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DIVISION II

NO. 39635-1

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

RONALD EDWARD STEEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 09-1-00303-5

Brief of Respondent

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

1. Has defendant failed to show that RCW 9A.76.020 is unconstitutional where defendant failed to show that providing his name and date of birth when requested was incriminating?
2. Did the State concede any argument when they responded to defendant's argument? If the court finds the State did concede, is the court bound by that concession?
3. Was there sufficient evidence to find that defendant committed the crime of obstruction where the State presented evidence that defendant refused to comply with the deputies' orders to exit the fifth wheel trailer and defendant refused to provide his name and date of birth to the deputies despite repeated requests?
4. Did the State commit prosecutorial misconduct where addressing defendant's refusal to provide his name and date of birth was not a comment on silence and proper in light of the facts and jury instructions in this case?

B. STATEMENT OF THE CASE.

1. Procedure

On July 10, 2008, the Pierce County Prosecuting Attorney's Office charged defendant, Ronald Steen, with one count of obstructing a law enforcement officer. CP 41-45. Pre-trial motions, including a motion to dismiss and a *Knapstad*¹ motion, were held on December 10, 2008. CP 41-45. The court denied defendant's motions. CP 41-45. The matter then proceeded to a jury trial and the jury returned a verdict of guilty on December 11, 2008. RP 348², CP 41-45. The court sentenced the defendant to 365 days, with 279 days suspended and 86 days credit for time served. CP 41-45.

From entry of the trial court's judgment and sentence, the defendant filed a timely notice of appeal. CP 46-47.

The Superior Court affirmed defendant's conviction in a written ruling. CP 451-457, 458-460. Defendant has now filed a motion for discretionary review with this Court. CP 461-470.

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986)

² The report of proceedings from the District Court was designated as a clerk's paper rather than being transferred up as the Report of Proceedings. There is no explanation as to why. The State will refer to the Report of Proceedings from the District Court as RP and use the transcript page numbers. The Report of Proceedings can be found at CP 48-417.

2. Facts

On July 9, 2008, Pierce County Sheriff's Deputies Andrew Finley and Tanya Terrones were dispatched to investigate a report of a disturbance involving two or three people near the 5600 block and 92nd Street in Puyallup. RP 267, 275, 292. Deputy Finley arrived on the scene first and made contact with a white female who was exiting a trailer on the property. RP 275, 293, 296. The woman was visibly upset and had been crying. RP. 275, 293. Deputies Finley and Terrones observed that the woman had mascara running down her face and had red eyes. RP 275, 293. The deputies were concerned if other people were at the scene and if the female had been assaulted. RP 276.

Because this was a report of a disturbance involving two or three people, there was only one female at the scene who was visibly upset, and the female had just exited a seven feet wide by twelve feet long trailer, the deputies were concerned with the possibility of injured persons at the scene. RP 275, 277, 293-298. The deputies continued their investigation by knocking on the trailer, announcing their presence, and ordering whoever was inside the trailer to exit with their hands up. RP 277, 298. The deputies knocked, announced, and ordered whoever was inside the seven foot by twelve foot trailer to exit multiple times during their initial fifteen minute investigation. RP 277, 298-99. After repeated requests for

whoever was inside the trailer to exit, Deputy Terrones entered the trailer through an unsecured window. RP 277-78, 299. The deputies investigated the trailer to confirm or dispel the presence of any injured persons. RP 298-99.

Once inside the trailer, Deputy Terrones unlocked the door so Deputy Finley could enter. RP 279, 297. As Deputy Finley opened the door to the trailer, Deputy Terrones saw the defendant at the end of the trailer, in the direction of the back bedroom area. RP 279, 299. Deputy Terrones told the defendant to put his hands up, and Deputy Finley handcuffed the defendant and detained him as part of making the scene safe. RP 279, 299-300.

The deputies asked the defendant for his name and date of birth, but the defendant said nothing. RP 279-80, 302. The deputies made this request multiple times, and it took approximately forty-five minutes of investigation to determine the defendant's identity. RP 280, 302. Deputy Terrones read the defendant his constitutional rights after determining the defendant's identity. RP 291.

C. ARGUMENT.

1. THE SUPERIOR COURT DID NOT ERROR IN FINDING RCW 9A.76.020 CONSTITUTIONAL AS APPLIED, WHERE DEFENDANT FAILED TO SHOW THAT PROVIDING HIS NAME AND DATE OF BIRTH WAS INCRIMINATING INFORMATION IN CONTEXT OF THE CRIME OF OBSTRUCTION.³

“The constitutionality of a statute ... is an issue of law, which [the Court] reviews de novo.” *State v. Abrams*, 163, Wn.2d 277, 282, 178 P.3d 1021 (2008) (quoting *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005)). “A statute is presumed constitutional, and the party challenging the constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.” *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996). Wherever possible, it is the duty of [the court] to construe a statute so as to uphold its constitutionality. *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985).

Both the United States and Washington constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const. amend. V; Wash. Const. art. I, § 9. Washington courts provide the same interpretation to the two

³ The State is addressing defendant’s constitutional argument as a whole despite the fact that defendant has chosen to break it up into two segments. The State is not conceding any of defendant’s sub-arguments by addressing the argument as a whole.

constitutional provisions and liberally construe the right against self-incrimination. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). Further, the defendant has the right to silence both before and after the arrest. *Easter*, 130 Wn.2d at 238.

The purpose of the right to silence is 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.” *Doe v. United States*, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 3d. 184 (1988).

The right against self-incrimination prohibits the State from using a defendant’s constitutionally protected silence as substantive evidence of guilt. *Easter*, 130 Wn.2d at 236. However, the police may ask routine questions during the arrest and booking process even where a suspect has invoked his right to remain silent. *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987) (citing *United States v. Menichino*, 497 F.2d 935, 941 (5th Cir. 1974)). Routine questions are permissible because they rarely elicit incriminating responses. *Wheeler*, 108 Wn.2d at 238. Thus, a defendant may assert the right to silence only to resist compelled disclosures of incriminating information. *Doe*, 487 U.S. at 212.

Defendant argues, as he did in Superior Court, that RCW 9A.76.020 is unconstitutional because he has a right to remain silent under both the First and Fifth Amendments to the Constitution. Defendant has not claimed that his name and his date of birth were incriminating information in the context of this obstruction case. Rather, this information was requested by Deputies Terrones and Finley as part of their routine investigation into a disturbance involving two or three people. RP 279-80, 302. This is permissible under case law and does not violate defendant's constitutional rights. There is nothing in the record to suggest that the State commented on the defendant's right to remain silent in refusing to provide the deputies with incriminating evidence. Defendant's name and date of birth did not require defendant to share his thoughts and beliefs with the government. These were merely routine questions. The defendant's contentions regarding his right to remain silent and the right to be free from self-incrimination are without merit. As such, the Superior Court did not error in finding the RCW 9A.76.020 constitutional, and upholding the defendant's conviction for obstruction.

Further, while defendant only referenced one case in the trial court in support of his First Amendment argument that had nothing to do with a criminal proceeding, defendant now seeks to expand on his first

amendment argument with cases and argument that were not before the Superior Court.⁴

Defendant's cases are distinguishable. *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982) *superseded by statute*, *State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996), deals with a version of the statute that has since been amended. Defendant's citation refers to a footnote and in no way is controlling law. *Id.* at 97. Further, the footnote specifically addresses a stop and identify type of situation which is not the situation in the instant case. Here, the deputies were securing the scene and looking for injured persons. Defendant still has not shown a First Amendment right to remain silent, especially in the context of an investigation.

Defendant also cites to *City of Mountlake Terrace v. Stone*, 6 Wn. App. 161, 492 P.2d 226 (1971). Again, the portion of the opinion cited by defendant is a brief mention of the First Amendment in passing, and is not any part of the holding of the case. *Id.* at 167. The court was concerned with statements that were, "asked by a police officer, under an

⁴ Since defendant is now bringing forth new argument and new case law, the State is entitled to address these items. Defendant's allegations that the State conceded any argument below would then appear to be moot.

overhanging criminal sanction.” *Id.* This simply is not the situation in the instant case. Defendant was only asked to give his name and his date of birth.

Defendant also tried to group defendant’s refusal to answer the door for the deputies under this argument. However, defendant has cited no case law or argument regarding defendant’s refusal to answer the door. An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Further, defendant has not argued that answering the deputies was incriminating in any way. Defendant’s constitutional challenges fail.

To argue that the U.S. Supreme Court as well as Washington Courts have recognized a right to remain silent under the First Amendment, and to argue that this includes the right to refuse to identify yourself to a police officer is a stretch as defendant has presented no case law that says this. Brief mentions in a footnote of possibilities in relation to a superseded statute and a mention in passing do not make controlling law. This case must be analyzed in light of the controlling case law which the State has cited. The Superior Court did not error in finding RCW 9A.76.020 constitutional.

2. THE STATE DID NOT CONCEDE DEFENDANT'S CONSTITUTIONAL ARGUMENT AS THE STATE RESPONDED. FURTHER, SHOULD THIS COURT FIND THAT THE STATE CONCEDED, THE SUPERIOR COURT WAS NOT BOUND BY ANY CONCESSION.

Defendant argues, as he did in his reply brief below, that the State conceded his argument as to the First Amendment. First, the State did not concede any argument. The State responded to defendant's constitutionality claims in one argument. Defendant's claim as to the constitutionality of the statute was that defendant's refusal to provide his name was a constitutionally protected right, as he had a right to remain silent. The State's response was the same for both sub-claims of the same argument and so the argument was addressed as one argument as to constitutionality, namely that defendant does have a right to remain silent but specifically in the context of an investigation does not have a right to remain silent as to his name and date of birth. The case law the State presented supports this proposition. The fact that the State did not separate out two separate arguments to address constitutionality does not mean the State conceded the argument.

However, even if the court finds that the State did concede, the Superior Court was not bound by any concession. A court is not bound by an “erroneous concession related to a matter of law.” *State v. Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). An appellate court may affirm a defendant’s conviction on any theory supported by the record and the law. *State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001). It is within the court’s discretion to accept or reject the concession. Here, the court made a ruling as to defendant’s First Amendment claim finding that it was not an opinion statement and not protected. CP 451-457. Defendant only cited one case below to support his argument and the court distinguished that case in making its finding. *See* CP 451-457, page 3-4. *Doe v. United States*, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 3d 184 (1988), cited by the State in their response brief below and in this response, supports the Superior Court’s ruling.

The Superior Court’s decision finding that defendant did not have a valid First Amendment claim was supported by case law and within the court’s discretion. The State did not concede this point, and instead argued the constitutional argument as a whole. There was no error.

3. THERE WAS SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF OBSTRUCTION WHERE THE STATE PRESENTED EVIDENCE THAT DEFENDANT REFUSED TO COMPLY WITH THE DEPUTIES' ORDERS TO EXIT THE TRAILER AND DEFENDANT REPEATEDLY REFUSED TO PROVIDE HIS NAME AND DATE OF BIRTH TO THE DEPUTIES.⁵

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn.

⁵ The State is addressing defendant's sufficiency argument as a whole despite the fact that defendant has chosen to break it up into three segments. The State is not conceding any of defendant's sub-arguments by addressing the argument as a whole.

App. 282, 290, 627 P.2d 1323 (1981). 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 and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict. As such, these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

The defendant claims that the jury did not have sufficient evidence to convict him 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.

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, 315-16, 966 P.2d 915 (1998) (emphasis added).

Evidence that a defendant refused to give his name to a police officer, when coupled with other evasive conduct, can support a conviction for obstructing a law enforcement officer. *State v. Turner*, 103 Wn. App. 515, 525-26, 13 P.3d 234 (2000). Additionally, a defendant does not have the right to hinder or delay an investigation by refusing to identify himself, when the refusal is coupled with other evasive conduct. *Contreras*, 92 Wn. App. at 316-17.

In the case at bar, there was evidence that the defendant obstructed Deputies Terrones and Finley in their official duties of investigating a disturbance involving two or three people. The jury heard that the deputies responded to a report of a disturbance involving two or three

people and observed only one female at the scene who was visibly upset. RP 275, 277, 293-298. Deputy Finley observed the female exit the seven foot by twelve foot fifth wheel trailer. RP 277, 296. The deputies knocked on the trailer, announced their presence and ordered whoever was inside the trailer to exit with their hands up. RP 277, 298. The deputies knocked, announced, and ordered whoever was inside the seven foot by twelve foot trailer to exit multiple times during their initial fifteen to twenty minute investigation. RP 277, 298-99. After repeated requests for whoever was inside the trailer to exit, Deputy Terrones entered the trailer through an unsecured window. RP 277-78, 299. It took approximately forty-five minutes of investigation to determine the defendant's identity. RP 280, 302.

The defendant's refusals to identify himself, coupled with his inaction of exiting the seven foot by twelve foot trailer when ordered to do so, hindered and delayed the deputies' ability to investigate the reported disturbance. *Contreras*, 92 Wn. App. at 316-17.

The jury had sufficient evidence to convict the defendant for obstruction. The defendant's argument focuses on whether defendant actually knew the deputies were executing their official duties. However, the evidence showed that the deputies' made multiple knocks on the trailer, announced their presence, and ordered whoever was inside the trailer to exit. RP 277, 298-99. Defendant was in a small seven by twelve foot trailer and the deputies made their presence known for 15-20 minutes.

RP 277, 298-99. It was reasonable for the jury to find defendant knew the deputies were there in an official capacity. In addition, the court views all evidence in the light most favorable to the State. The credibility of the witnesses and the evidence they presented were properly weighed by the jury and the decision of the trier of fact should be upheld. *See Cord*, 103 Wn.2d at 367.

Further, defendant failed to comply with the commanded of the deputies' for fifteen to twenty minutes and it took forty-five minutes to identify defendant. RP 277. 280, 298-99, 302. There was more to the obstruction charge than defendant just refusing to provide his name.

Thus, the defendant's arguments on the sufficiency of the evidence are without merit, and the Superior Court did not error in upholding the defendant's conviction for obstructing a law enforcement officer.

4. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT WHERE THE STATE ADDRESSED DEFENDANT'S REFUSAL TO PROVIDE HIS NAME AND DATE OF BIRTH TO THE OFFICERS AS THIS WAS PART OF THE EVIDENCE FOR THE CHARGE OF OBSTRUCTION AND DEFENDANT REQUESTED A JURY INSTRUCTION THAT ADDRESSED THIS EVIDENCE.

To show that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were both improper and so prejudicial as to deny the

defendant a fair trial. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985).

A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the prosecutor's remarks were improper and that they prejudiced the defense." *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006). A prosecutor may not make an improper comment on a defendant's exercise of his right to remain silent in closing argument. *Id.* at 838. An improper comment on the right to remain silent only occurs "when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *Id.* at 838 (*quoting State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *see State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). Prejudice on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), *quoting State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

While a prosecutor cannot point to the lack of defense evidence as proof of guilt, “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87 (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir. 1978)). Further, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

In the instant case, the State did not make an improper comment on the defendant’s right to remain silent. In light of jury instruction eight, which instructed the jury that “mere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer,” the State presented an argument that included both the defendant’s failure to comply with the deputies’ orders to exit the trailer, the length of time it delayed the deputies, as well as the defendant’s refusal to provide routine information. RP 330, 334-37, CP 6-19. Jury instruction eight was requested by defense counsel. RP 316. Defendant cannot show prejudice as his own attorney suggested a jury instruction that necessarily brought this evidence into question and to the attention of the jury. When the State’s presentation of the defendant’s refusal to provide his name and date of birth are viewed in the context of the State’s entire argument for the crime of obstruction, the evidence addressed, and the instructions

given, the State did not make an improper comment on the defendant's right to remain silent. *Russell*, 125 Wn.2d at 86.

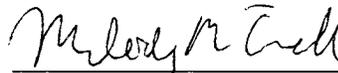
Additionally, the State did not present the jury with an improper argument that the defendant's refusal to provide his name or date of birth was substantive evidence of guilt or even suggested to the jury that his silence was an admission of guilt. *Gregory*, 158 Wn.2d at 838 (*quoting State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). Rather, the defendant's refusal to provide routine information was offered to establish that the defendant was obstructing the deputies' investigation into a reported disturbance. It was direct evidence. Defendant was not being questioned about a crime or suspected of a crime at the time that the deputies asked for his name and date of birth. This case is distinguishable in that the police were not questioning defendant about a crime and using his lack of explanation or evasiveness as evidence of consciousness guilt. The act of refusing to provide his name and date of birth was what delayed and obstructed the deputies in their efforts to search for injured persons and secure the scene. As such, the defendant has failed to establish that the State's remarks were improper and that the remarks prejudiced the defendant. The Superior Court did not error in finding that the prosecutor did not engage in misconduct.

D. CONCLUSION.

The State respectfully requests that this Court affirm defendant's conviction. The decision of the Superior Court should be upheld.

DATED: April 20, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

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.

4/20/10 Melody M. Crick
Date Signature

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BY [Signature]