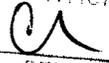


FILED  
COURT OF APPEALS  
DIVISION II

10 FEB 17 PM 3:59

STATE OF WASHINGTON

BY  DEPUTY

Nº. 39635-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON  
Respondent,

v.

RONALD EDWARD STEEN,  
Appellant.

---

OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County,  
Cause No. 09-1-00303-5  
The Honorable Linda Lee, Reviewing Judge

---

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A. ASSIGNMENTS OF ERROR

1. The Superior Court erred in affirming Mr. Steen's conviction where RCW 9A.76.020 is unconstitutional as applied to Mr. Steen since it violates his First and Fifth Amendment rights to remain silent.
2. The Superior Court erred in affirming Mr. Steen's conviction where the State presented insufficient evidence to convict Mr. Steen of obstructing a law enforcement officer.
3. The Superior Court erred in affirming Mr. Steen's conviction where prosecutorial misconduct deprived Mr. Steen of a fair trial where the State used Mr. Steen's pre-arrest silence as the basis of the charge of obstructing a law enforcement officer.
4. The Superior Court erred in failing to find that the State had conceded that Mr. Steen's First Amendment right to remain silent had been violated since the State failed to respond to this argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is RCW 9A.76.020 unconstitutional as applied to Mr. Steen where Mr. Steen did nothing but remain silent?  
(Assignment of Error No. 1)
2. Does a right to remain silent exist under the First Amendment? (Assignment of Error No. 1)
3. May an individual be prosecuted for obstructing a police officer under RCW 9A.76.020 for exercising his Fifth Amendment right to remain silent? (Assignments of Error No. 1 and 3)
4. Where the State fails to respond to an argument raised by an appellant, has the State conceded that issue?  
(Assignment of Error No. 4)

5. Does the State present sufficient evidence to establish that a defendant obstructs police by failing to open the door to a trailer the police seek to enter where the only evidence introduced at trial was that the defendant was sleeping when the police attempted to gain entry into the trailer? (Assignments of Error Nos. 1 and 2)
6. Is it prosecutorial misconduct for the prosecutor to base an entire prosecution for obstructing a police officer on an individual's exercise of his right to remain silent? (Assignments of Error Nos. 1, 2, and 3)

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On July 9, 2008, Pierce County Sheriff's Deputies Tanya Terrones and Andrew Finley were dispatched to an address in response to a report of a disturbance involving 2-3 people. CP 311-314, 322, 336-339.

Deputy Finley arrived on scene first and encountered a white female exiting a trailer on the property. CP 322, 340, 343. The woman was visibly upset and had been crying. CP 322, 340.

In order to look for more people who might be on the property, the officers attempted to enter the trailer but found the door to be locked. CP 324, 342-343. Deputy Terrones knocked and announced twice on the trailer door, but nobody answered so Deputy Finley helped Deputy Terrones climb through a window on the trailer. CP 324, 346.

Once inside the trailer, Deputy Terrones unlocked the door so Deputy Finley could enter. CP 326, 344. As Deputy Finley opened the

door to the trailer, the police observed a man, later identified as Ronald Steen, exit the bedroom of the trailer. CP 326, 346. Deputy Finley told Mr. Steen to put his hands up, Mr. Steen complied, and Mr. Steen then said to the deputies, "What do you want? I was sleeping." CP 346-347. Mr. Steen was very cooperative, but Deputy Finley immediately handcuffed Mr. Steen and placed him in Deputy Finley's patrol car. CP 326, 346-347.

The police asked Mr. Steen several times what his name and date of birth was, but Mr. Steen said nothing. CP 326-327, 349. It took 45 minutes of investigation to determine Mr. Steen's identity. CP 338, 349. Mr. Steen was read his *Miranda* rights after police determined his identity. CP 338.

On July 10, 2008, Mr. Steen was charged with obstructing a law enforcement officer in violation of RCW 9A.76.020. CP 41.

On December 11, 2008, the charge proceeded to trial, and the jury returned a verdict of guilty at 3:40 a.m. on December 12, 2008. CP 44.

Notice of appeal was timely filed on January 2, 2009. CP 45.

On direct appeal to the Pierce County Superior Court, Mr. Steen made three arguments: (1) that RCW 9A.76.020 was unconstitutional as it applied to Mr. Steen because it violated his First and Fifth Amendment rights to remain silent; (2) that the State presented insufficient admissible

evidence to convict him of obstructing a police officer where the only evidence introduced at trial was that Mr. Steen was sleeping when the officers were attempting to enter the trailer and that Mr. Steen remained silent before and after he was “detained” by police; and (3) that prosecutorial misconduct deprived Mr. Steen of a fair trial where the State used Mr. Steen’s pre-arrest and post-arrest silence as the basis of the charge of obstructing a law enforcement officer. CP 418-433.

In its Response Brief, the State failed to address Mr. Steen’s First Amendment argument. CP 434-444.

In his Reply Brief, Mr. Steen argued that under *State v. Ward*, 125 Wn.App. 138, 144, 104 P.3d 61 (2005), the State had conceded that RCW 9A.76.020 was unconstitutional as applied to Mr. Steen because it violated his First Amendment right to remain silent. CP 445-450.

Argument on Mr. Steen’s appeal was heard on May 8, 2009. RP 2-30. The Superior Court issued a written ruling on July 8, 2009, and entered an Order of Remand on July 31, 2009. CP 451-457, 458-460. The Superior Court ruled as follows: (1) the application of RCW 9A.76.020 to Mr. Steen’s actions did not violate his Fifth Amendment right to remain silent because Mr. Steen’s identity “would not provide a link in the chain of evidence needed to convict him in a separate offense”; (2) the application of RCW 9A.76.020 to Mr. Steen’s actions did not violate his

First Amendment right to remain silent because the First Amendment does not grant an individual the right to refuse to answer questions from police because the questions did not compel Mr. Steen to speak or express a certain point of view; (3) Mr. Steen's refusal to identify himself to the deputies combined with his failure to exit the trailer when order to do so by the deputies were facts sufficient to uphold a conviction for obstruction of a police officer; and (4) the prosecutor did not commit misconduct in introducing evidence of Mr. Steen's pre- and post-arrest silence because "The State elicited testimony about [Mr. Steen's] failure to answer the door and his refusal to give his name and date of birth as direct evidence to prove an element of the crime charged, not to suggest to the jury that [Mr. Steen's] silence was an admission of guilt or to infer guilt from [Mr. Steen's] silence." CP 451-457. The Court's Ruling did not address the fact that the State had failed to address Mr. Steen's argument that he had a First Amendment right to remain silent and that, under Washington law, the State's failure to address an issue raised on a appeal is considered to be a concession of the validity of that argument. CP 451-457.

Notice for Discretionary Review was filed on July 31, 2009. CP 461-470.

On October 29, 2009, the Court of Appeals Commissioner denied Mr. Steen's motion for discretionary review. A motion to modify the

commissioner's ruling was filed on November 5, 2009. On December 18, 2009, a panel of judges granted the motion to modify the Commissioner's ruling and ordered that review of Mr. Steen's appeal be accepted.

D. ARGUMENT

When reviewing the decision of a Superior Court on an appeal from a court of limited jurisdiction, the Court of Appeals' inquiry is whether the court of limited jurisdiction committed an error of law and whether substantial evidence supports the factual findings. *City of Seattle v. May*, 151 Wn.App. 694, 697, 213 P.3d 945 (2009); RALJ 9.1. Any unchallenged findings are verities on appeal and review for errors of law is de novo. *May*, 151 Wn.App. at 697, 213 P.3d 945.

**1. RCW 9A.76.020 is unconstitutional as applied to Mr. Steen since it violates his First and Fifth Amendment rights to remain silent.**

Constitutional questions and issues of statutory construction are both reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Alleging a statute is unconstitutional as-applied requires showing only that application of the statute to the party's specific actions is unconstitutional. *Moore*, 151 at 668-69, 91 P.3d 875. Statutes are presumed constitutional; the challenger has the burden of proving a statute unconstitutional beyond a reasonable doubt. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984); *State v. Dixon*, 78 Wn.2d 796, 479 P.2d

931 (1971).

Statutes may be unconstitutionally vague either on their face or only as to certain applications. *Bellevue v. Miller*, 85 Wn.2d 539, 541, 536 P.2d 603 (1975), *abrogated on other grounds*, *State v. Smith*, 111 Wn.2d 1, 759 P.2d 372 (1988). The test to be applied depends upon the challenge. *Maciolek*, 101 Wn.2d at 262, 676 P.2d 996. If the challenge is facial, the defendant's conduct will be ignored and the statute examined to determine whether any conviction under it could be constitutionally upheld. If not, it is facially flawed. *Miller*, 85 Wn.2d at 541, 536 P.2d 603. A defendant's particular conduct is examined when a statute is challenged only as to certain applications, because even though it may be vague as to certain conduct, it still may be constitutionally applied to one whose conduct clearly falls within the scope of its core. *State v. Zuanich*, 92 Wn.2d 61, 593 P.2d 1314 (1979).

Here, RCW 9A.76.020 is unconstitutional as applied to Mr. Steen because it violates Mr. Steen's First and Fifth Amendment rights to remain silent. The State's theory of the case was that Mr. Steen obstructed the deputies in the exercise of their duties by not coming out of the trailer when the deputies were knocking on it and by not providing his name or any other information. CP 79.

- A. The Superior Court’s ruling that Steen’s First Amendment right to remain silent was not violated because he was not compelled to express a certain point of view is contrary to decision of the State and US Supreme Courts.

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely **and the right to refrain from speaking at all.** A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. **The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.”**

*Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428 (1977) (internal citations omitted) (emphasis added). Thus, the First Amendment protects both the right to speak freely **and** the right to say nothing at all.

In *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Washington Supreme Court acknowledged that the First Amendment included a right to refrain from speaking which included the right to refuse to identify one’s self to a police officer. At issue in *White* was the constitutionality of a previous version of Washington’s “stop-and-identify” statute, RCW 9A.76.020 which then read:

Obstructing a public servant. 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.

*White*, 97 Wn.2d at 95-96, 640 P.2d 1061.

The *White* court identified four possible challenges to stop-and-identify statutes, one of which was that “the identification requirement may be violative of an individual’s First Amendment right not to speak.” *White*, 97 Wn.2d at 97, n. 1, 640 P.2d 1061, citing *Wooley v. Maynard*, 430 U.S. 705, 709, 97 S.Ct. 1428. However, beyond acknowledging that RCW 9A.76.020 was open to attack as violating the First Amendment right to remain silent, the Court did not address the First Amendment further and, instead, decided the case under the Fourteenth Amendment and the Fourth Amendment, and also as a violation of White’s Article 1, § 7 rights. *White*, 97 Wn.2d at 97, n. 1, 102-112, 640 P.2d 1061.

Similarly, in *City of Mountlake Terrace v. Stone*, 6 Wn.App. 161, 492 P.2d 226 (1971), Division 1 of the Court of Appeals was concerned with the lawfulness of a city ordinance making it a misdemeanor to refuse or neglect, after due notice, to make or furnish a statement, report or information lawfully required by any public officer. *Stone*, 6 Wn.App. at 162, 492 P.2d 226. In discussing the case, the *Stone* court recognized in passing that an individual being requested by a police officer to identify

themselves under penalty of criminal sanction must decide many issues before answering, including whether the information may be required “before the interrogatee is given an opportunity to consult counsel, or before being warned of his constitutional right to remain silent either under the Fifth or possibly the First Amendments, especially on the theory that an overhanging criminal sanction makes the interrogation involuntary in character”. *Stone*, 6 Wn.App at 167, 492 P.2d 226.

Thus, both the US Supreme Court as well as Washington Courts have acknowledged that the First Amendment right to free speech also grants the right to refrain from speaking, including the right to refuse to identify yourself to a police officer.

Here, the State prosecuted Mr. Steen for obstructing a police officer under RCW 9A.76.020 based on Mr. Steen’s choice to remain silent while in the trailer and then not tell the police his name or give his date of birth. The Superior Court found that this did not violate Mr. Steen’s First Amendment right to remain silent because “[Steen] was asked to provide factual information; specifically his name and date of birth. The information was not an opinion on religion, politics or ideological cause.” CP 454.

However, the First Amendment prohibition against forced speech extends to compelled speech which is not a forced opinion on religion,

politics, or ideological cause. For example, in *United States v. Pourhassan*, 148 F.Supp.2d 1185 (D. Utah, 2001), the court was ruling on Pourhassan's motion to dismiss his indictment on the ground that the statute upon which his indictment was based was void for vagueness. *Pourhassan*, 148 F.Supp.2d at 1186. Pourhassan had been charged with two counts of violating 18 U.S.C. § 1159 which makes it a criminal offense to "offer or display for sale or sell any good...in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization." *Pourhassan*, 148 F.Supp.2d at 1187.

Pourhassan challenged 18 U.S.C. § 1159 as being facially vague. *Pourhassan*, 148 F.Supp.2d at 1187-1188. The court ruled that Pourhassan could properly challenge the statute as being facially vague because the statute implicated First Amendment scrutiny in that the statute "in substance and effect may require some actors to make some affirmative statement regarding the actual origin of certain products or be subject to prosecution." *Pourhassan*, 148 F.Supp.2d at 1189-1190. The *Pourhassan* court therefore acknowledged that the First Amendment right to remain silent protects against forced commercial speech, rather than just forced speech regarding religion, politics, or ideological cause. Thus, the Superior Court erred in this case when it held that the First Amendment

right to remain silent applied only to forced speech regarding religion, politics, or ideological cause.

As acknowledged by the United States Supreme Court in *Wooley*, and the Washington Supreme Court in *White*, the First Amendment grants all US Citizens the right to choose not to speak, even in the context of a police officer requesting the person to identify themselves. Further, the First Amendment right to remain silent protects the right to be free from any forced speech, not just speech regarding religion, politics, or ideology. Thus, Mr. Steen had an absolute First Amendment right to choose not to answer the door when the police knocked on it or to choose not to respond to police questions.

Mr. Steen had no legal duty or obligation to respond either to the deputies knocking on the trailer or to the deputies' questions. Both his silence in the trailer and his refusal to tell police his name or any other identifying information was constitutionally protected speech: Steen had a First Amendment right to remain silent and say and do nothing at all.

RCW 9A.70 020 is unconstitutional as applied to Steen because it punishes Steen for exercising his First Amendment right to choose to remain silent.

B. RCW 9A.76.020 violates Mr. Steen's Fifth Amendment right to remain silent.

“The Fifth Amendment privilege against compulsory self-incrimination protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 190, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004).

“Courts have ruled on evidentiary grounds pre-arrest silence is not admissible because of its low probative value and high potential for undue prejudice.” *State v. Easter*, 130 Wn.2d 228, 235 n. 5, 922 P.2d 1285 (1996). However, “[t]he use of pre-arrest silence as substantive evidence of guilt implicates the Fifth Amendment and is not merely an evidentiary issue.” *Easter*, 130 Wn.2d at 235, 922 P.2d 1285. “The right against self-incrimination is liberally construed.” *Easter*, 130 Wn.2d at 236, 922 P.2d 1285.

An accused's right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. **The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation.** The right can be asserted in any investigatory or adjudicatory proceeding. *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent; **Miranda indicates the right to silence exists prior to the time the government must**

**advise the person of such right when taking the person into custody for interrogation.** *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A “bell once rung cannot be unring.” *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). The State’s theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant’s pre-arrest silence as evidence of guilt.

*Easter*, 130 Wn.2d 228, 238-239, 922 P.2d 1285, citing *Roberts v. United States*, 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622 (1980) (“[T]he right to silence described in those [*Miranda*] warnings derives from the Fifth Amendment and adds nothing to it.”) and *Jenkins v. Anderson*, 447 U.S. 231, 247 n. 1, 100 S.Ct. 2124, 2134 n. 1, 65 L.Ed.2d 86 (1980) (Marshall, J., dissenting) (“The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution.”).

The purpose of the right against self-incrimination supports the conclusion **a right to silence exists prior to arrest.** The purpose of the right is to make the government obtain evidence on its own, and “to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.” **The right exists to put the entire load of producing incriminating evidence on the State “by its own independent labors.”**

*Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (internal citations omitted) (emphasis added).

Here, Mr. Steen could have believed that both revealing his presence inside the trailer to police and identifying himself to the police could be used in a criminal prosecution or could lead to other evidence that might be so used since Steen was aware that there were warrants for his arrest. Thus, Mr. Steen had an absolute Fifth Amendment right to remain silent and not answer the officer's questions both *before* and *after* he was *Mirandized* or placed in police custody.

Similar to Mr. Steen's First Amendment right to choose not to respond to the deputies knocking on the trailer or their questions, Mr. Steen also had a Fifth Amendment right to choose not to respond to the deputies' knocking on the trailer or their questions. It was not necessary for Mr. Steen to be formally arrested for him to exercise his Fifth Amendment right to remain silent.

RCW 9A.76.020 is unconstitutional as applied to Steen because it punished Steen for exercising his Fifth Amendment right to choose to remain silent. Mr. Steen, and every other American citizen, have First and Fifth Amendment rights to choose not to speak to police and to remain silent when questioned by police, whether or not the citizen is in police custody, has been arrested, or is simply sitting in a trailer police want to enter. RCW 9A.76.020 is unconstitutional as applied to Mr. Steen

because Mr. Steen did nothing more than exercise his First and Fifth Amendment rights to remain silent.

**2. The State presented insufficient evidence to convict Steen of obstructing a law enforcement officer.**

When the sufficiency of the evidence to convict the defendant of a crime is challenged on appeal, the appellate court reviews the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Hernandez*, 120 Wn.App. 389, 391-392, 85 P.3d 398 (2004), citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

A person is guilty of obstructing a law enforcement officer if he or she “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 statute’s essential elements 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. Contreras*, 92 Wn.App. 307, 315-316, 966 P.2d 915 (1998).

The State argued that Mr. Steen obstructed the deputies in two ways: first, by failing to exit the trailer when the police knocked on the door, and second, by not telling the deputies his name or any other identifying information. CP 79. Neither of these behaviors of Steen is sufficient to establish that he knowingly obstructed the deputies in the performance of their duties.

- A. The State presented insufficient evidence to establish beyond a reasonable doubt that Steen knew the deputies were discharging their duties when he did not exit the trailer.

As stated above, Mr. Steen had no legal obligation or duty to answer the door when the deputies knocked or to answer the deputies' questions. Further, the only evidence presented at trial regarding Mr. Steen's knowledge of what the deputies were doing when they knocked on the door to the trailer and then climbed through the window was Deputy Finley's testimony that Mr. Steen asked the Deputies what they wanted and told them he was sleeping. RP 346-347. Thus, the only evidence

before the jury to establish that Mr. Steen knowingly obstructed the deputies was that he was sleeping when the deputies knocked on the door to the trailer and was awakened by their activity.

If Mr. Steen was sleeping, there is no way he could have known what the deputies were doing or why they wanted entry into the trailer, or even that the deputies were trying to enter the trailer. At best, the evidence establishes that Mr. Steen was awakened by the deputies' attempts to enter the trailer and he was on his way to open the door when Deputy Terrones crawled through the window. Therefore, even viewed in the light most favorable to the State, the State presented insufficient evidence to establish that Steen knowingly obstructed the deputies when he did not exit the trailer.

B. The State presented insufficient admissible evidence to establish beyond a reasonable doubt that Steen obstructed the deputies when he did not answer their questions about his name and date of birth.

As stated above, Mr. Steen had a First and Fifth Amendment right to remain silent when questioned by police. This right existed prior to his being formally arrested when Deputy Terrones read him his *Miranda* rights and after.<sup>1</sup>

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<sup>1</sup> It should be noted that Mr. Steen was legally "arrested" at the time Deputy Finley handcuffed him inside the trailer, not when he was formally arrested in Deputy Finley's patrol car. Deputy Finley testified that he was investigating the reason for the 911 call

The right against self-incrimination prohibits the State from using a defendant's constitutionally protected silence as substantive evidence of guilt. *State v. Knapp*, \_\_ Wn.App. \_\_, 199 P.3d 505, 508 (2009), citing *Easter*, 130 Wn.2d at 236, 922 P.2d 1285.

Here, the State's entire case against Mr. Steen was based on his constitutionally protected silence. The introduction of this evidence was improper and violated Mr. Steen's rights to remain silent under the First and Fifth Amendments.

C. Mr. Steen's act of remaining silent, without more, is insufficient to establish that he hindered the police.

The only behavior engaged in by Mr. Steen was remaining silent. Mr. Steen did not run from police, did not try to assault the police, and, save for opening the trailer while he was asleep, complied with everything the police requested him to do. These facts are insufficient to establish

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when he and Deputy Terrones entered the trailer and handcuffed Mr. Steen. CP 342-343. A person is "seized" under the Fourth Amendment where, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). A person is under arrest for constitutional purposes when, by means of physical force or a show of authority, his freedom of movement is restrained. *State v. Young*, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998), citing *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). An investigatory detention is a seizure. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). A reasonable person who had been handcuffed by police would not feel free to leave the scene, and Mr. Steen was handcuffed and detained by Deputy Finley to allow Deputy Finley to investigate the incident further. Thus, Mr. Steen was arrested in the trailer when Deputy Finley handcuffed him. Any assertion by the State or the deputies that Mr. Steen was merely "detained" as opposed to "formally arrested" prior to Steen being informed of his *Miranda* rights is simply legally incorrect.

that Steen obstructed the deputies.

As acknowledged by the Superior Court, Washington courts have always required more than mere silence to convict an individual for obstructing police. *See, e.g., Contreras*, 92 Wn.App. at 316-317, 966 P.2d 915.

Here, Mr. Steen did nothing other than choose to remain silent. He was cooperative and compliant (CP 346-347), but simply didn't answer the deputies' questions. Silence alone is insufficient to establish obstruction of the deputies.

The State presented insufficient evidence to establish that Mr. Steen's act of not answering the door was done with knowledge that it would hinder the police. Mr. Steen's pre- and post-arrest silence may not be used to establish his substantive guilt. Mr. Steen's silence, alone, is insufficient to establish that Mr. Steen obstructed the deputies. Thus, the State presented insufficient evidence to establish that Mr. Steen obstructed the police officers.

**3. Prosecutorial misconduct deprived Mr. Steen of a fair trial where the State used Mr. Steen's pre-arrest silence as the basis of the charge of obstructing a law enforcement officer.**

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S.

1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). The Washington Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial.

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in *Huson*, we believe the prosecutor's conduct in this case was reprehensible and departs from the prosecutor's duty as an officer of the court to seek justice as opposed to merely obtaining a conviction.

*State v. Coles*, 28 Wn.App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981) (citations omitted) (quoting *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)).

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor's conduct was improper and the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116

S.Ct. 931, 133 L.Ed.2d 858 (1996). A defendant must show that the conduct of the prosecutor had a substantial likelihood of affecting the verdict. *Brett*, 126 Wn.2d at 175, 892 P.2d 29.

Washington courts have held that comments by prosecutors regarding a defendant's pre-arrest silence are constitutional errors. *See Knapp*, \_\_\_ Wn.App. \_\_\_, 199 P.3d 505, 509; *Easter*, 130 Wn.2d at 243, 922 P.2d 1285. Similarly, the State may not use witnesses' comments or make closing arguments relating to the defendant's post-arrest silence in order to imply guilt. *State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988).

The right against self-incrimination prohibits the State from using a defendant's constitutionally protected silence as substantive evidence of guilt. *Knapp*, \_\_\_ Wn.App. \_\_\_, 199 P.3d at 508 (2009), *citing Easter*, 130 Wn.2d at 236, 922 P.2d 1285.

The Superior Court ruled that the prosecutor did not commit misconduct by basing the State's case on Mr. Steen's pre- and post-arrest silence because the State introduced the evidence "as direct evidence to prove an element of the crime charged, not to suggest to the jury that [Steen's] silence was an admission of guilt or to infer guilt from [Steen's] silence." CP 456.

The Superior Court's ruling is simply illogical and is contrary to

*Knapp*. The State charged Mr. Steen with obstructing a police officer based on his decision to remain silent and not respond to the deputies knocking on the door to the trailer and his refusal to identify himself to the deputies. Thus, the State's case was based on Mr. Steen's silence, and the silence *was* admitted as substantive evidence of his guilt and the State's closing argument was essentially nothing but string of commentary about Mr. Steen's pre-arrest and post-arrest silence. Further, the prosecutor did more than merely comment on Mr. Steen's silence, the prosecutor based her entire case on it.

It was improper for the prosecutor to comment or introduce evidence about Mr. Steen exercising his rights to remain silent. Further, the introduction of this evidence and the prosecutor's comments about it prejudiced Mr. Steen because without such evidence, the State would not have had a case.

It was prosecutorial misconduct for the prosecutor to even charge this case, much less take it to trial. Mr. Steen was prejudiced by the prosecutor's actions in that he was convicted of obstructing the police officers. The Superior Court's ruling is in error and is contrary to established law.

**4. The Superior Court erred in failing to find that the State had conceded that Mr. Steen's First Amendment right to remain silent had been violated since the State failed to respond to this argument.**

Where the State fails to respond to an argument raised on appeal, the State is deemed to have conceded the issue. *State v. Ward*, 125 Wn.App. 138, 144, 104 P.3d 61 (2005).

Here, the State failed to respond to Mr. Steen's argument regarding his First Amendment right to remain silent in its Response Brief. Mr. Steen pointed this out in his Reply Brief and cited *Ward*, but the Superior Court ignored *Ward* and ruled against Mr. Steen on this issue. The Superior Court's ruling was in error and is contrary to Washington law.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Steen's convictions and remand for dismissal with prejudice.

DATED this 17<sup>th</sup> day of February, 2010.

Respectfully submitted,

  
\_\_\_\_\_  
Reed Spear, WSBA No. 36270  
Attorney for Appellant

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STATE OF WASHINGTON

BY \_\_\_\_\_

CERTIFICATE OF SERVICE

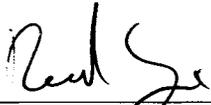
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 17<sup>th</sup> day of February, 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Ronald Steen, DOC# 975478  
W 2321 Dayton Airport Rd  
Post Office Box 900  
Shelton, WA 98584

And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office  
930 Tacoma Avenue South  
Tacoma, WA 98402

Signed at Tacoma, Washington this 17<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
Reed Speir, WSPA No. 36270