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NO. 88694-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERISTUS JORDAN JOHNSON,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. This Court has previously held that the Obstructing a Law Enforcement Officer statute, RCW 9A.76.020, does not impermissibly regulate First Amendment rights because the statute focuses on conduct rather than speech, and because this Court has placed a limiting construction on the statute that prohibits any conviction based on speech alone. Additionally, the statute contains a *mens rea* element that makes conduct such as merely observing police activity or merely yelling profanities at officers perfectly lawful under the statute. With this legal backdrop, should this Court reject the defendant's claim that the obstructing statute is constitutionally overbroad?

2. Officers responding to a domestic violence incident involving the defendant's mother and his intoxicated sister acted with appropriate care and patience in stabilizing a volatile situation, until the defendant interjected himself physically and verbally, escalating a controlled situation into an unpredictable and potentially explosive event. Should this Court reject the defendant's claim that his conduct was protected by the First Amendment and that no rational trier of fact could have found him

guilty of obstructing a law enforcement officer who was performing his official duties?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted at a bench trial of Obstructing a Law Enforcement Officer in violation of RCW 9A.76.020. On appeal, the defendant raised certain constitutional claims that were neither factually nor legally pursued before the trial court. The court of appeals affirmed the defendant's conviction at State v. E.J.J., 67726-8-I, 2013 WL 815921 (Div. 1 2013) (unpublished).

2. SUBSTANTIVE FACTS

As trial commenced, defense counsel informed the court that the defense would not be raising any motion to suppress any evidence, and other than hearsay objections, the defense was not objecting to the admission of any of the defendant's statements. RP 5-6. The court then heard the following trial testimony:

On February 14, 2011, at approximately 7:00 p.m., Geraldine Johnson called the police to report that her daughter, RJ, was trying to assault her and was threatening to break all the windows in her house. RP 14-15, 58-59. When Officer Barreto and Officer Perkins responded, they looked through the house but

found that RJ was gone. RP 15, 17. A short time later, Geraldine called 911 again because RJ had returned and was again threatening her. RP 15. This time, Officers Barreto, Mullins and Jenkins responded. RP 15, 18, 38.¹

Geraldine recognized Officer Barreto from the officer's response to the earlier call. RP 16. Geraldine informed the officer that RJ was inside the house and she wanted her removed. RP 17-18. Officer Barreto went inside the house and escorted RJ outside to get her away from the family situation. RP 17. RJ was "highly intoxicated," underage, and "very belligerent." RP 17. The officers did not place RJ under arrest, nor did they plan to do so – although they likely had probable cause to arrest her for a domestic violence harassment offense. RP 24-26, 52. They also had not physically touched RJ up to this point. RP 52.

Officer Barreto believed that they could investigate and resolve the situation very quickly, with the intent being to calm RJ down, find an alternative place for her to spend the night and give her a courtesy ride to a bus stop. RP 24-26. As the officers were succeeding in getting RJ to calm down, Officer Barreto went back

¹ All that is known about the three responding officers is that one is Black -- the race of the other two is unknown, and that one is female. RP 68. The record does not reflect that Officer Perkins responded to the second 911 call.

inside the house to talk with Geraldine and obtain bus fare for RJ.
RP 18, 39, 45.

While Officer Barreto was inside the house, the defendant, who stands 6 feet four inches tall, exited the house and stood on the porch. RP 30, 69-70, 80. He then left the porch and approached Officers Jenkins and Mullins from their rear, proclaiming, "that's my sister." RP 39-40, 69-70. The officers informed the defendant that they were in the process of investigating the situation and asked him to step back inside the house. RP 40. Officer Jenkins testified that this would have been "common practice," because they were in the middle of an investigation involving RJ and her mother, the defendant was not part of the investigation, he had not been patted down for weapons (nor could the officers legally have done so), and for officer safety reasons. RP 42.

The defendant, described as "irate," began yelling profanities, racial slurs and repeating "that's my sister, that's my sister." RP 43-45.² The defendant refused – multiple times, to back off and go back inside the house. RP 40-41.

² The defendant testified and admitted that he was "pissed off" and that he called the officers names, but, he claimed, the officers used foul language as well. RP 71-72. However, the defendant's own mother testified that the only foul language

With just two officers now having to deal with two separate hostile individuals in the darkened front yard, Officer Barreto had to exit the house to deal with RJ, who was becoming "very agitated" and "very hostile" due to the defendant's actions. RP 16, 18-19, 23-25, 33-34, 45. As Barreto was trying to talk with her and calm her down again, RJ became so "agitated" and kept trying to get up and talk with defendant that Officer Barreto was forced to physically hold on to her. RP 34.

In the meantime, Officer Jenkins was forced to divert his attention to dealing exclusively with the defendant, who would not go back inside the house and was calling him a "fat fuck" "mother fucker," "bitch," and racial slurs – the specifics of which were not made a part of the record. RP 20, 43-45. Officer Jenkins repeatedly asked the defendant to go back inside and that he could be arrested for obstructing. RP 40-41. Eventually Officer Jenkins was able to escort the defendant "not hands-on" back up into the house. RP 41.

she heard came from her son, that he was hurling racial slurs and calling the officers "pigs and honkies." RP 60, 71-72. Consistent with Geraldine's testimony, Officer Jenkins testified that he used a raised voice in dealing with the defendant but that he did not call him any names. RP 49.

Officer Jenkins then asked the defendant to close the door, but he refused. RP 43.³ Officer Jenkins felt that if the defendant were to close the door, the officers could continue with the task at hand. RP 42. Plus, the defendant was "clearly agitated" that officers were talking to his sister, he continued to yell profanities at the officers, he had not been patted down for weapons, nor did officers know if there were any weapons in the house, and thus, there was a security concern. RP 52, 54-56. Officer Jenkins then closed the door himself, but the defendant opened it back up. RP 43. This occurred four or five times. RP 43. Officer Jenkins continued to inform the defendant that he could be arrested for obstructing. RP 44. After a total of between 15 to 20 minutes of the officers having to deal with RJ and the defendant, Officer Jenkins finally placed the defendant under arrest. RP 25, 53, 74.⁴

The defendant testified at his trial and said that he was in his room when RJ and his mother got into a "disagreement" and his mother call the police to have them take RJ away. RP 68. When the police arrived, he claimed that he watched them from the porch.

³ There were two doors, a wrought iron security door and a solid main door. RP 55. It was the solid main door the officer wanted closed. Id. There was a window nearby the door in which the defendant could still have observed the officers. RP 78.

⁴ The defendant had locked the wrought iron door but Geraldine unlocked it for the officer. RP 61.

RP 77. However, he testified that one of the officers pulled out a nightstick and was going to hit RJ with it and this is why he left the porch to contact the officers. RP 69-70.⁵ He approached the officers saying, "what are you guys hitting my sister with that nightstick for." RP 69.

The defendant admitted that the officers asked him to go inside, that he initially refused, that he was "pissed off," and that he called the officers a number of profanities. RP 70-72. He said that he felt he had a right to do what he did and that his intent was to "supervise" the officers. Id. He claimed that he was ultimately pushed inside the house and that he opened the door repeatedly when the officer closed it, even though he could have looked out a window if he wanted to observe the officers. RP 75, 78-79.

Based on these facts, the court found the defendant guilty. RP 95-101; CP 13-17. The court made clear that it was not finding the defendant guilty based on a single act in isolation or his acts of disrespecting the officers, but rather, through his acts, he hindered the officers in performing their duties. Id.

⁵ Officer Jenkins testified that he does not carry a nightstick, and that while Officer Mullins does carry a nightstick on occasion, he did not know if Mullins did so on this occasion. RP 48-49. None of the officers testified to having, using or threatening to use a nightstick, and there was no evidence that RJ was struck or physically abused in any way.

C. ARGUMENT

1. THE OBSTRUCTING A LAW ENFORCEMENT OFFICER STATUTE IS NARROW IN SCOPE AND NOT CONSTITUTIONALLY OVERBROAD.

The defendant contends that the obstructing statute prohibits a substantial amount of constitutionally protected speech and therefore the statute is facially overbroad. It is not. Three factors ensure that the statute does not impermissibly infringe on First Amendment rights. First, as this Court has previously found, the focus of the obstructing statute is on conduct, not speech. Second, this Court has placed a limiting construction on the statute with the purpose of avoiding any First Amendment infirmities. Specifically, this Court requires that any conviction under the statute be based at least in part on the perpetrator's conduct, i.e., a conviction based on speech alone cannot stand. And third, the statute contains a *mens rea* element that requires that a person violating the statute act *willfully* in obstructing a law enforcement officer discharging his or her official duties. Thus, contrary to the defendant's position, a person who merely hurls profanities at an officer, or a person who is simply monitoring police activities, cannot be convicted under the statute because pure speech cannot be the sole basis for a conviction and a person engaged in conduct who is not willfully

hindering an officer performing his or her official duties cannot be convicted under the statute.

A statute that sweeps constitutionally protected speech within its prohibitions may be overbroad. City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). Where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Osborne v. Ohio, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). Even where a statute at its margins infringes on protected speech or expression, "facial invalidation is inappropriate if the remainder of the statute. . . covers a whole range of easily identifiable and constitutionally proscribable. . .conduct." Osborne, 495 U.S. at 112. A statute is presumed constitutional and the party challenging the statute has the burden of proving its unconstitutionality beyond a reasonable doubt. State v. Myers, 133 Wn.2d 26, 31, 941 P.2d 1102 (1997).

The threshold inquiry in an overbreadth analysis is whether the statute prohibits a substantial amount of constitutionally protected speech. Huff, 111 Wn.2d at 925. On its face, RCW 9A.76.020 does not prohibit a substantial amount of speech; rather,

it prohibits only the willful or knowing hindrance, delay or obstruction of a law enforcement officer discharging his or her official duties – no speech is required or regulated.

In 1909, the legislature enacted the precursor to the current obstructing statute. The statute provided that:

Every person who, after due notice, shall refuse or neglect to make or furnish any statement, report or information lawfully required of him by any public officer, or who, in such statement, report or information shall make any willfully untrue, misleading or exaggerated statement, or who ***shall willfully hinder, delay or obstruct any public officer in the discharge of his official powers or duties***, shall be guilty of a misdemeanor.

Former RCW 9.69.060 (emphasis added). In 1975, the legislature repealed RCW 9.69.060, and enacted RCW 9A.76.020, which read as follows:

Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required of him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) ***shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties***; shall be guilty of a misdemeanor.

Former RCW 9A.76.020 (emphasis added); see Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010.

The current version of the obstructing statute, as amended in 1994 and 1995, removed subsections (1) and (2), providing in pertinent part 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.***

RCW 9A.76.020(1) (emphasis added); see Laws of 1994, ch. 196, § 1; Laws of 1995, ch. 285, § 33. Thus, the same statutory language at issue here, the language in bold type, has been in effect for over 100 years.⁶

In a unanimous decision, this Court previously held that the statutory language in question here does not regulate First Amendment rights; rather, the focus of the statute is “on conduct other than speech.” State v. Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978). Co-defendants Jean Grant and Ann Richmond were convicted of obstruction based on their actions when Richmond’s husband was pulled over for a suspected DUI. While a trooper attempted to determine the sobriety of Mr. Richmond, Ann Richmond became “quite vocal” and refused to remain in the car as

⁶ The legislature’s use of the term “willfully” in the 1909 version of the statute, the term “knowingly” in the 1975 version of the statute, and the change back to the term “willfully” in the current statute, was not intended to change the *mens rea* element of the statute. Bishop v. City of Spokane, 142 Wn. App. 165, 171, 173 P.3d 318 (2007). To act “willfully” is to act “knowingly.” Id.

directed. A second trooper had to be summoned to deal with Mrs. Richmond so that the original responding trooper could continue his investigation of Mr. Richmond. This Court upheld Richmond's conviction over the defendants' constitutional vagueness challenge. This Court found inapposite the cases cited by the defense because "without exception these ordinances [in the cases cited] regulated First Amendment rights of speech and assembly. RCW 9.69.060 focuses on conduct other than speech."⁷ Grant, 89 Wn.2d at 685-86.

This Court's finding in Grant makes perfect sense, considering that under the plain language of the obstructing statute, no speech is required to violate the statute. For example, a person willfully blocking the path of an officer pursuing a bank robber could be found guilty of obstructing despite never having uttered a single word. The fact that a defendant's speech may permissibly be used to support a conviction is consistent with the plethora of cases that hold that the First Amendment does not prohibit the use of speech to prove the elements of a crime.

⁷ Similarly, before the court of appeals, the defendant cited to multiple cases that are inapplicable to the case at hand because they deal with statutes that regulate pure speech. See, e.g., State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004) (felony harassment), and Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (threats against the president).

[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Cox v. Louisiana, 379 U.S. 559, 563, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (picketing case); State v. Talley, 122 Wn.2d 192, 206-07, 858 P.2d 217 (1993) (upholding Washington's "hate crime" statute and finding use of speech to show victim selection based on race not a First Amendment infringement).⁸ In short, the defendant's speech here "has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all." United States v. Quinn, 514 F.2d 1250, 1268 (5th Cir.1975) (extortion case), cert. denied, 424 U.S. 955 (1976).

Thus, while "Washington courts have long limited the application of obstruction statutes based upon speech," in the over 100 years of its existence, the statutory language challenged here has *never* been held unconstitutional or found to impermissibly

⁸ See also Wisconsin v. Mitchell, 508 U.S. 476, 489-90, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) (statute providing for enhanced sentence where defendant selects victim based on race); Haupt v. United States, 330 U.S. 631, 641, 67 S.Ct. 874, 91 L.Ed. 1145 (1947) (statements about government admissible to prove treason); Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (statements made at work admissible in sex discrimination case).

infringe on First Amendment rights. State v. Williams, 171 Wn.2d 474, 478, 251 P.3d 877 (2011) (unanimous decision). Still, in an abundance of caution, this Court decided long ago to place a limiting construction on the statute to ensure the statute's constitutional firmness in the face of First Amendment challenge. Specifically, this Court has held that any conviction under the obstructing statute must be based at least in part on the perpetrator's conduct; a conviction cannot be based on pure speech alone. See Williams, 171 Wn.2d at 478;⁹ see also State v. Lalonde, 35 Wn. App. 54, 665 P.2d 421, rev. denied, 100 Wn.2d 1014 (1983) (cited with approval in Williams, at 480).¹⁰

⁹ Williams drove away from a tire dealership without paying for his new tires. When contacted by the police, he gave the officers a false name to avoid discovery of an outstanding warrant. Citing Grant with approval, this Court stated that "[w]e hew to our jurisprudential history of requiring conduct in addition to pure speech in order to establish obstruction of an officer." Williams, 171 Wn.2d at 480, 485-86. This, the Court noted, avoids the First Amendment issues in criminalizing pure speech. Id. The Court then overturned Williams' conviction because the conviction was based on nothing more than pure speech -- Williams' giving of a false name.

¹⁰ In Lalonde, officers responded to complaints about a loud party. While one officer was attempting to arrest a partygoer, Lalonde approached another officer to try and talk to him and calm things down. Lalonde admitted that he had been told several times to get back and that even when moved back, he again approached the officer and attempted to talk to him. Lalonde, 35 Wn. App. at 56. Lalonde was arrested and convicted of obstructing. The court of appeals rejected Lalonde's constitutional challenge to the statute and upheld his conviction against a claim of insufficient evidence. The court noted that "Lalonde's offense did not arise from his speech, but from the acts which accompanied his words." Id. at 61. Lalonde's conduct in reapproaching the officer in an attempt to converse with the officer was intended to hinder or delay the officer from arresting the other partygoer. Id.

The defendant must demonstrate that the findings of these cases are "incorrect and harmful" before they will be abandoned. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). The defendant fails in this task. The arguments made to date do not show a constitutional infirmity. In addition, the statute's *mens rea* element eliminates many of the defense arguments.

In Virginia v. Black,¹¹ the United States Supreme Court was asked to rule on the constitutionality of Virginia's cross-burning statute under the First Amendment. The statute made it illegal to burn a cross with the intent to intimidate others. The Court noted that cross-burning, as repugnant as it may be, *is* a form of protected speech that can be used to express political or ideological ideas. Nevertheless, the Court stated, the State of Virginia could permissibly proscribe cross-burning because the statute in question required that the cross-burning be done "with the *intent to intimidate*" and thus it was not protected speech. Black, 538 U.S. at 362 (emphasis added).¹²

¹¹ 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

¹² The Court ultimately struck down the statute but for other reasons. Specifically, the statute contained an impermissible legal presumption; a provision of the statute that allowed a jury to find that any cross-burning was done with the intent to intimidate -- even if the cross-burning was done for political or ideological reasons. Black, at 363-64.

Similar to Black, the *mens rea* element of the obstructing statute eliminates many of the First Amendment claims made here. For example, the defendant has asserted that a person who is merely monitoring police activities could be convicted under the statute – such as a person videotaping an arrest. This is incorrect. That person could be convicted under the statute only if he or she were found, beyond a reasonable doubt, to have been “willfully” obstructing the officer who was performing his or her official duties. If all the person was doing was videotaping an arrest, he or she could not even be convicted of a crime. Similarly, a person yelling profanities or criticizing police officers could not be convicted under the statute for two reasons: first, per this Court’s precedents, the person must also commit some act that obstructs the officers, and second, as in the prior example, the person must also willfully obstruct the officers.

Under a First Amendment overbreadth analysis, “[o]nly a statute that is substantially overbroad may be invalidated on its face.” City of Houston, Tex. v. Hill, 482 U.S. 451, 458-59, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (citing New York v. Ferber, 458 U.S. 747, 769, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)). The Court has “never held that a statute should be held invalid on its face merely

because it is possible to conceive of a single impermissible application....” Broadrick v. Oklahoma, 413 U.S. 601, 630, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (Brennan, J., dissenting). Only where the statute makes unlawful a “substantial amount of constitutionally protected conduct” will the statute be held to be facially invalid. Hill, 482 U.S. at 458.¹³ The overbreadth doctrine is “strong medicine” when used to invalidate a statute on its face and it should be applied “only as a last resort.” Talley, 122 Wn.2d at 210 (citing Broadrick, 413 U.S. at 613).

Whatever hypothetical examples the defendant can muster, between the plain language of the statute that shows the statute's focus is on conduct, not speech, the limiting construction this Court has given the statute requiring conduct as well as speech, and the *mens rea* requiring that a perpetrator act willfully, any infringement

¹³ The defendant relies heavily on the Hill case. The city ordinance in Hill differs greatly from the statute challenged here. The ordinance found facially overbroad in Hill provided in pertinent part that it “shall be unlawful for any person to...in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty...” Id. at 461 (quoting Code of Ordinances, City of Houston, Texas, § 34-11(a) (1984)). On its face, the Houston ordinance does not focus primarily on conduct, does not require that a conviction include any conduct, and does not contain a *mens rea* element in regards to the result, i.e., intentionally or willfully obstructing an officer performing official duties.

upon protected speech is not "substantial" as required to invalidate the statute.¹⁴

2. A RATIONAL TRIER OF FACT COULD HAVE FOUND THE DEFENDANT GUILTY OF OBSTRUCTING.

The defendant contends that there was insufficient evidence to support a conviction. But the facts of his case do not differ significantly from the facts in Grant, supra, or Lalonde, supra.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616

¹⁴ Similar types of arguments have been rejected in other cases involving a variety of criminal statutes. In State v. Hahn, the defendant asserted that the criminal solicitation statute was overbroad because it punished constitutionally protected speech. 162 Wn. App. 885, 256 P.3d 1267 (2011), conviction aff'd on other grounds, 174 Wn.2d 126 (2012). A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give something of value to another to engage in specific conduct that would constitute a crime. RCW 9A.28.030. While speech is likely required to engage in such conduct, the court rejected Hahn's First Amendment challenge. The court held that Hahn had not even met the threshold burden of proving that the statute prohibited a substantial amount of constitutionally protected speech. "On its face," the court said, "RCW 9A.28.030 clearly does not prohibit a substantial amount of speech; rather, it only prohibits remuneration in exchange for the commission or attempted commission of a crime. Thus, Hahn's argument fails." Hahn, 162 Wn. App. at 900-01. See also State v. Dyson, 74 Wn. App. 237, 243, 872 P.2d 1115 (telephone harassment requires an intent to harass and therefore "[b]ecause the requisite intent establishes the criminality of the communicative conduct, any impact ... on speech is insubstantial"), rev. denied, 125 Wn.2d 1005 (1994); State v. Strong, 167 Wn. App. 206, 272 P.3d 281, 284-89 (2012) (extortion statute not overbroad even though crime may involve a great deal of speech as "extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all"), rev. denied, 174 Wn.2d 1018 (2012).

P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982) (citing Green, 94 Wn.2d at 221).

Here, when the officers first contacted RJ outside the home, the defendant was not present. The officers, who likely had probable cause to arrest RJ for her threats to assault her mother and damage her property, showed due restraint and properly exercised discretion in attempting to calm a very intoxicated underage RJ. The testimony showed that the officers did not place RJ under arrest and were not intending to do so. Instead, once she was calm, the officers hoped to provide RJ with a courtesy ride to a

bus stop where she could travel to another location to spend the night as her mother desired.

The officers were succeeding in their task of calming RJ down when they were approached from the rear by the defendant.¹⁵ According to the defendant's own testimony, he had been watching the officers from the porch (which would have been perfectly lawful) but then approached and confronted the officers because he believed the officers might harm his sister. By his own testimony, this was a purposeful interjection into the mix. From this point on, there is no question that the officers' ability to calm RJ down, and defuse and resolve the situation without incident, was hampered significantly. RJ erupted into a very agitated and very hostile state. The defendant repeatedly refused to back away and he too erupted into a very agitated hostile state—yelling racial slurs and profanities at the officers. Due to the defendant's actions, one officer was

¹⁵ In his petition to this Court, the defendant states that he was inside the house and was asked to step outside by one of the officers. Pet. at 3. With no citation to the record, the State reviewed the transcripts anew. With one exception, the testimony does not support the defendant's assertion. During Officer Barreto's testimony, the transcript at one point indicates that Barreto said Officer Jenkins asked the defendant to step outside. Because this did not make sense considering that the remainder of the testimony indicated that Officer Jenkins was outside dealing with RJ, the prosecutor listened to the CD of the hearing. It is clearly a typographical error in the verbatim report of proceedings. Barreto testified that Officer Jenkins asked the defendant to go back inside, not to go outside. See RP 20.

required to leave his task of dealing with RJ to deal specifically with the defendant.

In short, there was sufficient evidence that the defendant willfully hindered or delayed the police in performing their duties. To prevail here, the defendant must prove that no rational trier of fact could have found him guilty of obstructing—even when the evidence is viewed in the light most favorable to the State. He fails to meet this burden.

3. THE DEFENDANT'S ACTIONS—AN “AS APPLIED” CHALLENGE.

Finally, in the court of appeals, the defendant made an “as applied” challenge to his conviction. “An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional.”

City of Redmond v. Moore, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Where a statute is unconstitutional as applied, future application of the statute in a similar context is prohibited. Id.

As noted by the court of appeals, at trial, the defendant never moved to suppress any evidence based on the First

Amendment or search and seizure laws. Thus, the "as applied" challenge is based on the facts before the court.¹⁶

The defendant makes various arguments that all he was doing was supervising the police, that he had a right to be on his property, and that he was convicted because of what he said to the police. But these are not the findings of the trial court. Further, the defendant's actions cannot be taken piecemeal. For example, the defendant did not just hurl racial slurs from his porch – an action that by itself would be protected. Instead, the defendant intentionally left the porch to engage the officers, an action that

¹⁶ Before the court of appeals, the defendant, for example, asserted that actions he took inside his home were protected under the Fourth Amendment, article I, section 7 of the Washington Constitution and due process, and could not be used to support his conviction. These claims were not raised before the trial court, there are no legal or factual findings regarding the assertions (appellate courts do not decide facts or make credibility determination), and additionally, the defendant fails to explain how his assertions affect an "as applied" challenge. For example, the defendant claimed that actions he took inside his house could not be used against him. However, all the defendant's actions committed inside the home were conducted in open view of the officers. See State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986) (When a law enforcement officer observes something in open view from a lawful vantage point, the observation is not a search triggering the protections of article I, section 7). As well, the officers had the permission of the home owner, Geraldine Johnson, to enter the home. See State v. Khounvichal, 110 Wn. App. 722, 729, 42 P.3d 1000 (2002), aff'd, 149 Wn.2d 367 (2003) (absent a pre-entry intent to conduct a search, officers being invited into a residence are entitled to obtain evidence in open or plain view); State v. Hastings, 119 Wn.2d 229, 235, 830 P.2d 658 (1992) (warrant not required when agent is invited into the home). And finally, the defendant fails to explain how actions constituting obstruction would be constitutionally permissible inside a home but unlawful and punishable if done outside the home. The State is unaware of any constitutional provision that would allow, for example, a person to willfully attempt to block the arrest of a domestic violence perpetrator inside a home (assuming the lawful presence of the officers), but if the same actions were taken in the front yard, the person could be convicted of obstruction.

required the officers to divert their attention from RJ to the defendant, whereupon he unleashed his tirade of profanities and racial slurs.¹⁷

The First Amendment does not protect from conviction a course of conduct made illegal merely because speech may be used to obtain a conviction. Cox v. Louisiana, 379 U.S. at 563. The defendant's actions met the requirements of the obstructing statute and the First Amendment.

¹⁷ While the State does not make the argument here, the defendant's words themselves may have been unprotected. "Fighting words" are not afforded constitutional protection. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Fighting words are words whose very utterance inflict injury or tend to incite an immediate breach of the peace. Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). Words that may otherwise be merely derisive or annoying can fall under the context of "fighting words" depending on the circumstances under which they are uttered. Chaplinsky, 315 U.S. at 573; Lewis v. New Orleans, 415 U.S. 130, 135, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (Powell, J. concurring), see also, State v. Reyes, 104 Wn.2d 35, 40-44, 700 P.2d 1155 (1985) (finding former RCW 28A.87.010 -- a statute that prohibits abusing a teacher, overly broad because it goes beyond prohibiting language that is substantially disruptive to the school process, fighting words or words inherently likely to lead to a breach of peace, and bans all insults against a teacher).

Here, partly because the defendant did not raise this issue below, while the record clearly reflects that the defendant angrily derided the officers with profanities and racial slurs, his exact full statements and the circumstances in which each statement was made, are unknown. For example, did the defendant merely call the officers "mother fuckers" or was he face to face with an officer saying "I'll kick your ass mother fucker." While the former may be protected, the latter may border on unprotected speech.

D. CONCLUSION

There is no question that police officers must act with proper restraint regardless of the hostilities they may face in the performance of their duties. At the same time, officers must be allowed to perform the duties that we as a society have entrusted them with. Here, the officers showed restraint, spending nearly 20 minutes trying to calm RJ down so they could remove her from a volatile situation without having to place her under arrest. However, the officers had to spend an equal amount of time and restraint trying to get the defendant away from the situation that he was knowingly making worse. His arrest was not unlawful.

For the reasons cited above, this Court should affirm the defendant's conviction and uphold the constitutionality of the obstructing statute.

DATED this 6 day of January, 2014.

Respectfully submitted,

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King County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Lila Silverstein, of Washington Appellate Project, Nancy Talmer of the ACLU and David Perez of Perkins Coie, containing a copy of the Supplemental Brief of Respondent, in State v. Johnson, Cause No. 88694-6, in the Supreme Court, for the State of Washington.

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

Name Dennis J McCurdy
Done in Seattle, Washington

Date 1/7/14

OFFICE RECEPTIONIST, CLERK

From: McCurdy, Dennis <Dennis.McCurdy@kingcounty.gov>
Sent: Tuesday, January 07, 2014 2:18 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Supplemental Brief of Respondent
Attachments: Johnson Eristus SC.pdf; Johnson Eristus E-mail Filing.docx

Attached is the Supplemental Brief of Respondent and Proof of Service in the following case:

Eristus Jordan Johnson, 88694-6

Sincerely

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