor, and the judge discussed concerns that the prospective jurors may have read the article but agreed to wait to see if the issue came up during juror selection.

After attending to other matters, the court returned to voir dire. It selected seven prospective jurors for individual questioning because each indicated a preference for a private interview or prior knowledge about the sheriff's department. This exchange followed:

> THE COURT: I don't know if we're going to be expecting that the media will be here, but we do need to get all those people here in the courtroom. I need to make the request to see if there's anyone present that has an objection to it being done in chambers. Even though it will be on the record, I need to make that point.
>
> . . . .

> MR. QUINN [the prosecutor]: We also have to identify a reason for doing such that doesn't contemplate just fairness or what was the Bone-Club analysis?
>
> THE COURT: I've got Bone-Club here

The court then attended to some other issues regarding voir dire before adjourning for lunch.

After lunch, the court assembled the seven jurors selected for private questioning in the courtroom. It informed them that after completion of the private interviews, the court would call the entire venire back to complete the juror selection process. The court then asked if "anyone in this courtroom that has any objections whatsoever to the court conducting questions with counsel and their clients, conducting questions of these jurors outside of the presence of the public and outside of the presence of the remainder of the jury panel." No one objected, and the court ordered the seven jurors back to the jury room to wait for individual questioning.

Before the first juror was called back into the courtroom, Senior's counsel noted that the list of jurors to be questioned privately did not include those jurors who indicated familiarity with the case. After stating that counsel would have an opportunity to question the entire venire later on, the court proceeded with the private interviews by calling jurors back to the courtroom one at a time and seating them in the jury box.

After the last of the seven jurors was questioned, the court stated,

> I want to put on the record something which I think needs to

> be addressed.
>
> 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 such 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 [sic] interests, and to find out if people had significant knowledge about this case, or about the other matters [regarding] 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 some of our jurors pretty adequately attempted to express . . . , and I think that allows the jurors the opportunity to participate in voir dire honestly and openly. . . .
>
> In weighing the competing interests of the proponent of the 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 . . . .
>
> 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.
>
> So I would find that all of the State v. Bone-Club factors have been met, and that is the record for the court of appeals.

Senior's counsel then asked the court to use the same procedure to conduct individual voir dire of those additional jurors who indicated prior knowledge about the case. Citing unnecessary delay, the prosecutor opposed that recommendation. Junior's counsel, however, advocated for it, stating,

> [T]he problem is some of them have indicated . . . that they had some exposure to some of the material. Some of the materials that have been written about this in the Herald. The problem is if we inquire of them in a general panel, and they talk about what they read, thereby kind of tainting the rest of the group.

Senior's counsel also argued that voir dire in front of the whole panel "serves to

contaminate the entire panel, which is what we decided we were going to try to avoid."

The court took a short recess to review the questionnaires, and after reconvening, the parties identified 12 additional jurors for private questioning. Counsel and the trial judge then discussed three options for proceeding with voir dire: excusing those 12 jurors, recalling the whole panel and questioning the 12 jurors in front of them, or questioning the 12 jurors individually in a closed proceeding.

Opting for the third option, the court dismissed the remainder of the jury pool for the day and ordered the 12 identified jurors to return to the jury room to wait for individual questioning. During private voir dire, the court dismissed one juror, a law enforcement officer, because he stated he could not be fair and impartial.

The jury found Senior guilty of assault in the third degree and obstructing a public servant but acquitted him of attempting to disarm a law enforcement officer. The jury found Junior guilty of obstructing a public servant but acquitted him of assault in the third degree.

The Lockrems appeal.

ANALYSIS

Together, the Lockrems contend the trial court violated their right to a public trial when it questioned prospective jurors in a closed proceeding.

Individually, Senior claims the prosecutor committed misconduct by making inappropriate remarks during closing statements, and Junior asserts the trial court improperly excluded impeachment evidence, denied his motion for a bill of particulars, and refused to give a unanimity instruction on the obstruction charge. We first address the public trial right challenge and then these individual claims.

Right to Public Trial

Article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution each guarantee a criminal defendant the right to a public trial by an impartial jury. Article I, section 10 of our state constitution[3] secures to the public open and accessible judicial proceedings.[4] These provisions "'assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny.'"[5] Whether a defendant's constitutional public trial right has been violated is a question of law we review de novo.[6]

The right to a public trial applies to jury selection.[7] But the general

[3] Article I, section 10 of the Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay."

[4] Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

[5] State v. Coleman, 151 Wn. App. 614, 620, 214 P.3d 158 (2009) (quoting State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007)); see also State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

[6] Bone-Club, 128 Wn.2d at 256.

[7] In re Pers. Rest. of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)); see also Presley v. Georgia, __ U.S. __, 130

requirement of openness may give way to "an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest."[8] To determine if a closure is appropriate, a trial court first must apply and weigh the five Bone-Club 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."[9]

After applying these guidelines, the trial court should enter specific findings justifying its closure order.[10] If a public trial right violation occurs that "'render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,'" it warrants reversal and remand for a new trial.[11]

S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010).

[8] Momah, 167 Wn.2d at 148.

[9] Bone-Club, 128 Wn.2d at 258-59 (second alteration in original) (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). These factors comport with the requirements for closure under the Sixth Amendment, as identified by the United States Supreme Court in Waller v. Georgia, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); see Momah, 167 Wn.2d at 149 ("To determine if closure is appropriate, we apply closure guidelines drawn from Waller's approach.").

[10] Momah. 167 Wn.2d at 149.

[11] Momah, 167 Wn.2d at 149 (alteration in original) (quoting Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)).

As a threshold matter, we address two of the State's preliminary arguments. The State first contends that a criminal defendant does not have standing to assert the public's right to the open administration of justice. After oral argument in this case, the Washington Supreme Court filed its opinions in In re Detention of D.F.F.,[12] where all nine justices agreed that a detainee in a civil commitment proceeding has standing to assert an open administration of justice challenge under article I, section 10. Since a defendant in criminal proceedings should be allowed to assert the same rights, the Lockrems have standing to assert the public's right to open proceedings.

The State next contends that the Lockrems failed to demonstrate that a closure occurred because the only people excluded from the courtroom were other prospective jurors. This argument assumes that a defendant must show an actual exclusion of identified members of the public to establish closure. Washington public trial case law does not impose this requirement. In State v. Momah,[13] the defendant did not contend that any person wishing to attend any part of the trial was excluded. Rather than requiring proof that a member of the public was actually excluded, Washington courts look to the transcript of the trial court's ruling to determine the presumptive effect of its order.[14] "[O]nce the plain language of the trial court's ruling imposes a closure, the burden is on the State

[12] No. 81687-5, 2011 WL 2790943, at *1 (Wash. July 14, 2011).

[13] 167 Wn.2d 140, 156, 217 P.3d 321 (2009) (Penoyar, J.P.T., concurring).

[14] Orange, 152 Wn.2d at 807-08.

to overcome the strong presumption that the courtroom was closed."[15]

Here, the trial court clearly stated that it was temporarily excluding the public from the courtroom. Before questioning individual jurors, the court asked if "anyone in this courtroom that has any objections whatsoever to the court conducting questions with counsel and their clients, conducting questions of these jurors outside of the presence of the public and outside of the presence of the remainder of the jury panel." (Emphasis added.) The court later said the procedure used for individual voir dire "was to essentially close the courtroom and inquire of this group of jurors individually." (Emphasis added.) Because the court's plain language indicates a closure occurred, the burden shifted to the State to present evidence sufficient to overcome the "strong presumption" that the courtroom was closed. Because the State failed to present any such evidence, we conclude the court closed a portion of voir dire to the public.

We next address the merits of the Lockrems' public trial argument. Although the Lockrems acknowledge that the court articulated a Bone-Club analysis on the record after the closure occurred, they claim this analysis came too late to pass constitutional muster. They further contend the trial court erred by failing to identify a sufficient "overriding" interest in its articulation of this analysis.

A judge should conduct an on-the-record Bone-Club analysis before

[15] State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005).

ordering a courtroom closure.[16] But in Momah, our Supreme Court identified facts and circumstances where a failure to do so does not warrant the remedy of reversal and a new trial.[17] As explained below, Momah controls the outcome of this case.

Momah involved a heavily publicized trial where the trial judge, prosecutor, and defense attorney held "considerable" discussions about the risks of jury pool contamination if counsel questioned jurors in front of the entire venire.[18] After the trial judge, the prosecutor, and defense counsel discussed a list of jurors to be questioned privately, defense counsel requested expansion of the private questioning to include all venire members.[19] Instead of granting this request, the trial court admonished the jury pool not to talk about the case and then closed the courtroom to conduct in-chambers voir dire of select jurors. The trial court did not expressly apply the Bone-Club guidelines.[20] Momah's attorney actively participated in the process, questioned jurors, and exercised numerous for cause challenges.[21]

Based on these facts, our Supreme Court distinguished the case before it

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[16] See Bone-Club, 128 Wn.2d at 256; Orange, 152 Wn.2d at 805-07; Brightman, 155 Wn.2d at 515; State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006); Momah, 167 Wn.2d at 148-49; State v. Strode, 167 Wn.2d 222, 227-28, 217 P.3d 310 (2009).

[17] Momah, 167 Wn.2d at 155-56.

[18] Momah, 167 Wn.2d at 145-46; Strode, 167 Wn.2d at 232 (Fairhurst, J., concurring).

[19] Momah, 167 Wn.2d at 146.

[20] Momah, 167 Wn.2d at 146, 151.

[21] Momah, 167 Wn.2d at 146-47.

from earlier public trial cases. It observed that unlike the pre-Momah line of cases, defense counsel affirmatively advocated for closure, argued for expansion of closure, and benefitted from it.[22] The trial court and defense counsel had legitimate concerns about the impact of pretrial publicity on juror impartiality. The trial court recognized competing article I, section 22 interests in the case.[23] Further, the trial court narrowly tailored the closure to harmonize the right to a fair trial with the defendant's public trial interests.[24] Under these facts and circumstances, the court concluded that the remedy of reversal and remand was not warranted.[25]

This case presents similar considerations. As in Momah, pretrial publicity gave the trial judge and counsel concern about the risk of jury pool contamination. Before trial, this case received significant local media coverage. A local newspaper published an article two days before trial started, specifically discussing anticipated evidence, possible defense strategy, and quoting counsel for one defendant. The court and counsel discussed whether this publicity might have sufficiently tainted the venire to require impaneling a jury from another county and other possible methods of securing an impartial jury. As Momah indicates, jury impartiality implicates the right to a fair trial, a legitimate "overriding" interest that may cause the right to a public trial to yield to some

[22] Momah, 167 Wn.2d at 155.
[23] Momah, 167 Wn.2d at 151-52, 156.
[24] Momah, 167 Wn.2d at 156.
[25] Momah, 167 Wn.2d at 156.

degree in certain circumstances.[26] That same overriding interest existed in this case.

The trial court here also recognized and addressed public trial interests of the defendants and the public: before any closure occurred, the court cited Bone-Club and asked if anyone present objected to private questioning. No one objected. Instead, as happened in Momah, the defendants made deliberate and tactical choices to protect their right to an impartial jury by accepting closure, arguing for the expansion of it, actively participating in it, and seeking benefit from it. And as happened in Momah, by limiting private voir dire to select jurors, the trial court narrowly tailored the closure to harmonize that right with public trial interests. Given the strong similarities this case bears to Momah, we conclude no error structural in nature occurred and reversal is unwarranted.

In response, the Lockrems claim that the federal constitution requires reversal, citing Presley v. Georgia[27] and State v. Paumier.[28] While we agree with the general proposition that Presley and Paumier require that the trial court consider alternatives to closure, even when none are offered by the parties, and make findings adequate to support closure, these cases also recognize that in certain cases the right to an open trial may "give way" to a defendant's right to a

[26] Momah, 167 Wn.2d at 155 ("We find all of these actions by Momah's counsel and the trial judge occurred in order to promote and safeguard the right to an impartial jury.").

[27] __ U.S. __, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

[28] 155 Wn. App. 673, 230 P.3d 212 (2010).

fair trial.[29] This is one of those exceptional cases.

The trial court also satisfied the procedural requirements of Presley. It did not rely upon generic reasons for closure. Specific pretrial publicity created issues regarding juror impartiality discussed by counsel and the court. The record before this court demonstrates that the trial court had before it and applied the Bone-Club factors as it considered proposals from counsel and determined the least restrictive way to proceed with jury selection. The trial court's colloquy with counsel and postclosure oral findings together contain findings sufficient to support its decision to close a portion of voir dire. The closure did not violate the federal constitutional requirements for an open trial because the trial court considered less restrictive alternatives and made sufficient findings.

Prosecutorial Misconduct

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial."[30] Comments are prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict."[31] When a defendant bases a claim of misconduct on comments made by the prosecutor in closing argument, without any objection, that claim is waived

[29] Presley, 130 S. Ct. at 724; Paumier, 155 Wn. App. at 684.
[30] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).
[31] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

unless the alleged misconduct is "so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct."[32] To determine if any prejudice could have been remedied by a curative instruction, we "do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions give to the jury."[33]

Senior contends that the prosecutor's closing remarks amounted to prosecutorial misconduct that deprived him of a fair trial. Specifically, he identifies the prosecutor's statement disparaging the family as a "pack of wolves," which was made in the following context:

> Choices, choices, and 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 entitled [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.

Defense counsel did not object to the statement at that time. Rather, counsel waited until after the prosecutor finished closing and the court took a short recess. Junior's counsel then objected to the "pack of wolves" reference, asked for a curative instruction, and noted that if the language was repeated, he would ask for a mistrial. Senior's counsel joined the objection. The court

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[32] State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

[33] State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (citing State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)).

suggested that rather than give a curative instruction, which would only serve to call more attention to the problem, it would remind the jury that closing arguments are not to be considered as evidence. Junior's counsel then withdrew a request for a curative instruction and moved for a mistrial, which Senior joined. The trial court denied the motion, reasoning that an isolated comment provided an insufficient basis for granting a mistrial, but cautioned the parties against using inflammatory language.

Senior compares the prosecutor's remarks to those made in State v. Rivers[34] and State v. Belgarde.[35] In Rivers, the prosecutor commented that the defendant was part of a pack of attackers, "a vicious rocker," "a predator," and that he and others were "nothing more than hyenas."[36] He even called the defendant a "jackal" and went so far as to read the dictionary definition of the term to the jury.[37] And in Belgarde, the prosecutor described the American Indian Movement as a "deadly group of madmen" comparable to "Sean Finn" or "Kadafi—feared throughout the world."[38] The prosecutor also invited the jury to consider Wounded Knee, stating, "[Wounded Knee] is one of the most chilling events of the last decade. You might talk that over once you get in there. That was the American Indian Movement. That was a faction of the American Indians

[34] 96 Wn. App. 672, 981 P.2d 16 (1999).
[35] 110 Wn.2d 504, 755 P.2d 174 (1988).
[36] Rivers, 96 Wn. App. at 673.
[37] Rivers, 96 Wn. App. at 673.
[38] Belgarde, 110 Wn.2d at 506.

that were militant, that were butchers, that killed indiscriminately."[39]

The State concedes that the remark was improper. But the State correctly argues that it was not prejudicial in the context of the whole record and circumstances at trial. First, Junior's counsel stated during his opening statement that the family weekend "had the makings of how blood becomes thicker than water." The prosecutor's (ill-advised) analogy, therefore, is more aptly viewed as an effort to argue that family connections do not justify the commission of a crime. Further, the prosecutor's comment was not repeated and, unlike Rivers and Belgarde, no other improper language was used in the prosecutor's closing or rebuttal.

Under these circumstances, we do not find a substantial likelihood that the misconduct affected the jury's verdict. We therefore conclude that the trial court did not abuse its discretion in denying the motion for a mistrial.

Impeachment Evidence

Junior argues that the trial court violated his right to confront Freeman about his alleged willingness to lie in official police reports. According to Junior, he should have been allowed to question Freeman about Wiederspohn v. Freeman,[40] a civil case where a jury found Freeman liable for malicious, oppressive, or reckless disregard for Wiederspohn's rights.

This court reviews a trial court's limitation of the scope of cross-

[39] Belgarde, 110 Wn.2d at 507.
[40] No. 07-2074 (W.D. Wash., January 30, 2009).

examination for a manifest abuse of discretion.[41] The State argues that the trial court did not abuse its discretion by limiting cross-examination because the impeachment material was irrelevant.

Both the United States Constitution and the Washington State Constitution guarantee a defendant the right to confront and cross-examine a witness against him.[42] Evidence Rule 608(b) also allows, in the court's discretion, for the cross-examination of a witness as to specific instances of conduct if the inquiry is germane to that witness's propensity for truthfulness.[43] But this right, whether exercised on constitutional grounds or under ER 608, is not absolute; it is limited by considerations of relevance.[44] A defendant has no right to present irrelevant or otherwise inadmissible evidence.[45] Relevant evidence is "evidence having any tendency to make the existence of any fact

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[41] State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

[42] The Sixth Amendment to the United States Constitution provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." Article I, § 22 of the Washington Constitution states, "In criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face."

[43] ER 608(b) states,

> 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 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.

[44] State v. O'Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005).

[45] State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[46]

Here, Junior claims that Freeman's conduct in Wiederspohn was a proper subject for cross-examination because the plaintiff in that case apparently alleged that Freeman's police reports were knowingly false or made with reckless disregard for the truth. But while the jury in Wiederspohn found "Freeman's conduct was malicious, oppressive or in reckless disregard of Plaintiff Wiederspohn's rights," it made no finding that Freeman lied in any police report. Instead, the special verdict form indicates that the jury found that Freeman's foot crossed the exterior of the plaintiff's threshold without consent and without probable cause for arrest. Because malicious, oppressive, or reckless disregard of a civilian's Fourth Amendment rights is not relevant to truthfulness, the trial court did not abuse its discretion in limiting cross-examination.

Jury Unanimity Instruction

Junior asserts that the trial court should have instructed the jury that it must unanimously agree on which act it relied to convict on the charge of obstructing a public servant. When the State presents evidence of multiple distinct criminal acts, any one of which could form the basis for a single charge, the State must choose the specific act upon which it relies for conviction or

[46] ER 401.

inform the jury that it must unanimously agree that the same criminal act has been proven beyond a reasonable doubt.[47] When the State presents evidence of a single continuing offense, however, a unanimity instruction is not required.[48] The failure to give a unanimity instruction when one is required constitutes constitutional error, and the case should be remanded to the trial court unless the State proves that error was harmless beyond a reasonable doubt.[49] Error is not harmless if the reviewing court concludes that "'a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.'"[50]

RCW 9A.76.020(1) states that 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." The "to convict" instruction stated that to find Junior guilty of obstructing a public servant, the State had to prove beyond a reasonable doubt that he "willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties."

Because a criminal defendant has a constitutional right to a unanimous jury verdict,[51] Junior submits that the jury should have been required to find that

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[47] State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990).

[48] See State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984), rev'd on other grounds, State v. Kitchen, 110 Wn.2d 403, 405, 756 P.2d 105 (1988).

[49] Kitchen, 110 Wn.2d at 411.

[50] Kitchen, 110 Wn.2d at 411 (quoting State v. Loehner, 42 Wn. App 408, 411, 711 P.2d 377 (1985) (Scholfield, J., concurring).

he hindered, delayed, or obstructed a specific officer (i.e., "the" law enforcement officer). He reasons that because two officers were involved and that these officers had different roles in the incident, the jurors might not have agreed as to which officer, Freeman or Smith, Lockrem obstructed.

In response, the State argues that Junior's failure to propose a unanimity instruction precludes him from raising it on appeal. But if the issue may be raised on appeal, the State also argues that instruction is not required where the charged obstruction was based on a continuing course of conduct.

In this instance, Junior is correct. Although Junior did not propose a unanimity instruction on this charge, the failure to give a unanimity instruction when required is manifest error affecting a constitutional right that may be raised for the first time on appeal.[52] And because Junior merely acquiesced to the court's instructions, the doctrine of invited error does not preclude review.

To determine whether Junior's conduct was one continuing offense, this court considers whether distinct acts occurred at separate times or places.[53] Here, the possible acts supporting a conviction for obstructing a law enforcement officer were distinct: they involved two different officers. Specifically, Freeman testified that Junior disobeyed his commands to step back, grabbed his left arm to prevent him from controlling Senior, and grabbed the

[51] State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).
[52] RAP 2.5(a)(3).
[53] See State v. Marko, 107 Wn. App. 215, 220-21, 27 P.3d 228 (2001).

police dog's collar so that the dog was unable to assist Freeman. Smith also testified that Junior "block[ed]" him and prevented him from going to Freeman's aid, ignored his commands, and that he was only able to finally place handcuffs on Junior because the police dog was biting Junior's other arm. Because the State presented evidence of multiple distinct criminal acts, a unanimity instruction should have been given.

However, the error in this case was harmless beyond a reasonable doubt. Junior testified that he heard Smith order him to stay back and that he refused to comply with the order. He also testified that he had repeatedly attempted to get Smith's attention while Smith was trying to assist Freeman in controlling Senior. In addition, the videotape admitted into evidence shows Junior stepping around Smith and moving toward Freeman while Freeman was on the ground with Senior. It also shows Junior advancing toward Smith on multiple occasions, twice getting close enough for Smith to push him in the chest.

Because no rational trier of fact could have had a reasonable doubt as to whether each incident established the crime, we conclude that the error was harmless.

Bill of Particulars

Junior argues that the trial court committed reversible error by denying his motion for a bill of particulars on the obstruction charge. This argument lacks merit.

We review a trial court's denial of a motion for a bill of particulars for an abuse of discretion.[54] The purpose of a bill of particulars is "to amplify or clarify particular matters considered essential to the defense."[55] "'A defendant should be given enough information about the offense charged so that he or she may, by the use of diligence, prepare adequately for the trial.'"[56]

Here, Junior admits that the charging document was legally sufficient because it included all of the essential elements of the crime charged. In addition, the facts known to the court and the parties supported the elements of obstruction. The affidavit of probable cause alleged that Junior assisted Senior during the fight with Freeman and that Junior fought the police dog while Smith wrestled him into handcuffs. It also states that Junior's actions prolonged the

[54] State v. Noltie, 116 Wn.2d 831, 844, 809 P.2d 190 (1991).
[55] Noltie, 116 Wn.2d at 845.
[56] State v. Allen, 116 Wn. App. 454, 460, 66 P.3d 653 (2003) (quoting 1 Charles Alan Wright, Federal Practice and Procedure § 129, at 652-54 (3d ed. 1999)).

fight between Senior and Freeman. Therefore, Junior had adequate notice, was able to prepare for his defense, and no error occurred.

We affirm the convictions for Junior and Senior.

Leach, A.C.J.

WE CONCUR:

Appelwick, J.

Ellington, J.