IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ERIK JOHANN SIPPEL,
Defendant-Appellant.

Multnomah County Circuit Court
15CR37363; A161780

Kathleen M. Dailey, Judge.

Submitted September 1, 2017.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Sarah Laidlaw, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Peenesh Shah, Assistant Attorney General, filed the brief for respondent.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

LAGESEN, P. J.

Conviction for interfering with a peace officer reversed and remanded; otherwise affirmed.

LAGESEN, P. J.

Defendant was convicted of interfering with a peace officer for refusing to obey a lawful order, ORS 162.247 (1)(b). On appeal, defendant argues that the trial court erred by allowing the state, during rebuttal closing argument, to introduce a new theory as to which lawful order he had disobeyed. According to defendant, the introduction of that new theory, at such a late stage in the proceedings, left him with no meaningful opportunity to address the argument and created a risk that the jury would find him guilty without the requisite number of its members concurring as to which factual occurrence constituted the crime. In response, the state concedes that the trial court "should have either foreclosed the state from relying on a new theory of guilt or at least issued a concurrence instruction to the jury," notwithstanding defendant's failure to request such an instruction. For the reasons that follow, we agree with and accept the state's concession that the court committed plain error under the circumstances, and we reverse and remand the judgment of conviction.

The relevant facts are procedural in nature. After a traffic stop of defendant escalated into a confrontation with police, he was charged with interfering with a peace officer.[1] The charging instrument alleged that defendant had "unlawfully and intentionally refuse[d] to obey a lawful order by [Officer] Bryson," but it did not specifically identify which of Bryson's orders defendant had disobeyed. Instead, the prosecutor appeared to elect a theory during her opening statement, explaining to the jury that the state would prove that defendant had disobeyed orders by police "to get back in the car."

During its case-in-chief, the state presented evidence, including a videotape of the traffic stop, showing that Bryson repeatedly directed defendant, who was approaching the officer, to get back into defendant's car. The state also presented evidence that, during an ensuing effort to detain defendant, Bryson had ordered defendant to put his hands behind his back and a different officer, Kerridge, had

[1] He was also charged with, and acquitted of, second-degree disorderly conduct.

ordered defendant to put his arms behind his back, but that defendant had continued to struggle against the arresting officers. Defendant himself testified that, as he was being detained, "Officer Kerridge got my right arm and I stuck my right arm like into the open window [of the car] to try and like not get pulled back."

During her closing argument, the prosecutor focused initially on defendant's refusal to obey Bryson's orders to get back into his car; defendant's closing argument then responded to that theory. However, during rebuttal, the prosecutor suggested that defendant also had refused to obey a lawful order to put his arms behind his back. She argued, "He told you himself. You heard that there were other lawful orders given. Put your arms behind your back. He didn't listen to that."

Defendant immediately objected that the prosecutor was offering a new theory of the crime during rebuttal. The court sustained the objection but explained that it would allow the prosecutor to "say it another way." The prosecutor then repeated her argument that defendant resisted a lawful order during the attempt to detain him:

> "The officers, you heard, were trying to detain him. He told you himself that he resisted. He tensed up. He had his arm through the window. That's not complying with a lawful order."

Defendant again objected to the introduction of the new theory but, this time, the court overruled the objection. So, the prosecutor continued her argument, stating that defendant "[o]nce again was disregarding, refusing to obey a lawful order," and she asked the jury to return a guilty verdict, which it ultimately did.

On appeal, defendant argues that, by overruling his objection to the closing argument and then not instructing the jury on the issue of jury concurrence, the trial court created a risk that defendant would be convicted without the requisite number of its members agreeing on what conduct actually constituted the offense—that is, without agreement about which of the orders defendant had refused to obey. As noted, the state concedes the point and we agree. Even if

it were permissible for the court to allow the prosecutor to introduce the new factual theory at that late stage of the case—a point we do not decide—the court was required in that circumstance to instruct the jury that the requisite number of its members must agree on which of the factual occurrences constituted the crime. *See State v. Ashkins*, 357 Or 642, 659, 357 P3d 490 (2015) (where the indictment charges a single occurrence of each offense, and the evidence permits the jury to find any one or more among multiple, separate occurrences of that offense involving the same victim and the same perpetrator, the state is "required to elect which occurrence it would prove or, alternatively, defendant was entitled to a concurrence instruction"); *State v. Pipkin*, 354 Or 513, 517, 316 P3d 255 (2013) (explaining that the need for such an instruction can arise where "the indictment charges a single violation of a crime but the evidence permits the jury to find multiple, separate occurrences of that crime"); *State v. Teagues*, 281 Or App 182, 194, 383 P3d 320 (2016) (where the state proceeded on two theories, based on different factual occurrences, and the court did not require the state to elect its theory, "it subsequently erred by failing to give a concurrence instruction"). Here, because the court did not require the state to elect a theory of the crime when defendant objected, the trial court's subsequent failure to give the necessary concurrence instruction—even in the absence of a request by defendant for such an instruction—was plainly erroneous. And, given the manifest potential, based on the prosecutor's rebuttal, for the jury to find defendant guilty without actually agreeing on what conduct violated ORS 162.247(1)(b), we exercise our discretion to correct the error. *See, e.g.*, *State v. Bowen*, 280 Or App 514, 535-36, 380 P3d 1054 (2016) (exercising discretion to correct plain error in failing to give a jury concurrence instruction where there was no plausible strategic reason for the failure to request the instruction and this court was not persuaded that a sufficient number of jurors concurred on a single theory of liability).

Conviction for interfering with a peace officer reversed and remanded; otherwise affirmed.