

70133-9

70133-9

COA No. 70133-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS VEILLEUX,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

The Honorable Theresa B. Doyle

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APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
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## **A. ASSIGNMENTS OF ERROR**

1. Mr. Veilleux's conviction for Obstructing a Law Enforcement Officer under RCW 9A.76.020(1) was entered in violation of Due Process where the evidence at his jury trial was insufficient under State v. Williams, 171 Wn.2d 474, 486, 251 P.3d 877 (2011), to prove the offense beyond a reasonable doubt.

2. The jury's verdict on obstructing lacks adequate assurances of unanimity under State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984).

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. After his arrest, Mr. Veilleux said to a police officer, "I don't know" when he was asked what his name was, he gave a birthdate of nonsensical numbers to a different officer, and he later refused to cooperate with the civilian fingerprint technician. Was the evidence sufficient to prove that Mr. Veilleux obstructed Seattle Police Officer Michael Renner, the complainant named in the amended information and the 'to-convict' instruction?

2. In the absence of a unanimity instruction or an election, does the jury's verdict lack adequate assurances of unanimity?

### **C. STATEMENT OF THE CASE**

Nicholas Veilleux was charged with residential burglary and obstructing a law enforcement officer, following his arrest at a West Seattle home that he entered without permission. CP 3-5, 6-7. At his jury trial, his defense to the burglary charge was that he could not and did not form any intent to commit a crime therein, because of his intoxication with alcohol and benzodiazepines. CP 16; CP 91; 2/22/13RP at 46-49.

During contacts that Mr. Veilleux had that night with many of the 10-plus officers responding to the scene, Nicholas either indicated that he did not know, or he refused to give his name, to Officer Brian Koshak. At another juncture he responded to Officer Melissa Wengard's request for his date of birth by stating numbers that she said were "gibberish." Mr. Veilleux also did not volunteer any identifying information to Officer Renner while he and several others assisted the arresting officer to transport Mr. Veilleux to the southwest precinct. 2/12/13RP at 63; 2/14/13RP at 43-44; 2/20/13RP at 77. Subsequently, when the group of officers took him to the downtown Seattle Police headquarters, Mr. Veilleux would not physically cooperate with the civilian fingerprint

technician's request to have him roll his fingerprints correctly without smearing. 2/19/13RP at 120-22.

Mr. Veilleux obtained a voluntary intoxication instruction. CP 91. The jury convicted him as charged, and he was sentenced based on an offender score of zero. CP 305-09. He appeals. CP 316.

#### **D. ARGUMENT**

##### **THE OBSTRUCTING CONVICTION MUST BE REVERSED WHERE IT WAS PREMISED ON MR. VEILLEUX'S SILENCE AND SPEECH WITHOUT ADDITIONAL CONDUCT HINDERING OFFICER RENNER IN PERFORMING AN OFFICIAL DUTY.**

**1. State's evidence and closing argument.** During trial, the parties argued about admission of testimony that Mr. Veilleux, post-arrest, was uncooperative with Fire Department medical personnel, and evidence that he made critical remarks about the police during the evening's episode. The defense argued, among other things, that many of these events had nothing to do with Officer Renner, or that they were mere silence or protected speech. The defense expressed concern about the jury's possible improper reliance on them for the obstructing charge. 2/14/13RP at 53-56.

In response, the prosecutor indicated to the court and counsel that the State would be making clear in closing argument what particular acts the prosecution would be relying on for the charge of obstructing Officer Renner. 2/14/13RP at 56.

In closing argument, the prosecutor specified that the jury should find guilt based on Mr. Veilleux's saying "I don't know" when asked his name, that he offered meaningless numbers when asked his birth date, and because he did not cooperate with the fingerprint technician while Officer Renner and other SPD officers were present in the fingerprint room:

He does not want to be identified by the police. He, when asked his name, says, "I don't know." When asked his birthdate, gives a series of numbers. Not gibberish. He gives some numbers, but they're not a date of birth. And you heard from Officer Wengard – she experiences people who don't want to be identified, and that's what they do. But that's not all the defendant did. Next, when they try to identify him, when they waste multiple officers' times with someone who is uncooperative throughout the contact, they try to roll his print and he curls up his hands and he won't allow himself to be fingerprinted.

2/22/13RP at p. 9. Yet Officer Renner, who was named in the information, was the specific and only officer who the State was alleging by amended information Mr. Veilleux had obstructed, and

the State's conception of guilt for obstructing was flawed.

2/22/13RP at p. 25. The State argued:

And the State has selected Officer Renner, a law enforcement officer, in the discharge of the law enforcement officer's official powers or duties and that the defendant knew that the that the law enforcement officer was discharging his official duties at the time.

2/22/13RP at p. 25. The prosecutor then emphasized that the defendant was obstructing because he "was willfully delaying":

And how did he delay? He delayed first by not refusing to give his name, but when Officer Koshak asked him his name, he said, "I don't know." And he didn't give his name for the rest of the night. Officer Renner took him to the jail and never knew his name. The basis for the obstructing charge, the willful hinder or delay, that the defendant, in addition to saying "I don't know," wouldn't provide his fingerprints. He wouldn't allow them to identify him. And that is all.

2/22/13RP at 26. According to the State, when one included Officer Renner, who went along with Officer Macdougald and others to the downtown police headquarters, "[t]his detour for fingerprinting took the time of not one, not two, not three, but four police officers because of the uncooperative state the defendant was in." 2/22/13RP at 27.

**2. The State's foregoing evidence of Mr. Veilleux's refusals, false speech and non-cooperation with fingerprinting fails to prove that he obstructed Officer Renner.** The State's evidence was inadequate to meet the Due Process requirement of sufficiency. U.S. Const. amend. 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see State v. Green, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980) (test for sufficient evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements beyond a reasonable doubt); State v. Drum, 168 Wn.2d 23, 34, 225 P.3d 237 (2010) (same).

The offense of Obstructing a Law Enforcement Officer under RCW 9A.76.020(1) is defined as follows:

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(1); see WPIC 120.02, CP 99, 103 (Jury instructions nos. 19, 23). A requirement of knowledge applies as an essential element of the offense, and, along with the definition of willfully, imposes the requirement that the person know and intend that their actions will hinder the police officer, named in the

information. CP 23; see RCW 9A.08.010(4), see also WPIC 120.02.01 ("Willfully means to purposefully act with knowledge that this action will hinder, delay, or obstruct a law enforcement officer in the discharge of the officer's official duties."); CP 100; cf. State v. Hudson, 56 Wn. App. 490, 496, 784 P.2d 533 (1990); State v. CLR, 40 Wn. App. 839, 842, 700 P.2d 1195 (1985).

These requirements of proof were not met below. The trial testimony indeed reveals that it was Officer Koshak who asked Mr. Veilleux his name, and he who received the response of "I don't know." 2/14/13RP at 43-44. Officer Renner was asked during his testimony if Mr. Veilleux made any statement to him while he was complaining of injury to the Fire Department medics at the precinct. Renner answered, "I don't believe I asked him any questions other than maybe for more information about his name and date of birth" and noted, "I don't remember any response he gave." 2/12/13RP at 63.

Additionally, it was Officer Wengard who testified that Mr. Veilleux offered only "gibberish" when asked for his date of birth. 2/20/13RP at 77 ("We had initially asked him for his name and his birthday, and he did give a series of numbers, but they were not anything that would equal a birthday, not in American format or

European format”). Officer Wengard indicated that this occurrence had occurred either at the southwest precinct, or headquarters. 2/20/13RP at 76-77.

At a different juncture, regarding an occurrence that the prosecutor did not choose to rely on,<sup>1</sup> Officer Wengard testified about how she was trying to walk the defendant into the headquarters building, and Mr. Veilleux would become “limp”:

Myself and – I can't recall specifically which of the other officers it was – I know it was either Macdougald or Galbraith assisted me in maneuvering him into the headquarters building. I would say we walked him in there, but he basically went limp on us and forced us to carry him the distance from the patrol car to the elevators, from the elevator to the fingerprinting area.

2/20/13RP at 57. Officer Michael Renner confirmed in his testimony that he was not the officer walking Mr. Veilleux into the building, primarily because he was exasperated with him; he did opine, however, that the defendant was “making [sic] the choice not to walk.” 2/20/13RP at 29. In fact, Officer Renner simply went from the burglary scene to the Southwest Precinct along with the arresting officer, Koshak, to assist him in dealing with the

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<sup>1</sup> Mr. Veilleux contended that the arresting officers, using a knee technique or other force, had injured or exacerbated a fractured rib, which was diagnosed by Group Health physician and defense trial witness Dr. Blair Becker. 2/21/13RP at 20-22.

defendant, who was examined there by medics, and to do paperwork. 2/19/13RP at 112-13.

Officer Renner did state that when the officers left the southwest precinct with Mr. Veilleux, "we still had been unable to identify the defendant" because "he had not given us his name, so we took him downtown to headquarters to have him fingerprinted." 2/19/13RP at 114-15. In that part of the evening, four officers stood in the fingerprinting room, with Officer Renner completing the necessary forms, as the "fingerprint tech" tried to use the ink roller. 2/19/13RP at 120-21. Mr. Veilleux, however, "was not obeying the fingerprints [sic] easy directions to just relax his fingers so that she could just roll the fingers and take good fingerprints." 2/19/13RP at 121. The technician could not obtain prints from the defendant, despite her effort to provide Mr. Veilleux with instructions to not cause smearing. 2/19/13RP at 122. The officers then handcuffed Mr. Veilleux and took him to the jail, from which Officer Renner then departed. 2/19/13RP at 122.

This is not obstruction of Officer Renner. See CP 2 (amended information, alleging that the defendant obstructed Officer "Michael Renner"); CP 103 (court's to-convict instruction on obstructing, requiring proof that the defendant obstructed "Officer

Renner”); see also State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (prosecution must prove crime as alleged in the jury’s ‘to-convict’ instruction, which is the law of the case).

First, of course, any false speech, whether uttered to Officers Koshak or Wengard or to the sole named complainant Officer Renner, is not a sufficient premise for a charge of obstructing in the first place. Under the Supreme Court’s decision in State v. Williams, 171 Wn.2d 474, 486, 251 P.3d 877 (2011), the crime of obstructing, as set forth in its most recent statutory version at RCW 9A.76.020(1), is not proved by the accused’s act of giving a false name, unless combined with additional actual conduct that hinders the officer. Williams, 171 Wn.2d at 475, 485-86 (act of giving brother’s name in response to investigating officer’s request was not obstructing, but was merely offense of making false statement to public officer, RCW 9A.76.175).

Under RCW 9A.76.020(1), a person’s refusal to state correct information is not obstruction of a police officer. State v. Contreras, 92 Wn. App. 307, 316, 966 P.2d 915 (1998) (“[m]ere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer.”); Williams, supra, see also Brown v. Texas, 443 U.S. 47, 48–49, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (suggesting

that identifying information may incriminate suspect within meaning of Fifth Amendment); U.S. Const. amend. 5. Additionally, the Court in Williams held that, as a matter of statutory interpretation informed by a disfavor for punishment that encroaches upon the First Amendment, such a conviction cannot be based on false speech, but must be predicated on hindering conduct. Williams, at 475, 485-86.<sup>2</sup>

In this case, there is no accompanying conduct in addition to the false speech that could support a conviction for obstructing Officer Renner in his own duties. The fingerprint technician is not a law enforcement officer for purposes of obstructing. Pursuant to RCW 9A.76.020(2), "Law enforcement officer" means "any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes." RCW 9A.76.020(2). The fingerprint technician was specifically shown to be a "civilian" employee. 2/20/13RP at 77. Thus, further, the defendant would not know he was obstructing such an officer,

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<sup>2</sup> See also State v. Budik, 173 Wn.2d 727, 735-36, 272 P.3d 816 (2012) (citing Williams in holding that mere false disavowal of knowledge was insufficient to support a conviction for rendering criminal assistance and, instead, an affirmative act was required).

given the uncontradicted evidence that this person was not. See 11A Washington Practice, WPIC 120.02.01 (Obstructing a Law Enforcement Officer--Willfully—Definition). The State did not prove the crime charged in the information.

**3. Absence of unanimity.** Relatedly, the manifest constitutional error of the absence of a unanimity instruction leaves no assurances that the jury's verdict has an adequate statutory or constitutional basis, even if one existed. Wash. Const. art. 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see, e.g., State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995) (unanimity error where some jurors could have based guilt on one of multiple incidents, and others another); RAP 2.5(a). In determining whether there are adequate assurances of unanimity in a criminal case, the reviewing court considers the whole record of trial, including the State's evidence, the instructions, and argument. State v. Bland, 71 Wn. App. 345, 351–52, 860 P.2d 1046 (1993).

In the present case, the deputy prosecutor never urged the jury that it had to unanimously agree on a certain act of obstructing. State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005) (State's wide-ranging discussion in closing argument of certain acts

as supporting certain charged counts was not an election). The State's manner of procuring the guilty verdict relied on untenable bases. Reversal is required because the jury was urged to rely on conduct or a course of conduct which, under the statute, and Williams and Contreras, cannot provide any reasonable jury with a basis to find the crime charged beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (clarifying Petrich constitutional error analysis) (citing State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)).

**4. Reversal and dismissal of the obstructing conviction is required.** In totum, Mr. Veilleux's physical resistance or unwillingness to be fingerprinted by a civilian employee does not result in the pairing of protected speech together with "additional conduct" in this case that hindered Officer Renner or any complainant-specified officer in attempting to perform a lawful duty. Williams, at 883 and n. 10. For example, in the case of Contreras, the Supreme Court held that there was probable cause to establish obstructing where a suspect refused to answer an officer's shouted questions, gave a false name, and also did not exit his vehicle or place his hands in view for the officer's safety. State v. Contreras,

92 Wn. App. at 316–17 and n. 6. And in State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000), the defendant's culpability was similarly based on speech and conduct intertwined – extending from a refusal to give his name, to actual threatening speech, and then physical attack. Turner, 103 Wn. App. at 525. In sum, the Washington courts agree that punishment under RCW 9A.76.020(1) for obstructing based on speech and accompanying additional conduct comports with due process only when a defendant's combined culpability had “very specific” consequences of hindrance of the named officer's performance of a duty. See also State v. Steen, 164 Wn. App. 789, 802 and n. 8, 265 P.3d 901 (2011).

Here, in distinct contrast, Mr. Veilleux did not know, or refused to give, his personal information to Officer Koshak or Officer Wengard, he apparently continued to fail to *volunteer* that information to Officer Renner, and then later he would not physically cooperate with the civilian fingerprint technician. Mr. Veilleux's refusal to identify himself did not have specific consequences of hindering or delaying Officer Renner in any performance or attempted performance of a duty by him.

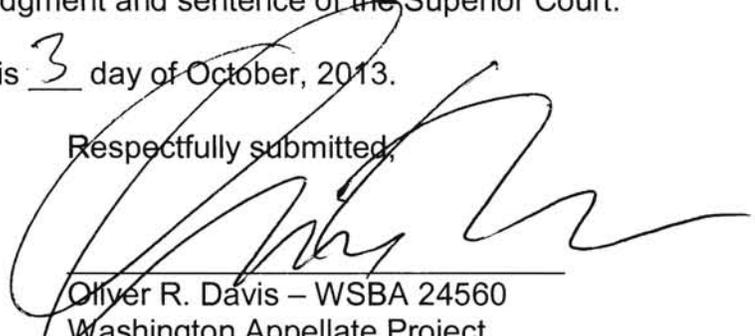
The evidence is insufficient. The State failed to prove obstruction of Officer Renner as charged in the amended information. Mr. Veilleux respectfully asks that this Court reverse his conviction for Obstructing a Law Enforcement Officer and dismiss the criminal charge under RCW 9A.76.020(1), with prejudice. U.S. Const. amend. 14; State v. Wright, 131 Wn. App. 474, 478, 127 P.3d 742 (2006), aff'd, 165 Wn.2d 783, 203 P.3d 1027 (2009).

**F. CONCLUSION.**

Based on the foregoing, Mr. Veilleux respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this 3 day of October, 2013.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70133-9-I
v.	)	
	)	
NICHOLAS VEILLEUX,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF OCTOBER, 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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[X] NICHOLAS VEILLEUX 4235 SW DONOVAN ST SEATTLE, WA 98136	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF OCTOBER, 2013.

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