NO. 45893-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CESAR BELTRAN, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 13-1-02975-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err by permitting the parties to exercise peremptory challenges in open court via a written process that was referenced orally by the court during the seating of the jury and filed in the court file?

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3. Where there was sufficient evidence for the obstruction charge, did the prosecutor commit error during the closing arguments by arguing that the evidence was sufficient?

4. Where the prosecution did not commit error during closing argument, has the defendant overcome the strong presumption that his trial counsel's performance was adequate when he did not object to the prosecution's argument?

B. STATEMENT OF THE CASE.

1. Procedure

On July 29, 2013, appellant Cesar Beltran, Jr. ("defendant") was charged with and arraigned on seven offenses: felony harassment, intimidating a public servant, assault third degree, obstructing a law enforcement officer ("obstruction"), resisting arrest, duty on striking property ("hit and run"), and reckless driving. CP 1-2, 5-8.

Approximately five months after the arraignment, the case was assigned for trial. 1 RP 3[1]. The trial department heard pre-trial motions on January 7 and 8, 2014. The defendant did not challenge the lawfulness of his arrest. The trial court held a voluntariness hearing pursuant to CrR 3.5 and ruled that the defendant's statements were admissible. 1 RP 63. The defense did not argue against admissibility of the statements and did not argue that the statements should be suppressed due to an alleged unlawful arrest. 1 RP 63.

Jury selection began in the afternoon of January 7, 2014 and concluded the following morning. 6 RP 3. 6 RP 92. The entirety of jury

[1] This brief will refer to the six volumes of verbatim reports as follows: volumes one through four refer to pre-trial, trial, and sentencing proceedings in the trial department starting on January 7, 2014, and concluding on February 7, 2014. These four volumes will be referenced in numerical and chronological order starting with 1 RP which reports pre-trial motions held before the trial department on January 7 and 8, 2014. Two additional volumes will be referenced as 5 RP and 6 RP. 5 RP is the report of an October 28, 2013, pretrial motion before the criminal presiding department. 6 RP is the report of jury selection proceedings that were held on January 7 and 8, 2014.

selection occurred in open court. The parties' peremptory challenges were completed in writing. CP 103. The court remained in session, the entire jury panel remained present, and the panel was directed to "stay in the same general area in case the attorneys need to put a face with a number" while the attorneys exercised their peremptory challenges. 6 RP 91. After the peremptory challenge sheet was presented to the court in open court, the court accepted the peremptory challenges and empanelled the jury. CP 101-02. 6 RP 91-92. The peremptory challenge sheet was filed the same day in the court file. CP 101-02. The defendant did not challenge the peremptory challenge procedure.

The trial proceedings included testimony and argument during three court days. The prosecution's case in chief included twelve witnesses. 2 RP 81. 3 RP 252. The defendant's case included the defendant and one other witness. 4 RP 387.

2. Closing Arguments

All seven charges were submitted to the jury for deliberation on January 14, 2014. 4 RP 537. The court instructed the jury concerning the elements of all seven charged offenses. CP 14-51. The instructions included an instruction concerning a lawful warrantless arrest. Instruction

No. 26, CP 42. No instruction concerning warrantless entry or arrest in a private residence was requested or given. CP 9-11. CP 14-51.

As might be expected the prosecution emphasized the facts related to the felony offenses. 4 RP 491-497. The prosecutor argued that the defendant made threats toward "a criminal justice participant," the police, in an attempt to frighten them, interfere with their investigation and influence their decision making. 4 RP 491-93. The prosecution then turned to the obstruction and resisting arrest charges and argued that they were continuing offenses. 4 RP 498.

Concerning obstruction, the prosecutor argued that the defendant was obstructing the officers "throughout." 4RP498. He further argued that from the time the officers came to the door, to when, "he fled from the officers, he caused delay in this whole thing. This whole thing could have taken moments if he had just come out. That was it. And had not made threats to the officers." 4 RP 498.

The prosecutor completed his argument about obstruction and resisting arrest by arguing the lawfulness of the arrest. 4 RP 501. The prosecutor argued that after the officers had probable cause to arrest the defendant for both the driving offenses and the threats against the officers. 4 RP 497-99. The prosecutor further argued that in the defendant's

hindrance of the officers making a lawful arrest, in his disobedience of commands to surrender, he resisted a lawful arrest. 4 RP 498-501.

The defense led off with a reference to the anti-authoritarian works of author George Orwell. 4 RP 505. The defense closing argument then focused on a recent arrest of the defendant's father. The defense attorney argued "Cesar Beltran Sr. was shot by the police. You heard testimony that [the defendant] was aware of that incident, knew that TPD had shot his father." 4 RP 507

The defense attorney addressed the resisting arrest and obstruction charges together and expressly conceded the defendant's culpability: "I am not saying Mr. Beltran handled everything perfectly. Of course he didn't. In this situation, all Mr. Beltran did was resist arrest and obstruct because of his intoxication, because of his fear. It is not a justification. It is just a reason why." 4 RP 513-15.

3. Statement of the Case

The defendant committed the acts that led to the charges on July 26, 2013. The incident began with reckless driving and hit and run. 2 RP 162. It ended with the defendant being taken into custody from his residence several blocks away after he made threats to shoot the responding police officers. 3 RP 290. The driving offenses and collision

occurred in the area of East 44th and R Streets, a residential neighborhood known as Salishan on Tacoma's Eastside. 2 RP 103. 2 RP 114. The defendant's residence, a two story single family home, was located five blocks away in the 1700 block of East 38th Street. 2 RP 161. The suspect vehicle was registered to the defendant there and was followed to the area by two eye witnesses. 2 RP 154. 2 RP 123. 2 RP 177-78.

The State's evidence included 28 exhibits and twelve trial witnesses. 2 RP 81-81. 3 RP 252-53. The witnesses included four civilian eye witnesses to the driving, seven police officers and a department of licensing records custodian. The defendant testified in his own defense and called one additional witness, his girlfriend. 4 RP 391. 4 RP 451.

Collectively the eyewitnesses described the reckless driving and hit and run. One of the witnesses, Alisha Clapp, was a neighborhood resident who saw a vehicle speed across her yard at 25 to 30 miles per hour, hit a stop sign and then flee the scene. 2 RP 97-99, 105. She was in the doorway of her home because a neighbor boy had come to her front door to play with her children. She testified that, "There was a woman screaming, 'Get in the house. Everybody get back in the house.' We didn't know what was going on. There was a car that drove through my

yard. Finally I saw the little boy was plastered up against his door next door to me." 2 RP 97-98, 109.

Two of the other eye witnesses also saw the reckless driving and the collision with the stop sign and followed the vehicle. 2 RP 118 and 2 RP 175. Both of these witnesses, Azsia Keel and Angela Gentele, identified the car and the defendant. 2 RP 137-38. 2 RP 178. Ms. Keel focused on the driver and identified the defendant in court as looking like the suspect driver. 2RP 139. Ms. Gentele identified the defendant as the driver both in court and in a police field identification. 2 RP 185.

Tacoma Police Officer Erika Haberzettl, along with a number of other officers including six who testified at trial, responded to the 911 calls. 2 RP 161. Officer Haberzettl contacted the witnesses at the reckless driving scene while other officers responded to the defendant's residence. 2 RP 161-52. One of the officers who responded to the defendant's residence was Officer Weaver. He arrived before the officers approached the house, checked the engine of the suspect vehicle, noted that it was warm and that the fan was still running. 2 RP 222.

Officer Anderson was another officer who responded to the residence. As he arrived, he saw the defendant step outside and then turn and go back in. 3RP 269-70. Officers Anderson and Williams went to the front door of the residence. 3 RP 272. Officer Williams heard the front

door being locked from the inside. 3 RP 306. They knocked three times. 3 RP 272. No one came to the door. Instead while they were at the front door, an upstairs window was broken out from the inside. 3 RP 272. They and the other officers yelled commands into the house. 3 RP 276-77.

In response to the commands, the defendant ordered the officers to leave. 3 RP 315. He also threatened to shoot the officers: "If you try to do anything, I'll shoot you without hesitation." 3 RP 308, 313, 334, 370. Officer Smith's description of the threat was that the defendant screamed, "Fuck you. If you take one step on this porch I'll fucking shoot you without hesitation." 2 RP 233. The officers did not force entry; instead they continued to shout instructions for the occupants to come to the door and come out. 3 RP 276-77.

After a short time, the defendant's girlfriend, Amanda Abbot and several children came out of the house. 3 RP 276-77. 4 RP 452. The defendant followed Ms. Abbot out of the house onto the front porch. 2 RP 233-34. 3 RP 278-79. He was ordered to get down on his knees with his hands on his head. 3 RP 278-79. He did not obey the command; instead he turned to go back in the house. 2 RP 234. At that point Officer Anderson deployed his tazer. 3 RP 281.

The defendant was approximately a foot outside the front door when Officer Anderson fired the first tazer probes. 3 RP 281. 3 RP 320. At that time the defendant was known to be the registered owner of the suspect car, had threatened to shoot the police and was ignoring their commands. 3 RP 281. Unfortunately the tazer did not have the intended effect. 2 RP 238. 3 RP 283. 3 RP 320. The defendant did not comply with the officer's commands and went back inside with the officers following immediately behind him. 3 RP 284. 3 RP 321. The officers feared that the defendant would arm himself with a gun or other weapon.

The officers made physical contact with the defendant inside the residence on a stairway. 3 RP 284. A number of officers converged. They gave repeated commands to stop resisting and eventually detained the defendant. 3 RP 284. 3 RP 322. While the officers were attempting to gain control of the defendant, the defendant delivered a backward "mule kick" to Officer Gerald Turney. 2 RP 238. 3 RP 285. Officer Turney, was knocked off his feet and tumbled down approximately eight stairs. 3 RP 350-52. 3 RP 374. Eventually the officers were able to gain compliance, place him in restraints and take him into custody.

The officers cleared the house after the defendant was in custody. They found two individuals inside the house, James Abbott and Jason

Koshman. 3 RP 331. They did not observe any firearms. 3 RP 295. Neither Mr. Abbott nor Mr. Koshman was arrested.

The defendant was transported to the hospital. Officer Haberzettl had contact with him there and noted that he had the odor of "intoxicating beverages" on his breath. 2 RP 185. According to the internal record from Officer Anderson's tazer, the tazer had been fired twice during a period of one minute twelve seconds. 3 RP 296. Probes from the two tazer deployments were recovered from the defendant's torso and extremities. 3 RP 295-96. Keys that fit the suspect car were found on the defendant's person after he was taken into custody. 3 RP 327-28.

4. The Defense Case

The defendant testified in his own defense. He admitted having consumed liquor and to being intoxicated. 4 RP 391. He admitted that he knew the police were at his house and that they arrived at this house five to ten minutes after he did. 4 RP 399. He saw the police outside with guns, and testified that it was the police who broke out his window and that he was scared because his father had recently been shot by the police. 4 RP 400. The defendant testified that he yelled back and forth with the police and told them to put away their guns. 4 RP 401. He said that he

told the officers, "You are not going to shoot me like you just shot my dad, you know." 4 RP 401

The defendant admitted that he did not comply with the police officers' directives. 4 RP 406. He testified that he fell inside the door and crawled to the stairs where he was repeatedly punched by the officers. 4 RP 406-409. He denied having kicked any of the officers. 4 RP 409.

Following closing arguments the jury deliberated. The jury found the defendant guilty of six of the seven charges, including count four, obstruction. CP 57. The defendant was acquitted of count three, third degree assault. CP 56. On February 7, 2014, the defendant was sentenced within the standard range. CP 63-75. CP 82-89. His sentence included twelve months total confinement for two felony offenses, 364 days suspended for two gross misdemeanors and 90 days suspended for two misdemeanors. CP 69. CP 82, 84. The defendant's notice of appeal was timely filed the same day as the sentencing. CP 76.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR BY PERMITTING THE PARTIES TO EXERCISE PEREMPTORY CHALLENGES IN OPEN COURT VIA A WRITTEN PROCEDURE THAT WAS REFERENCED ORALLY BY THE COURT DURING THE SEATING OF THE JURY AND FILED IN THE COURT FILE.

Both the Sixth Amendment and Washington's constitution guarantee a criminal defendant the right to a public trial. United States Constitution, Amendment VI, Washington Constitution, Article 1 §22. ***State v. Wise***, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). In cases alleging a violation of the public trial right, the threshold determination is whether the proceeding at issue even implicates the right. ***State v. Sublett***, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). The standard of review is *de novo.* ***State v. Wise***, 176 Wn.2d at 9.

In ***State v. Sublett***, supra, the Supreme Court adopted a two-part "experience and logic" test: (1) whether the place and process historically have been open to the press and general public (experience prong), and (2) whether the public access plays a significant positive role in the functioning of a particular process in question (logic prong). ***State v. Sublett,*** 176 Wash.2d at 72–73, citing ***Press-Enterprise Co. v. Superior Court***, 478 U.S. 1, 8–10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). To

satisfy the test a defendant must show that both questions are answered affirmatively. *Id.* at 73.

Neither prong of the experience and logic test is offended by the exercise of peremptory challenges at side bar or by passing a challenge sheet. ***State v. Dunn***, 180 Wn. App. 570, 575, 321 P.3d 1283(2014), ***State v. Webb***, ___Wn. App.___, 333 P.3d 470, 472-73(2014). In ***Dunn*** the claimed public trial violation was that the parties exercised their peremptory challenges in court but at the clerk's station. This was held not to violate either the experience or logic prong because the "public trial right does not attach to the exercise of challenges during jury selection." *Id.* at 575. The same reasoning prevailed in ***Webb*** where the challenged procedure consisted of passing a paper peremptory challenge sheet between the parties in open court and then seating the jury by referencing that sheet. ***State v. Webb***, 333 P.3d at 472-73.

This case is indistinguishable from ***Webb***. The procedure followed in this case was identical to ***Webb***. 6 RP 90-92.

It bears mentioning that even if ***Webb*** and ***Dunn*** had not been decided, the defendant's argument still would defy experience and logic. Under the defendant's reasoning references to a writing in court would constitute a public trial violation if the writing were not immediately made available to the public. However there are references made to writings in

court routinely that, for one reason or another, are not simultaneously provided to the public or especially the jury. The concluding instruction explicitly addresses this reality of court proceedings as follows: "Some exhibits and visual aids may have been used in court but will not go with you to the jury room." Instruction No. 34, CP 51. Contrary to the defendant's argument, experience and logic dictate that not every writing utilized in a court proceeding must be simultaneously published to the gallery or provided to the public.

2. THE EVIDENCE WAS SUFFICIENT TO PROVE OBSTRUCTION WHERE THE POLICE WENT TO THE DEFENDANT'S RESIDENCE TO INVESTIGATE RECKLESS DRIVING AND HIT AND RUN, AND WHERE THE DEFENDANT THREATENED TO SHOOT THE POLICE OFFICERS, REFUSED TO COMPLY WITH THEIR ORDERS, AND RESISTED ARREST.

The standard of review in this case requires that the verdict be upheld if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Rempel,*** 114 Wn.2d 77, 82-83, 785 P.2d 1134(1990), citing ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), ***State v. Joy***, 121 Wn.2d 333, 338, 85 1 P.2d 654 (1993). A sufficiency challenge admits the truth of the state's evidence and any reasonable inferences that may be drawn. ***State v.***

Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182(2014), citing ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and strongly against the defendant. ***State v. Salinas***, at 201.

The elements instruction in this case required the prosecution to prove that "the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties" and that "the defendant knew that the law enforcement officer was discharging official duties at the time." Instruction 21, CP 37. RCW 9A.76.020(1). When broken down, the instruction and the obstruction statute requires that the prosecution prove "(1) that the action or inaction in fact hinders, delays, or obstructs; (2) that the hindrance, delay, or obstruction be of a public servant in the midst of discharging his official powers or duties; (3) knowledge by the defendant that the public servant is discharging his duties; and (4) that the action or inaction be done knowingly by the obstructor." ***State v. Contreras***, 92 Wn. App. 307, 315-16, 966 P.2d 91 5 (1998), quoting ***State v. CLR***, 40 Wn. App. 839, 841–42, 700 P.2d 1195 (1985).

Willful refusal to comply with lawful commands by the officers is sufficient for obstruction. ***State v. Steen***, 164 Wn. App. 789, 265 P.3d 901 (2011). In ***Steen*** sheriff's deputies responded to a disturbance call. They

suspected that someone involved in the disturbance was in a fifth wheel travel trailer. *Id.* at 795-96. After giving orders to come out, the deputies announced their intention to conduct a building search of the trailer. They entered via a window. Defendant Steen was arrested in inside. *Id.* at 796-97. He refused to identify himself. Forty-five minutes later the deputies confirmed his identity and arrested him on an outstanding warrant.

This court found the evidence sufficient to uphold Steen's obstruction conviction. ***State v. Steen***, 164 Wn. App. at 797-98. The court noted that the refusal to provide identifying information would have been insufficient for obstruction if "considered in isolation." *Id.* at 800, citing ***State v. Williams***, 171 Wn.2d 474, 484, 251 P.3d 877(2011). However the totality of the facts, including "Steen's decision not to open the trailer's door impeded the officers' ability to locate the unaccounted-for participants in the disturbance, to render any necessary aid to victims, and to investigate the nature and causes of the reported disturbance." *Id.* at 801. Such facts constituted evidence of "willful conduct that amounted to obstruction." *Id.* at 801.

As in ***Steen*** the defendant in this case refused to answer the door. 3 RP 306. Minutes before the officers arrived at the defendant's residence, the defendant had committed reckless driving and hit and run. CP 13 and 58. He was outside his residence when the police arrived. 3

RP 269-70. He responded to their arrival by going inside and locking the door. He then broke out a window while the officers were knocking on the door and a short time later threatened to shoot them. 3 RP 272, 308, 313, 334, 370. This conduct occurred before the defendant came out onto the porch and was intended to, and did in fact, hinder delay and obstruct the officers in the investigation of the reckless driving and hit and run.

Likewise the defendant's conduct after coming out of the house supports obstruction. While the defendant was out of the house on the porch, he was given the command to get down on his knees and place his hands behind his head. 3 RP 278-79. These commands were given after the defendant had threatened to shoot the officers. 2 RP 233. From the jury's verdicts it may be inferred that at the time the defendant was being commanded to surrender he had committed at least two misdemeanors and two felonies.

The defendant argues that the evidence is insufficient if it is limited to a single fact, the initial refusal to come to the door. Where there are no facts other than "pure speech," such an argument is more persuasive. ***State v. Williams***, 171 Wn.2d 474, 485, 251 P.3d 877(2011). ***Williams*** was cited by ***Steen*** and distinguished. In ***Williams***, the Supreme Court held that conduct, that consisted of the defendant giving his brother's name to avoid a warrant, was insufficient to support a conviction

for obstruction. *Id.* at 476, 485. The ***Williams*** court further stated that the obstruction statute could not punish a defendant for invoking the right to remain silent. The court, however, distinguished instances where speech was accompanied by conduct such as failing to keep hands in view and exit a vehicle or where there were verbal and physical threats directed at an officer. *Id.* at 484, fn 10.

An example of a case involving verbal and physical threats was ***State v. Turner***, 103 Wn. App. 515, 525, 13 P.3d 234 (2000), quoted in ***State v. Williams***, 171 Wn.2d at 484, fn 10. In ***Turner*** a deputy sheriff stopped to investigate defendant Turner for urinating in public. During the contact Williams "threatened Officer Rogen and lunged at him." *Id.* at 525-26. The court held that such conduct was sufficient, for obstruction. *Id.*

Verbal and physical threats toward police officers are to be distinguished from "pure speech" cases. One example of a pure speech case was ***State v. Williamson,*** 84 Wn. App. 37, 924 P.2d 960 (1996). In ***Williamson*** the alleged obstructive conduct consisted entirely of providing the name "Christopher Columbus" by a fight suspect. *Id.* at 44-45. The refusal to provide indentifying information, particularly when the refusal was delivered as a sarcastic protest, was not sufficient to support an obstruction charge.

In light of the standard of review in this case and in light of cases such as ***Steen*** and ***Turner***, the defendant's claim of evidence insufficiency is not well taken. The evidence here does not, as did the evidence in ***Williams*** or ***Williamson***, consist of spoken words alone. Moreover the spoken words here were a threat to use a firearm to injure or kill the officers. 2 RP 233. This is a far cry from a defendant who peacefully provides a false name to avoid arrest, or a defendant who sarcastically gives an historical name in protest of an arrest. Here the defendant threatened to shoot the officers "without hesitation" if they persisted investigating the reckless driving and hit and run. 2 RP 228-232. 3 RP 313, 334.

In this case the defendant engaged in conduct, not just speech, in response to lawful commands from the officers. He obstructed and resisted arrest by refusing to surrender and by disregarding commands and fleeing into the house. He fought against the officers. His resistance included the delivery of a donkey kick to an officer that knocked the officer down the stairs. 2 RP 238. 3 RP 285-86. Each of these actions, like the breaking of the window and the threat to shoot, was conduct that is sufficient for obstruction.

3. WHERE SUFFICIENT EVIDENCE WAS INTRODUCED TO PROVE OBSTRUCTION, NO ERROR WAS COMMITTED BY THE PROSECUTOR DURING CLOSING ARGUMENTS.

The standard of review for allegedly improper comments during closing argument requires that the comments be reviewed in context. ***State v. Russell***, 125 Wn.2d 24, 882 P.2d 747 (1994). The comments are examined in light of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Id.* at 86. ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where no objection is made at trial, a defendant is deemed to have waived any error and must show not only improper conduct and prejudice, but must also show that the alleged error was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. ***State v. Emery***, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).

A prosecutor is permitted latitude to argue the facts in evidence draw reasonable inferences from the evidence and express those inferences to the jury. ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), citing ***State v. Hoffman***, 116 Wn.2d51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998) and ***State v. Fiallo–Lopez***, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995).

In this case the obstruction charge was not the prosecutor's first concern; he spent a good deal more time on the felony offenses. Nonetheless when he argued the obstruction charge he correctly referred to all of the evidence. 4 RP 497-98. He argued: "Now, in fact, throughout the defendant was obstructing law enforcement officers and also resisting arrest." 4 RP 497. He further argued that the defendant "caused delay in this whole thing", that this "whole thing could have taken moments if he had just come out" and if the defendant "had not made threats to the officers." 4 RP 498.

In this appeal the defendant argues that the prosecutor elected to rely on a single fact rather than all of the facts supporting obstruction. As can be seen from the record referred to above, this is not an accurate description of the entirety of the prosecutor's argument. While the prosecutor may have referred to all of the facts in summary or shorthand form, he did not make an election to exclude any of the facts. He spent

more time on the felonies rather than the misdemeanors but this was a decision based on his own personal style, experience and trial strategy and is wholly consistent with the latitude permitted a prosecutor to argue the facts in evidence and reasonable inferences. ***State v. Stenson***, *supra*, at 728.

4. WHERE THERE WAS NO ERROR IN PROSECUTION'S OBSTRUCTION ARGUMENT, THERE IS NO SHOWING THAT DEFENDANT'S TRIAL COUNSEL'S CONDUCT WAS DEFICIENT.

Since there was no error in the prosecutor's argument, it follows that the defense attorney was not ineffective for not objecting. To prevail on an ineffective assistance claim a defendant must show both deficient performance and resulting prejudice. ***State v. Carson,*** 179 Wn. App.961, 975, 320 P.3d 185(2014), citing ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The standard of review is *de novo*, "beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions." ***State v. Carson,*** supra at 975-76, citing ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and ***State v. Grier***, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

The defendant's argument about ineffective assistance, like his argument about prosecutorial error, is based in large part on an incomplete

description of what was said by the prosecutor. Brief of Appellant, p.14. The prosecutor did not argue that obstruction was committed only by the defendant having refused to come to the door. 4 RP 497-99. He referenced all of the evidence and specifically the defendant's threats to "shoot you without hesitation." 2 RP 233. 3 RP 308, 313, 334, 370. Under these circumstances the defense attorney did not commit error by failing to object to a proper argument.

Even if *de novo* review of the record were to disclose error, the error was patently strategic. The defense attorney not only did not object to the prosecution's obstruction argument but also tacitly conceded culpability for obstruction during his own argument. He argued, "all Mr. Beltran did was resist arrest and obstruct because of his intoxication, because of his fear." 4 RP 514-15. When deference is paid to the strategic decision-making of the defense attorney, that decision was eminently supportable. The defense attorney conceded the misdemeanors while forcefully arguing against guilt on the felonies. In light of the overwhelming evidence supporting the obstruction charge, this sophisticated strategic analysis is what should be expected of a seasoned defense attorney. There is no support for the ineffective assistance claim in the defense attorney's failure to object.

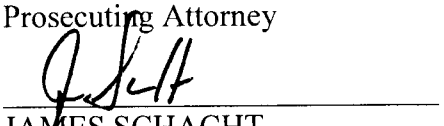
Since there was no error in the prosecution's closing argument, and since the defense attorney properly elected not to object and instead concede guilt on the obstruction charge, there is no basis for concluding that error was committed. The ineffective assistance claim is not well taken.

D. CONCLUSION.

For the foregoing reasons the court should affirm the defendant's conviction.

DATED: November 20, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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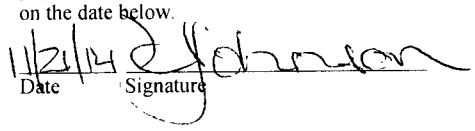
11/21/14 
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