

NO. 38599-6

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD CARL HOWARD, II, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 08-1-02055-1

BRIEF OF RESPONDENT

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

1. Should this court remand this case for entry of judgment and sentencing on the misdemeanor of attempted obstruction of a law enforcement officer where there was sufficient evidence presented to support that charge?

B. STATEMENT OF THE CASE.

1. Procedure

On April 30, 2008, the Pierce County Prosecutor's Office filed an information charging appellant, Richard Carl Howard, II ("defendant") with unlawful possession of a controlled substance, first degree driving while in suspended or revoked status, and obstructing a law enforcement officer in the Pierce County Superior Court Cause No. 08-1-02055-1. CP 1-2.¹

The case was assigned to the Honorable Kitty-Anne van Doorninck and the jury trial commenced on October 30, 2008. RPII 14. On October 31, 2008, the jury found defendant guilty of all three counts. RPIII 161-163; CP 25-27. On November 14, 2008, the court sentenced

¹ Citations to Clerk's Papers will be to "CP" and citations to the verbatim report of proceedings will be to "RP." The volume of the report cited will be indicated in Roman numerals after the designation, "RP."

defendant to the higher-end standard-range sentence of twenty-four months on the unlawful possession charge (CP 244), and 365 days each for the driving while in suspended or revoked status and the obstruction charges, to be served consecutively. CP 254. The court also ordered defendant to pay \$2600 in legal financial obligations. CP 244, 256-257.

Defendant filed a timely notice of appeal. CP 259. The court denied defendant's request for an appeal bond. RPIV 23.

2. Facts

On April 29, 2008, Officer Dana Smitley noticed a car with expired registration tabs and conducted a traffic stop. RPII 39. Officer Smitley testified that when he approached the car, he asked the driver, later identified as defendant, for his license, registration and proof of insurance. RPII 40. When defendant said he did not have any of those, Officer Smitley asked him for his name. *Id.* Defendant identified himself as Jason Carl Sacier, listed his birth date as December 28, 1979, and provided four digits of a social security number. RPII 58. Defendant testified that while he did not offer any identifying documents, he did not provide a false name to Officer Smitley. RPII 111. Officer Smitley then asked defendant to step out of the vehicle and handcuffed him for having no valid operator's license on person. RPII 41.

After defendant stepped out of his car and was placed in handcuffs, Officer Smitley conducted a weapons search. RPII 42. During this

search, Officer Smitley found a Washington state identification card in defendant's right front pocket, identifying the defendant as Richard Carl Howard. RPII 44. Within defendant's black leather bag, Officer Smitley testified that he also found a blue pill in a plastic bag. RPII 42-43. This was later identified as methylenedioxymethamphetamine. RPII 65, 70. At trial, defendant denied that the pill had been in his possession. RPII 103. Officer Smitley then advised defendant of his *Miranda* rights and placed him in the back of his patrol car. RPII 44. A records check performed by Officer Smitley revealed that defendant's driver status had been revoked in the first degree. RPII 45. Officer Smitley also determined that defendant's actual birth date was July 1, 1980. RPII 58.

C. ARGUMENT.

1. THIS COURT SHOULD REMAND THIS CASE FOR ENTRY OF JUDGMENT AND SENTENCING ON THE MISDEMEANOR OF ATTEMPTED OBSTRUCTION OF A LAW ENFORCEMENT OFFICER WHERE THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT THAT CHARGE.

a. There was insufficient evidence presented that defendant committed the completed crime of obstruction of a police officer.

Due process requires that the State bear the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. McCullom*, 98 Wn.2d 58, 61, 768 P.2d 1064 (1983). Evidence is

sufficient when, viewed in the light most favorable to the prosecution, it allows a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn. App. 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988). Further, "[w]hen 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. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence is as reliable as direct evidence. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). Where there is conflicting evidence or where reasonable minds may differ in interpreting certain evidence, the jury has the task of weighing the evidence, determining credibility of witnesses, and deciding disputed questions of fact. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1990). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Great deference should be given to the trial court's factual findings. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

In this case, defendant challenges the sufficiency of the evidence regarding his conviction of the gross misdemeanor obstructing a law enforcement officer. 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 official duties. RCW 9A.76.020(1).

Evidence that a defendant refused to give his name to a police officer, in addition to disobeying police orders is sufficient to support an arrest for obstructing a law enforcement officer. *State v. Contreras*, 92 Wn. App. 307, 316, 966 P.2d 915 (1998). Mere refusal to answer questions cannot be the basis for arrest for obstruction of a law enforcement officer. *State v. Turner*, 103 Wn. App. 515, 525, 13 P.2d 234 (2000). However, a defendant's affirmative and knowing statement that consists of false information can satisfy RCW 9A.76.020(1) if it actually delays or hinders the officer. *City of Sunnyside v. Wendt*, 51 Wn. App. 846, 851-852, 755 P.2d 847 (1988).

The court instructed the jury that the State needed to prove the following three elements to convict defendant for obstruction:

- (1) That on or about the 29th day of April, 2008, the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties;
- (2) That the defendant knew that the law enforcement officer was discharging official duties at the time; and
- (3) That the acts occurred in the State of Washington.

CP 21, Instruction No. 14.

The jury was also instructed on the definition of willfully:

Willfully means to purposefully act with knowledge that this action will hinder, delay, or obstruct a law enforcement officer in the discharge of the officer's official duties.

CP 20, Instruction No. 13.

Defendant asserts that the State failed to establish that defendant in fact hindered, delayed or obstructed Officer Smitley in his investigation of the crime. The evidence, when taken in the light most favorable to the prosecution, shows that defendant knowingly and willfully made false statements and refused to provide his identification to Officer Smitley upon request. RPII 40-41, 57-58, 111. The evidence shows that defendant knew Officer Smitley was acting in his official capacity when he requested information from defendant. RPII 40-41, 111. The evidence also shows that the acts occurred in the State of Washington. RPII 38-39.

The only question remaining is whether the false statements made by defendant in fact hindered or delayed Officer Smitley. Officer Smitley testified that while the defendant's false name, birth date and partial social security number raised his suspicions, they did not slow him down. RPII 59. In light of the fact that the officer testified that he was not delayed by the false statements provided by defendant, the State concedes that there was insufficient evidence to convict defendant of the gross misdemeanor of obstructing a law enforcement officer.

- b. This court should remand for entry of judgment and sentencing on attempted obstruction of a police officer, a lesser included offense.

The State produced sufficient evidence to prove defendant committed the crime of attempted obstruction of a law enforcement officer. The fact that the officer was in fact hindered or delayed is an essential element of the gross misdemeanor of obstruction of a law enforcement officer, and there was insufficient evidence to show any delay in the case at hand. However, an actual delay or hindrance is not an essential element of attempted obstruction of a law enforcement officer. So, while the evidence was insufficient to sustain a conviction of the completed crime of obstruction of a police officer, it was sufficient for attempted obstruction.

Upon an indictment for an offense, the jury may find the defendant not guilty of the charged offense and, instead, “guilty of any degree inferior thereto, or of an attempt to commit the offense.” RCW 10.61.003. This statute provides defendants with sufficient notice that they must also defend themselves against lesser degrees of the offenses charged. *State v. Foster*, 91 Wn.2d 466, 471, 589 P.2d 789 (1979); *State v. Garcia*, 146 Wn. App. 821, 829-830, 193 P.3d 181 (2008).

“When the evidence is insufficient to convict of the crime charged, but sufficient to support conviction of a lesser degree crime, an appellate court may remand for entry of judgment and sentence on the lesser degree.” *State v. Atterton*, 81 Wn. App. 470, 473, 915 P.2d 535 (1996). “[W]hen an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on the lesser degree of the offense charged when the lesser degree was necessarily proven at trial.” *Garcia*, 146 Wn. App. at 830; *see also State v. Plakke*, 31 Wn. App. 262, 639 P.2d 796 (1982), *overruled on other grounds by State v. Davis*, 35 Wn. App. 506, 667 P.2d 1117 (1983), *aff’d*, 101 Wn.2d 654, 682 P.2d 883 (1984).

An attempted crime is a lesser included offense of that crime, and the jury may convict a defendant of attempting to commit that crime, even if attempt was not specifically charged. *State v. Gallegos*, 65 Wn. App. 230, 234, 828 P.2d 37 (1992). In this case, the jury properly concluded that defendant willfully made false statements to Officer Smitley in the State of Washington while he was discharging his official powers and duties. CP 27. This is sufficient to support a conviction of attempted obstruction of a law enforcement officer, even though it is insufficient to support a conviction of the gross misdemeanor obstruction of a law enforcement officer.

Because an attempt to commit an offense is a proper lesser included offense, RCW 10.61.003, the proper remedy is to remand for

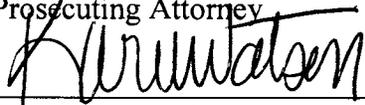
judgment and sentencing on the lesser offense, the misdemeanor of attempted obstruction of a law enforcement officer. *Garcia*, 146 Wn. App. at 830.

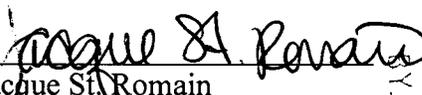
D. CONCLUSION.

For the foregoing reasons, the State concedes that there was insufficient evidence to sustain the conviction of the gross misdemeanor of obstruction of a law enforcement officer. However, the State respectfully requests this Court remand for entry of judgment and sentencing on the misdemeanor of attempted obstruction of a law enforcement officer.

DATED: July 24, 2009.

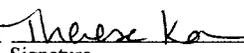
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Jacques St. Romain

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.

7-24-09 
Date Signature

STATE OF WASHINGTON
COUNTY OF PIERCE
CLERK OF COURT
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