

70133-9

70133-9

NO. 70133-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS VEILLEUX,

Appellant.

0000

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A conviction for obstruction of a law enforcement officer must be based on conduct and may not be based on speech alone. Veilleux's obstruction conviction is based on his conduct of repeatedly not complying with officers' directions and his false statements. Has Veilleux failed to show that his conviction is based on speech without additional conduct?

2. To prove obstruction of a law enforcement officer, the State must show that the defendant obstructed the named officer and that the defendant knew that the officer would be hindered, delayed, or obstructed as a result of the defendant's actions. The State presented evidence that Veilleux failed to comply with multiple officers, including Officer Renner, while Veilleux was in Officer Renner's custody, thus obstructing Officer Renner. Viewing the evidence in the light most favorable to the State, is the evidence sufficient to demonstrate that Veilleux obstructed Officer Renner?

3. Where multiple acts are part of a continuous course of conduct, neither a unanimity instruction nor election is necessary to preserve jury unanimity. Here, Veilleux told officers he did not know his name, provided a false date of birth, refused to walk by going limp, and failed to follow instructions on how to provide his

fingerprints by physically preventing prints from being obtained. Veilleux did these acts with the same objective: to not comply. Evaluating the evidence in a common sense manner, does the evidence show that Veilleux's actions were part of a continuous course of conduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Nicholas Veilleux was charged by Amended Information with residential burglary and obstructing a law enforcement officer. CP 6-7. Veilleux was also charged with the aggravating factor that the residential burglary victim was home during the commission of the crime. CP 6.

A jury found Veilleux guilty as charged and found that the victim was present during the commission of the burglary. CP 112, 114-15. The trial court sentenced Veilleux to the standard-range sentence of credit for time already served for the residential burglary. CP 306, 308. For the obstruction of a law enforcement officer, the court granted Veilleux a suspended jail sentence on the condition that he comply with chemical dependency treatment. CP 313-15.

2. SUBSTANTIVE FACTS.

On November 5, 2012, David Jones and Maryanne Tagney-Jones were asleep in their West Seattle home. 6RP¹ 171-73. At approximately 2:40 A.M., Jones was awakened by a security chime signaling that an outside door had been opened. 6RP 173. Jones got up to investigate. 6RP 174. As he walked out of his bedroom, he heard footsteps coming from downstairs and saw Veilleux in the hallway downstairs. 6RP 174.² Jones woke up his wife; they then locked themselves inside a bathroom and he called 911. 6RP 175. While Jones was on the phone with the 911 dispatcher, Tagney-Jones could hear banging and rattling noises as Veilleux moved around the house. 6RP 221-22. Within ten minutes of calling 911, Jones saw police officers walking up the driveway with flashlights. 6RP 178-79.

The first officers approaching the house saw Veilleux inside the home with the lights on. 5RP 29-30; 7RP 47. Veilleux made

¹ There are 11 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Feb. 1, 2013); 2RP (Feb. 12, 2013); 3RP (Feb. 13, 2013); 4RP (Feb. 14, 2013- addendum); 5RP (Feb. 14, 2013); 6RP (Feb. 19, 2013); 7RP (Feb. 20, 2013); 8RP (Feb. 21, 2013); 9RP (Feb. 22, 2013); 10RP (March 22, 2013); and 11RP (March 29, 2013).

² When Jones saw Veilleux in his home, Veilleux's identity was not known. His name was not discerned until he was booked into the King County Jail. 6RP 58; 7RP 60. For the sake of clarity, he is referred to by his surname throughout the recitation of the facts.

eye contact with officers and fled into another area of the home. 5RP 32; 7RP 47. After additional officers arrived, several officers entered the home to search for Veilleux. 5RP 34. Officers were unable to locate Veilleux during the first attempt. 5RP 37. During a second search, Officer Brian Koshak located Veilleux hiding on the floor between a couch and a wall. 5RP 39.

Officer Koshak asked Veilleux his name, and Veilleux responded, "I don't know." 5RP 44. When he was later asked his date of birth, Veilleux provided a series of "random numbers." 7RP 67. While being transported from the home to the precinct, Veilleux told Officer Koshak that he had "a severed spine" and stated: "I may need to go the hospital. I do need to go to the hospital." 5RP 48, 61. As a result, Officer Koshak called for medics to meet Veilleux at the precinct. 5RP 48. When Officer Koshak arrived at the precinct, Veilleux had moved his handcuffed hands from behind his body around to the front. 7RP 51. Officers consider that position to be "fairly dangerous" for officer safety. 7RP 51. When Fire Department medics evaluated Veilleux at the precinct, he refused to cooperate with the medics or answer their questions. 5RP 50-51. Officer Michael Renner stayed in Veilleux's cell while Veilleux was evaluated. 6RP 112-14.

When Veilleux was at the precinct, officers did not know his name. 6RP 114-15. Officer Melissa Wengard explained that, as a part of any investigation, officers need to identify the suspect and that officers must always identify individuals whom they have in their custody. 7RP 62. Due to Veilleux's failure to provide identifying information, he was transported to police headquarters to be identified by his fingerprints. 6RP 52-53; 7RP 55.³

As a result of Veilleux's previous non-compliance with officers, four officers accompanied Veilleux to be fingerprinted. 7RP 56. Two officers are the minimum number required to transport a suspect to be fingerprinted; extra officers were present "to prevent any other problems and to keep the situation under control." 6RP 120. Officer Renner and another officer transported Veilleux in one vehicle while two additional officers followed in a separate vehicle. 6RP 53.

Upon arriving at police headquarters, Veilleux refused to exit the vehicle and had to be removed by officers. 7RP 56. All four officers accompanied Veilleux from the vehicle to the fifth floor, where the evidence technician was located. 6RP 53. While traveling to and from the evidence technician, Veilleux went "limp"

³ The precinct did not have the required equipment to identify Veilleux through his fingerprints. 6RP 52-53.

while walking; he would “walk occasionally and then occasionally he would just drop his weight and need to be carried several feet.” 6RP 54; 7RP 57-58.

Upon reaching the technician, the officers instructed Veilleux on how to have his fingerprints taken and how to behave while the handcuffs were removed for fingerprinting. 6RP 56.⁴ While the officers were waiting for Veilleux to provide his fingerprints, Veilleux refused to comply with directions by arching his fingers and smearing the ink. 6RP 55. The technician was unable to obtain Veilleux’s fingerprints and the officers were unable to identify Veilleux at headquarters. 6RP 55-56.

Veilleux was then transported to the King County Jail by Officer Renner and the three other officers. 6RP 56-57; 7RP 60. Officer Renner and another officer drove Veilleux to the jail; if Veilleux had been compliant while walking, the officers would have walked him to the nearby jail. 6RP 122; 7RP 60. Throughout the officers’ interaction with Veilleux, he “badmouthed” the officers. 7RP 31-32. Officer Renner explained that he was “trying not to pay attention to Veilleux’s behavior,” because at that point officers were

⁴ To fingerprint an individual, the technician moves the person’s unhandcuffed hands across an ink pad and then across a pad of paper. 6RP 54.

just trying to identify Veilleux and get him where he needed to be:

“Safely to fingerprinting, safely to jail, that’s it.” 7RP 30.

C. ARGUMENTS

1. VEILLEUX’S OBSTRUCTION CONVICTION IS
BASED ON HIS CONDUCT AND FALSE
STATEMENTS.

Veilleux argues that his conviction for obstruction is premised on his silence and protected speech without additional conduct. This argument should be rejected. Veilleux’s conviction is based on his non-protected speech and his conduct. Although jurors heard evidence of protected speech, they were instructed not to consider that speech as evidence of obstruction.

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). The plain language of the statute signals the legislature’s intent to criminalize an individual’s willful failure to obey a lawful police order where the failure to obey willfully hinders, delays, or obstructs the officer. State v. Steen, 164 Wn. App. 789, 802, 265 P.3d 901 (2011).

A person cannot be punished for merely refusing to speak. See State v. Contreras, 92 Wn. App. 307, 316, 966 P.2d 915 (1998).⁵ Additionally, speech on its own cannot be the basis for an obstruction conviction. State v. Williams, 171 Wn.2d 474, 486, 251 P.3d 877 (2011). An obstruction conviction requires some type of conduct, which could be either action or inaction. Id.

Contrary to Veilleux's assertion, his conviction for obstruction is based on non-protected speech and conduct.⁶ If Veilleux had simply refused to speak to officers, he would not have been criminally liable for that refusal. However, Veilleux was not exercising his right to remain silent by stating that he did not know his name and providing random numbers for his date of birth. 5RP 44; 7RP 67. Moreover, in addition to providing officers with false information, Veilleux's statements were coupled with his conduct of willfully failing to comply with officers. The basis of Veilleux's obstruction conviction included Veilleux's refusal to exit a patrol car, to walk, and to comply with officers' instructions on how to have his fingerprints taken. 6RP 56; 7RP 56-58.

⁵ Once a person does speak to law enforcement, that person may be criminally liable for the crime of making a false statement to a public servant. RCW 9A.76.175.

⁶ Jurors were instructed on speech which could not form the basis for obstruction. CP 101-02.

Veilleux's obstructive conduct was similar to the conduct in Contreras, supra, and Steen, supra. In Contreras, the court found that the defendant was lawfully arrested for obstruction where he did more than "merely refuse to talk" by disobeying the officer's orders to put his hands up in view of the officer, to exit the car, to keep his hands on top of the car, and to provide his name. 92 Wn. App. at 316-17. In Steen, the court found sufficient evidence to support the defendant's conviction for obstruction where he willfully ignored officers' lawful orders to exit a trailer with his hands up while officers were performing their community caretaking functions. 164 Wn. App. at 799-802.

Although the jury heard evidence of protected speech made by Veilleux, jurors were instructed that the protected speech could not be considered for the obstruction charge.⁷ Jurors were instructed that:

Refusing to answer a law enforcement officer's questions cannot, alone, amount to the crime of obstructing a law enforcement officer.

⁷ Veilleux "berated" officers on several occasions while he was in Officer Renner's custody. 7RP 30-32. At "some point" Veilleux requested a lawyer named "Vern Fonk" in a "sarcastic or flippant" manner. 7RP 78-79, 94. Vern Fonk is a deceased man who sold insurance for people with "bad driving records" and advertised on television. 7RP 78-79.

Evidence of insulting language towards law enforcement officers is not to be considered evidence of obstructing a law enforcement officer.

CP 101-02 (Jury Instructions 21 and 22). Additionally, during closing argument, the prosecutor told jurors that Veilleux's "insulting language" and his request for "Vern Fonk" could not be considered as evidence of obstruction. 9RP 26-27. Veilleux's obstruction conviction was based on his conduct and false statements, not protected speech. This Court should reject Veilleux's arguments to the contrary.

2. SUFFICIENT EVIDENCE SUPPORTS VEILLEUX'S CONVICTION FOR OBSTRUCTING OFFICER RENNER.

Veilleux challenges the sufficiency of the evidence, claiming that the State failed to prove beyond a reasonable doubt that Veilleux obstructed Officer Renner. This argument fails, because the State produced substantial evidence for a rational trier of fact to find that Veilleux obstructed Officer Renner.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any

rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Id. Circumstantial and direct evidence carry equal weight when reviewed by an appellate court. Id. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

The essential elements of obstructing a law enforcement officer are:

- (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. CLR, 40 Wn. App. 839, 841-42, 700 P.2d 1195 (1985).

Veilleux argues that there is insufficient evidence that he had knowledge that his actions would hinder Officer Renner. This argument is unpersuasive. Officer Renner was with Veilleux while Veilleux was being examined by fire department medics at the precinct. 6RP 112. Veilleux was transported to headquarters by Officer Renner and another officer. 6RP 115. Veilleux was in the custody of Officer Renner and three other officers at police headquarters while he refused to exit a vehicle, walk, and provide fingerprints. 6RP 120.

It is reasonable to infer, given the circumstances, that Veilleux knew that his actions would not only affect the person or people that he was not complying with directly, but that his acts would also delay, hinder, or obstruct Officer Renner, one of the officers who had custody of him throughout Veilleux's non-compliance.

Viewing the record in the light most favorable to the State, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Veilleux obstructed Officer Renner

and that Veilleux had knowledge that Officer Renner would be obstructed as a result of his actions.

3. VEILLEUX'S RIGHT TO JURY UNANIMITY WAS PROTECTED WHERE HIS ACTS OF OBSTRUCTION WERE PART OF THE SAME CONTINUING COURSE OF CONDUCT.

Veilleux contends that the trial court violated his right to a unanimous jury verdict. Veilleux's argument fails because his acts of obstruction were part of a continuing course of conduct. Thus, neither a unanimity instruction nor election was necessary to ensure a unanimous jury verdict.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of several acts that could constitute the crime charged, the jury must unanimously agree on a specific act. State v. Kitchen, 110 Wn.2d 403, 422, 756 P.2d 105 (1988). To ensure jury unanimity, "[t]he State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." Kitchen, 110 Wn.2d at 409; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

However, the State need not make an election and the court need not give a unanimity instruction if the evidence shows that the defendant was engaged in a continuous course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); State v. Craven, 69 Wn. App. 581, 587, 849 P.2d 681, review denied, 122 Wn.2d 1019 (1993). To determine whether the defendant's conduct constitutes one continuing criminal act, "the facts must be evaluated in a commonsense manner." Petrich, 101 Wn.2d at 571; Craven, 69 Wn. App. at 588.

Courts have considered various factors in determining whether a continuous course of conduct exists. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Factors in this determination include whether the acts occurred in a "separate time frame" or "identifying place." Petrich, 101 Wn.2d at 571. In general, where the evidence involves conduct at different times and places, the evidence tends to show that the acts were several distinct acts and not a continuous course of conduct. Handran, 113 Wn.2d at 17.

In contrast, evidence that a defendant engages in more than one act intended to achieve the same objective supports the characterization of those acts as a continuous course of conduct.

See Handran, 113 Wn.2d at 17 (two acts of assault, the kissing and hitting of defendant's ex-wife, did not require a unanimity instruction or election because the evidence showed a continuous course of conduct intended to secure sexual relations with the victim); Fiallo-Lopez, 78 Wn. App. at 726 (in one count of delivery of cocaine, the acts of providing a "sample" at one site followed by delivering a "larger amount" at a different location, were part of a continuing course of conduct because, although the acts were separated in time and place, they were intended to bring about the same "ultimate purpose"); State v. Garman, 100 Wn. App. 307, 314, 984 P.2d 453 (1999) (separate criminal acts demonstrated a continuing course of conduct where the evidence supported that the acts were part of a scheme with the common objective of stealing money from the city); State v. Marko, 107 Wn. App. 215, 221, 27 P.3d 228 (2001) (threatening statements directed at different people during a ninety-minute time period formed a continuing course of conduct that did not require a unanimity instruction or election by the State).

Here, evaluating the evidence in a common sense manner shows that Veilleux's obstruction was part of a continuous course of conduct. Importantly, his actions were intended to achieve the same common objective: to be non-compliant. Evidence of this common objective is pervasive throughout the record. Immediately upon being arrested, Veilleux told an officer that he did not know his name and provided random numbers as his date of birth. 5RP 44; 7RP 67. When being transported to headquarters to be identified through his fingerprints, Veilleux refused to exit the vehicle on his own and repeatedly "went limp" and chose not to walk while the officer led him to and from the fingerprint technician. 7RP 56-58. While the technician attempted to take his fingerprints, Veilleux continued to refuse to follow directions and prevented his prints from being obtained. 6RP 55-56.

Veilleux's actions were directed toward everyone he came into contact with after his arrest, including officers, fire department medics, and the fingerprint technician. 5RP 50-51; 6RP 55-56. This is further evidence that Veilleux's purpose was singular and directed towards non-compliance.

Veilleux's obstruction also happened in a limited time frame and in the same identifiable place. Although the exact times of Veilleux's acts are not precisely reflected, the record shows that they all took place from the time of his arrest at approximately 3:00 a.m. to the time when he was transported to the King County Jail at 4:30 a.m. 5RP 25, 58-59; 7RP 14.⁸ Additionally, Veilleux's obstruction took place while he was in the custody of police officers. Although the officers transported Veilleux to various locations during that interaction, he was continuously in the presence of officers throughout his acts of obstruction.

Veilleux's acts served the same objective, occurred within the same time frame, and all occurred in the presence of officers. Evaluating the acts in a common sense manner demonstrates that the obstruction was part of the same course of conduct. Thus, the trial court did not need to provide a unanimity instruction nor did the State need to elect which act was the basis for the charge. Veilleux's right to a unanimous jury was not violated.

⁸ The approximate time of Veilleux's arrest is based on the officers' dispatch to the home at 2:45 a.m. and Officer Koshak's transport of Veilleux from the home to the precinct at 3:39 a.m. 5RP 25, 58-59.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Veilleux's convictions.

DATED this 18 day of December, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. NICHOLAS VEILLEUX, Cause No. 70133-9 -I, in the Court of Appeals, Division I, 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.

Dated this 18 day of December, 2013

A handwritten signature in black ink, consisting of a large, stylized initial 'O' followed by several horizontal strokes that extend to the right.

Name
Done in Seattle, Washington