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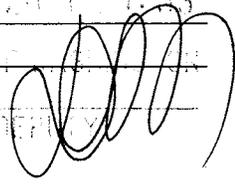
NO. 37619-9

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____



**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL WAYNE WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko

No. 07-1-06092-0

BRIEF OF RESPONDENT

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

1. As a matter of law, may the State proceed with charges of obstructing a law enforcement officer, based on the words of defendant where defendant's assertions hindered or delayed the officer investigating defendant; and, is an attorney ineffective for failing to raise such a claim below?

B. STATEMENT OF THE CASE.

1. Procedure

MICHAEL D. WILLIAMS, hereinafter defendant, was charged by information in Pierce County Superior Court, cause number 07-1-06092-0, with first degree theft, making a false or misleading statement to a public servant and obstructing a law enforcement officer, contrary to RCW 9A.56.020, RCW 9A.56.030, RCW 9A.76.020(1), RCW 9A.76.175. CP 1-2.

On January 31, 2007, the matter came before the Honorable Judge Serko, for a bench trial. Defendant was convicted as charged. CP 8-12, 35-36. Findings of Fact and Conclusions of Law were entered.

On April 11, 2008, Judge Serko imposed standard range sentences for each of the three offenses, 25 months for theft in the first degree, and 365 days for both misdemeanor offenses, concurrent to each other. CP 35-36.

This timely appeal follows. CP 37.

2. Facts

On December 3, 2007, defendant dropped off his Jeep Cherokee at Les Schwab tires in Fife. RP 19. According to accountant Heather Crawford, Les Schwab replaced the tires and the rims on the Jeep for a total of \$1,700. RP 19, 22.¹

When defendant came in to pick up his vehicle with the new tires and rims, Ms. Crawford asked defendant how he wanted to pay for the work. RP 24. Defendant handed her a check with a driver's license number written on it. RP 24. Ms. Crawford ran the check through the Telecheck system and Telecheck "declined" the check, meaning they would not guarantee the funds because they had a check returned from that driver's license number in the past. RP 24. Defendant was advised that they could not accept his check and he was asked whether he would like to put the matter on debit or credit. RP 24. Defendant answered, "no. My debit card was lost, and they're mailing me one." RP 24. Defendant asked her if Les Schwab needed to take the tires or rims off and Ms. Crawford told him "no," not if there was another way for him to pay for the items. RP 25.

¹ Unless otherwise noted, all citations to the verbatim report of proceedings are for to the 1/31/08 volume.

Defendant said he could go get some cash. Ms. Crawford replied that that was no problem as long as he gave her the key back to the vehicle, and the vehicle stays at Les Schwab until he obtains the cash. RP 25. Defendant left at approximately 2-2:30 with another man who brought him there. RP 25-26. Before he left, defendant indicated that he would be right back. RP 26. When defendant failed to return, Ms. Crawford attempted to contact him with the phone number he left, but when she tried to call it was not working. RP 27. At that point, she contacted police. RP 27.

At the request of Fife police department, Federal Way officer Scott Parker responded to an address in Federal Way to check on whether a Jeep Cherokee, license 544 UMC was at that address. RP 42. Chelsea Pierce answered the door and stated that she owned the vehicle matching that description, and confirmed that her boyfriend had recently purchased rims and tires for her vehicle. RP 43-44.

Defendant then came to the door and identified himself as Eric R. Williams, with a date of birth of 11/22/1977. RP 70. He indicated that he recently purchased the tires and rims from Les Schwab in Fife. RP 44. Defendant explained that Les Schwab was unable to take his check and he had said, "You can go ahead and take the tires and rims back," and they said something to the effect of "We don't want them back." RP 45. Defendant informed Les Schwab that he would go to the bank and get

cash for the equipment. RP 46. Defendant said that he gave them the key to the vehicle. RP 46. However, defendant also stated that he drove the vehicle to Seattle to take care of some business, and that he could not make it back to the Les Schwab dealership before it was closed. RP 46.

When Officer Parker asked defendant if he had any identification, defendant denied having any identification on him. RP 47. The officer then asked if there was another way to verify who he was. RP 47. Defendant responded that he had a grandmother in Federal Way, but when the officer pressed further he denied knowing her address. RP 47.

During Officer Parker's contact with defendant, he radioed back to Fife Officer Vrandenburg to apprise him of the contact with the suspect and suspect vehicle. RP 54. Officer Vrandenburg went up to Federal Way to meet with Officer Parker and defendant. RP 55. Officer Vrandenburg asked defendant his name, and defendant identified himself as "Eric R. Williams," with a date of birth of 11/22/77. RP 56. Officer Vrandenburg performed a Department of License check, and the name came back as "clear and current," however the physical description did not match. RP 56. At this point, Officer Vrandenburg asked for further identification and defendant stated he did not have any. RP 56. Defendant also denied knowing his address, social security number, or driver's license number. RP 57. Officer Vrandenburg later confronted defendant with the name "Michael Williams," and defendant stated that

that was his brother. RP 59. When asked why his brother's name would be on the Les Schwab document, defendant stated he did not know.

Officer Vrandenburg asked defendant for the check written to Les Schwab, and defendant stated that he did not have it and that he had thrown it away. RP 57. Officer Vrandenburg then inquired about what happened at Les Schwab. RP 57. Defendant stated that there was misunderstanding during the purchasing of the wheels and tires, that he had attempted to pay for them, and that for some reason there was a problem with the check he wrote, and that Les Schwab refused to take the tires off. RP 57-58. Defendant confirmed that Ms. Crawford with Les Schwab had requested a key to the Jeep Cherokee, but that he and Chelsea had errands to run and he got caught up in traffic. RP 59. Defendant further explained that at around 6:00 he tried to make a phone call to Les Schwab to let them know he would not make it before they closed and left a message. RP 59. Officer Vrandenburg made later attempts to call Les Schwab and check their answering machine, but there was no answering machine available, and Ms. Crawford confirmed later that there is no capability to leave messages with Les Schwab via machine. RP 8-9, 2/4/08.

Officer Vrandenburg placed defendant under arrest. RP 59. Officer Vrandenburg transported who he believed to be "Eric R. Williams" to the Fife City Jail and held him until transport to Pierce County jail arrived. RP 60. Officer Vrandenburg requested that jail staff

do an administrative booking where they can obtain a name, fingerprint, and photographs since he felt there was a discrepancy with his identification. RP 60. Officer Wone held defendant in a cell for a while, and when he brought defendant out he asked him his name, and defendant gave the name of "Michael Williams." RP 60. Officer Wone contacted Officer Vrandenburg and informed him of the name change and a different date of birth. RP 61. Once Officer Vrandenburg was armed with this new information, he conducted a records check which revealed a felony warrant for DOC escape. RP 61. After contacting Pierce County jail and obtaining a booking photo via e-mail, Officer Vrandenburg was able to verify defendant's identity. RP 61. Officer Vrandenburg confronted defendant with the information, and defendant stated that he lied to him about his name because he had a warrant. RP 61.

C. ARGUMENT.

1. THE STATE PROPERLY CHARGED AND CONVICTED DEFENDANT WITH OBSTRUCTING A LAW ENFORCEMENT OFFICER WHERE DEFENDANT PROVIDED FALSE INFORMATION TO OFFICERS DURING A CRIMINAL INVESTIGATION AND DELAYED OR HINDERED THE INVESTIGATION. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE OTHERWISE TO THE COURT BELOW.

Defendant argues that providing false information cannot legally constitute obstruction under *State v. Williamson*, 84 Wn. App. 37, 924

P.2d 960 (1996). Defendant fails to fully consider the statutory development of the obstruction statute.

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).

A mere refusal to answer questions cannot be the basis of an arrest for obstruction of a police officer. *State v. Turner*, 103 Wn. App. 515, 525, 13 P.3d 234 (2000); *State v. Contreras*, 92 Wn. App. 307, 316, 966 P.2d 915 (1998). The affirmative act of giving false information, however, can support an arrest and conviction under RCW 9A.76.020(1). *Contreras*, 92 Wn. App. at 317 (citing *City of Sunnyside v. Wendt*, 51 Wn. App. 846, 851-52, 755 P.2d 847 (1988)).

In *Williamson*, the case which is the backbone of defendant's entire argument to this court, the court held that the giving of a false name to a police officer did not constitute obstruction under a former version of RCW 9A.76.020. *Williamson*, 84 Wn. App. at 44-45. As originally enacted, the crime of "obstructing a public servant" could be committed by (1) refusing or neglecting to make or furnish any statement or report lawfully required by a public servant; (2) making a willfully untrue or misleading statement in such report, or (3) willfully hindering, delaying, or obstructing a public servant in the discharge of official powers or

duties. *Former* RCW 9A.76.020 (Laws of 1975, 1st Ex. Sess., ch. 260); *Williamson*, 84 Wn. App. at 43.

In 1982, the Supreme Court invalidated sections (1) and (2), holding that they were unconstitutionally vague. *State v. White*, 97 Wn.2d 92, 101, 640 P.2d 1061 (1982). Prosecutors subsequently attempted to charge persons who gave false names or information with obstruction under section (3), but reviewing courts rejected this approach after concluding that sections (1) and (2) had addressed false statements and that section (3) punished only obstructive conduct. *Williamson*, 84 Wn. App. at 43.

The legislature subsequently amended the statute and renamed it "Obstructing a law enforcement officer." Former RCW 9A.76.020 (Laws of 1994, ch. 196, § 1). This version of the statute eliminated section (1), dealing with failing to make a required report, and created two alternative means of committing the offense: the first covered false or misleading statements made to a law enforcement officer who had lawfully detained the defendant and the second was limited to obstructing law enforcement officers. *See Williamson*, 84 Wn. App. at 44; former RCW 9A.76.020(1)(a) and (b). In 1995, the legislature split the statute into two crimes: the obstructing statute was amended to cover only obstructing law enforcement officers, and a new crime was created to cover making false or misleading statements to public servants. Laws of 1995, ch. 285, §§ 33 and 32; *see* RCW 9A.76.020(1) and RCW 9A.76.175.

The 1994 version was at issue in *Williamson*, 84 Wn. App. at 44. This court held that by convicting the defendant of obstruction for making false statements, the trial court had either improperly characterized his statements as conduct under former RCW 9A.76.020(1)(b) or had convicted him of making false statements under former RCW 9A.76.020(1)(a), which constituted an uncharged alternative means of committing the offense. *Williamson*, 84 Wn. App. at 44-45.

The current version of the statute eliminates the distinction between speech and conduct, and the act of giving false information to a law enforcement officer can support a conviction under either RCW 9A.76.020 or RCW 9A.76.175. See *Contreras*, 92 Wn. App. at 317; 13A SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW, § 1809, at 375 n.5 (2d ed. 1998).

Here, the defendant gave false information, and this information obstructed the investigation. Defendant gave both officers a false name, and misstated that he left a message at Les Schwab. This is sufficient to sustain a conviction of obstruction. See *Contreras, supra* at 317 (upholding a conviction for obstruction where defendant refused to put hands in the air, keep his hands on top of the car and gave a false name); *City of Sunnyside v. Wendt*, 51 Wn.App. at 851-52 (finding that where defendant gave a false statement that he had no license in a traffic investigation he hindered the investigation).

Because the State could legally pursue obstruction charges based on speech, defense counsel was not ineffective for failing to pursue this line of argument. *See State v. Strickland*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Townsend*, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001) (to establish deficient performance, a defendant must demonstrate that the representation fell below an objective standard of reasonableness under professional norms.)

Defendant raises only a constitutional challenge to his conviction. He does not challenge the sufficiency of the evidence. *See* RAP 10.3 (a)(4)(brief of appellant must contain a separate and concise statement of each error a party contends was made by the trial court). Defendant also does not assign error to the findings of fact entered in this case, and unchallenged findings of fact are verities on appeal; an appellate court reviews only those facts to which the appellant has assigned error. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

Even if he were to raise such a challenge, there is sufficient evidence, factually, to support a conviction.

Evidence is sufficient if, when viewed in the light most favorable to the State, a reasonable person would find that the State proved the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A defendant's evidentiary challenge admits the truth of the State's evidence and all

inferences that can reasonably be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Included in the conclusions of law is a finding that defendant “unlawfully and willfully hindered, delayed, and obstructed a law enforcement officer in the discharge of his duties. (COL III). The finding that the defendant hindered or delayed is technically a finding of fact, labeled as a finding of law, or a mixed question of law and fact. An appellate court treats a finding of fact mislabeled as a conclusion of law as a finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Again, defendant did not assign error, so this court must find that the factual finding of “hinder” or “delay” is a verity on appeal. However, even if this court were to look to the record, such a finding is supported by substantial evidence. An appellate court reviews whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). There is evidence in the record that defendant caused much delay in what should have been a very simple theft investigation. The discrepancy in the name he gave to the two investigating officers led Officer Vrandenburg to request an administrative booking, and a photo identification from Pierce County jail. RP 61. These additional law enforcement efforts were necessary only

because of defendant's false assertions. Officer Vrandenburg also tried to call Les Schwab to see if there was an answering machine based on defendant's assertion that he left a message, but no such machine existed. RP 8-9, 2/4/08, CP X FOF V & VIII. Thus, the finding that defendant hindered or delayed the investigation is supported by substantial evidence.

Even if this court were to conclude that there was an absence of any factual finding of hinder or delay, there is still adequate evidence of this to support a finding on appeal. An absence of an affirmative factual finding may result in the presumption of a negative finding by the trial court, but an exception to this rule of construction applies where "there is ample evidence to support the missing finding, and the findings entered by the court, viewed as a whole, demonstrate that the absence of the specific finding was not intentional." *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992); *See also, State v. Armenta*, 134 Wn.2d 1, 21, f.n. 9, 36, 948 P.2d 1280 (1997).

It was undisputed below that defendant caused a delay in the investigation by offering a false name. Defendant admitted during testimony that he gave his little brother's name to police. RP 19, 22, 2/4/08. Defendant admitted that when officers asked if they could go to a relative's home to confirm his identity he testified, "Can we go there?" I had to, like, think about it for a second. No, if we go there then I can't be Eric Williams if we go there because they know what my name is, so I just was evasive with all their questions and my identity . . . [b]ecause I had a DOC

warrant.” RP 22, 2/4/08. Also, while on the stand defendant admitted that he had his id and wallet in the house the whole time, but did not go get it because of his warrant. RP 32. Further, defense counsel stipulated during closing that there was no issue to proof for the charges to making a false or misleading statement to a public servant and obstruction.²

Nor can defendant claim error based on the fact that the two convictions: obstruction and providing false or misleading information to a public servant, arise from the same set of facts. This type of argument is reserved for felony convictions only where issues of same criminal conduct may arise. *See* 9.94A.589 (SRA statute defining same criminal conduct for purposes of sentencing).

² Counsel's performance is not deficient when he or she admits guilt on one particular count where the evidence is overwhelming. *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) (citing *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991)). This type of concession can be a reasonable trial strategy when counsel is attempting to gain credibility with the jury in order to secure an acquittal on more serious charges. *Silva*, 106 Wn. App. at 597-98

D. CONCLUSION.

The State respectfully requests that this court affirm the conviction and sentence.

DATED: January 16, 2009.

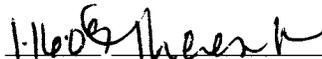
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date Signature

STATE OF WASHINGTON
BY
JAN 20 2009
COUNTY OF PIERCE

