

No. 46342-3-II

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

STATE OF WASHINGTON, RESPONDENT

V.

JAMES A. SHEA, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 13-1-00511-5

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The crime of obstruction of a law enforcement officer may not be sustained based entirely on the making of a false statement alone. But if a charge of obstructing a law enforcement officer is based in part on a defendant's false statement, then to sustain the charge the defendant must commit some act or omission in addition to the false statement, but the making of a false statement is not an element of obstructing a law enforcement officer, and the charge may be sustained based entirely on the acts or omissions of the defendant, even if no false statement is involved.
2. Existing, controlling case authority in Washington holds that when executing a lawful arrest, police may incident to the arrest search any unlocked article that is in the possession of the arrestee at the time of arrest or that was in his or her possession immediately prior to the arrest. Because Shea's wallet was in his possession at the time of arrest and immediately prior to his arrest, the search of his wallet and the discovery of methamphetamine in his wallet was lawful.
3. Because Shea's unstipulated admissions were voluntary, spontaneous utterances that were not in response to any questioning or any design to elicit incriminating statements, Shea's admissions were properly admitted at trial even though he provided them before officers had an opportunity to provide him with complete Miranda warnings. Additionally, even if the statements were erroneously admitted, the error would be harmless beyond a reasonable doubt because the relevant conviction is supported by other, overwhelming, untainted evidence provided by two eyewitnesses.
4. Shea asserts that his trial counsel was ineffective because there were several motions that his trial counsel should have raised but did not raise. But because none of these motions were meritorious, Shea has not shown that his trial counsel was ineffective for failing to bring them, and even if one or more

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of the motions had merit, Shea has not shown that there is any probability that the outcome of the trial would have been different had his counsel raised these motions.

B. FACTS AND STATEMENT OF THE CASE

On November 22, 2013, Officer Robert Auderer was at Bob's Tavern in Shelton, Washington, while off-duty, in civilian clothes, and buying some chicken and a beer when heard a commotion outside the tavern. RP 134-35, 137.

Officer Auderer went outside to see what was happening and saw a pedestrian, Grant Manning, penned under a yellow Mustang. RP 135, 175-77. People were yelling, and the front tire of Mustang was on the pedestrian's foot. RP 135, 277. Manning yelled for Shea to remove the car from his foot. RP 177. The driver, later identified as James Shea, then backed the car off Manning's foot. RP 135, 177. Manning and others yelled for Shea to stop, but despite people shouting for him to stop, Shea drove away without identifying himself, leaving insurance information, or offering assistance. RP 135-36, 177-79. Shea had struck Manning with his car, causing injury to his knee and foot. RP 177-78. Manning would later need surgery on his knee due to the injury he received. RP 178.

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Having just witnessed a hit and run, Officer Auderer got into a car and began to follow the mustang while he tried to call 911 and summon uniformed officers. RP 136-38. Officer Auderer reported that he was following the Mustang, and he continued to track the mustang until it later came to a stop at an alley. RP 138-40.

Officer Auderer drove up and parked near the Mustang, and as Shea and Officer Auderer both got of their cars, Officer Auderer identified himself as a police officer and told Shea to stop, that he was under arrest, and that uniformed officers were on the way. RP 140. Shea began to utter profanities and incriminating statements, such as that he had barely hit that guy, that he had barely hit him, and that he wasn't even hurt. RP 140, 154. Shea then began rifling through his pockets. RP 140. Officer Auderer told Shea numerous times to stop rifling through his pockets, but Shea ignored the commands; so, for safety reasons, Officer Auderer grabbed Shea by the arm and led away from the vehicle. RP 140.

Several – maybe three to five – people poured out of the house near where Shea had stopped his car. RP 141. The people were Shea's friends, and they surrounded Officer Auderer while he tried to hold onto Shea and keep his hands out of his pockets. RP 141. One of the people

who had surrounded Officer Auderer began to threaten him and say that he was going to beat him and knock him out. RP 141.

Officer Auderer repeatedly told Shea and his friends that he was a police officer and that uniformed officers were on the way. RP 142, 277. While still trying to hold Shea and keep him from reaching into his pockets, Officer Auderer managed to retrieve his police identification card and display it. RP 143. Officer Auderer's Shelton Police ID had his picture and a badge on it. RP 144. Shea was a foot or two away from Officer Auderer as Officer Auderer explained his police identification to him. RP 147. One of Shea's friends then openly exclaimed that Officer Auderer was a Shelton Police Officer. RP 144, 222.

Officer Auderer continued to try to restrain Shea so he could see Shea's hands and to try to keep him from reaching into his pockets, but Shea continued to struggle against Officer Auderer. RP 144. During the struggle, Shea had continued to empty his pockets. RP 148. Officer Auderer was concerned that Shea would pull a weapon or destroy or conceal evidence. RP 154. Shea had a wallet attached to a chain, and he managed to remove the chain from his belt and throw the wallet toward one of his friends, who he referred to as "Dave." RP 148, 228, 257.

Uniformed officers arrived in black and white patrol cars with blue lights activated, and as they arrived Officer Auderer told Shea to place his hands behind his back. RP 151. Even after the uniformed officers arrived, Shea continued to refuse to comply with commands. RP 167. A uniformed officer, Officer Backus, grabbed Shea and attempted to restrain him, but Shea continued to disobey commands. RP 167-68.

Officers later retrieved the wallet from Dave. RP 149, 169. From the time Shea tossed the wallet up to when Officer Auderer retrieved it, Officer Auderer never lost sight of Dave, and he kept a visual on Dave's hands the entire time. RP 150. Officers took Shea's ID from the wallet and confirmed his identity. RP 149, 169. They then found a bag of methamphetamine in the wallet. RP 149, 169.

Based on these facts, the State charged Shea with the crimes of obstructing a law enforcement officer, possession of methamphetamine, and hit and run from an injury accident. CP 78-79. After receiving the evidence, the jury returned guilty verdicts on all three counts. CP 48-50; RP 325-26.

C. ARGUMENT

1. The crime of obstruction of a law enforcement officer may not be sustained based entirely on the making of a false

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statement alone. But if a charge of obstructing a law enforcement officer is based in part on a defendant's false statement, then to sustain the charge the defendant must commit some act or omission in addition to the false statement, but the making of a false statement is not an element of obstructing a law enforcement officer, and the charge may be sustained based entirely on the acts or omissions of the defendant, even if no false statement is involved.

Shea contends that proof of the crime of obstruction of a law enforcement officer requires proof that the defendant made a false statement. Br. of Appellant at 26-29. He contends, therefore, that the evidence in the sufficient case is insufficient to support the conviction in the instant case because there is no evidence that Shea made a false statement. Br. of Appellant at 26-29.

“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), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

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Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). Competing evidence does not undermine the quantity or sufficiency of evidence; instead, “[w]here there is any evidence, however slight, and the evidence is conflicting or is such that reasonable minds may draw different conclusions therefrom, the question is for the jury.” *State v. Hunter*, 3 Wn. App. 552, 554, 475 P.2d 892 (1970) (quoting *State v. Reynolds*, 51 Wn.2d 830, 834, 322 P.2d 356 (1958)).

Shea cites *State v. Williams*, 171 Wn.2d 474, 251 P.3d 877 (2013) to support his contention that the crime of obstructing a law enforcement officer requires proof that the defendant made a false statement. Br. of Appellant at 27. In apparent ignorance or disobedience to GR 14.1(a), Shea then cites to an unpublished Court of Appeals decision to develop his point. Br. of Appellant at 27.

Obstruction occurs when one engages in affirmative conduct such as disobeying officer’s orders or physically resisting officers. *State v. Williams*, 171 Wn.2d 474, 251 P.3d 877 (2011). In *Williams*, the

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defendant was charged with obstruction based only the allegation that he gave officers a false name when they arrested him for an offense he had committed earlier in the day. *Id.* at 475. The *Williams* Court pointed out that separate statutes, RCW 9A.76.020 and RCW 9A.76.175, separately criminalize the acts of false statement and obstruction. *Id.* at 477, 485. Weighing the constitutional right to free speech, the Court then held that speech alone is insufficient to sustain a conviction for obstruction. *Id.* at 483-86. Thus, the Court then held: “In order to avoid constitutional infirmities, we require some conduct in addition to making false statements to support a conviction for obstructing an officer.” *Id.* at 486. Shea apparently reads this holding to always require speech as an element of obstruction. The State contends that Shea has interpreted *Williams* out of the applicable context and has misconstrued its holding.

“A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” RCW 9A.76.020(1). The plain language of the statute does not require speech or a false statement. “Under RCW 9A.76.020(1)’s plain language, a person may commit obstruction by willfully disobeying a lawful police order in a manner that hinders, delays, or obstructs he officer in the performance of

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his or her duties.” *State v. Steen*, 164 Wn. App. 789, 800, 265 P.3d 901, 907 (2011), *as amended* (Dec. 20, 2011). An off-duty police officer who is attempting to effect an arrest for a crime committed in his or presence, as in the instant case, is a police officer even if they are in civilian clothes. *State v. Graham*, 130 Wn.2d 711, 722, 927 P.2d 227 (1996). Evidence in the instant case shows that Shea willfully disobeyed both Officer Auderer and Officer Backus and willfully obstructed the performance of their duties. RP 140-49, 167-69.

2. Existing, controlling case authority in Washington holds that when executing a lawful arrest, police may incident to the arrest search any unlocked article that is in the possession of the arrestee at the time of arrest or that was in his or her possession immediately prior to the arrest. Because Shea’s wallet was in his possession at the time of arrest and immediately prior to his arrest, the search of his wallet and the discovery of methamphetamine in his wallet was lawful.

An appellate court may refuse to consider a claim of error that was not raised in the trial court. RAP 2.5(a); *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014). RAP 2.5(a)(3) provides an exception that allows for review of a “manifest error affecting a constitutional right.” For the first time on appeal, Shea now contends that the discovery of methamphetamine in his wallet at the time of his arrest in the instant case

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for hit and run and obstruction was the result of an unlawful search. Br. of Appellant at 29-35. But Shea has not claimed that any exception applies to RAP 2.5's general prohibition in this case. "RAP 2.5(a) does not mandate appellate review of a newly-raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not 'manifest.'" *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

To support his contention on appeal, Shea cites and discusses *State v. Boyce*, 52 Wn. App. 274, 758 P.2d 1017 (1988), but also cites and discusses an unreported case in violation of GR 14.1(a). Br. of Appellant at 30-34. Still more, uncited, contrary authority directly contradicts Shea's contentions.

First, it appears that by throwing his wallet away, Shea willfully abandoned it. RP 148, 228, 257. "Searching voluntarily abandoned property is an exception to the warrant requirement." *State v. Samalia*, ___ Wn. App. ___, 344 P.3d 722, 725 (No. 31691-2-III, Mar. 5, 2015) (citing *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007)) (further citations omitted).

More importantly, however, if an arrest is lawful, the arresting officer may incident to the arrest search articles closely associated with the

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arrested person and may do so “without showing the search was motivated by particularized concerns for officer safety or evidence preservation.” *State v. Byrd*, 178 Wn.2d 611, 614, 310 P.3d 793 (2013); *see also*, *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014). An article is closely associated with the arrestee person if he or she actually possessed the article at the time of arrest “or immediately preceding the time of arrest.” *State v. Brock*, 182 Wn. App. 680, 681, 330 P.3d 236 (2014), *review granted*, *State v. Brock*, 181 Wn. 2d 1029, 340 P.3d 228 (2015). *See also*, *MacDicken*, 179 Wn.2d at 941-42 (describing property that may be searched incident to arrest as property that defendant actually possessed at or immediately before time of arrest). This search may include a search of the contents of an unlocked wallet. *State v. Ward*, 24 Wn. App. 761, 764-68, 603 P.2d 857 (1979).

Here, Shea’s wallet was closely associated with him because he possessed it during and immediately before his arrest. RP 140, 148. Therefore, no error occurred when officers searched his wallet and found methamphetamine in it. *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013); *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014).

3. Because Shea’s unstipulated admissions were voluntary, spontaneous utterances that were not in response to any

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questioning or any design to elicit incriminating statements, Shea's admissions were properly admitted at trial even though he provided them before officers had an opportunity to provide him with complete Miranda warnings. Additionally, even if the statements were erroneously admitted, the error would be harmless beyond a reasonable doubt because the relevant conviction is supported by other, overwhelming, untainted evidence provided by two eyewitnesses.

Shea made two sets of confessions in this case. RP 9. The first set of confessions occurred at the very moment that Officer Auderer first contacted Shea. RP 154. The second set of statements are recorded on Exhibit 1 and occurred while Officer Auderer was attempting to control Shea while awaiting the arrival of uniformed officers. Ex. 1. Shea stipulated to the admission of the first set of statements but demanded a CrR 3.5 hearing on the second set. RP 9.

The trial court held a CrR 3.5 hearing and found that Shea's statements recorded on Exhibit 1 were admissible because they were voluntary, because no promises or threats were made to Shea to induce him to give a statement, and the statements were spontaneous and not in response to any kind of interrogation. RP 127.

“[T]he rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by

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substantial evidence in the record.” *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

A suspect who is in custody but who is not being “interrogated” does not have *Miranda* rights. *State v. Warness*, 11 Wn. App. 636, 639–40, 893 P.2d 665 (1995). “Interrogation” is broad enough to include express questioning and its functional equivalent, which the United States Supreme Court has defined as “any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *State v. Wilson*, 144 Wn. App. 166, 184, 181 P.3d 887 (2008) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Here, the stipulated admissions were admissible because Shea voluntarily and spontaneously uttered them when Officer Auderer was merely trying to inform him of the reason for his arrest. RP 154. Regarding Shea’s admissions recorded on Ex. 1, for which he provided no stipulation, there is substantial evidence in the record to show that those statements, also, were spontaneous, voluntary, and not in response to any interrogation. Ex. 1; RP 1-9 (Verbatim Transcript of Exhibit 1).

Generally, a reviewing court will not overturn the trial court's determination that statements were voluntarily or spontaneously made if

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substantial evidence in the record supports this conclusion. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). The determination of voluntariness is made upon the totality of circumstances surrounding statements. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (quoting *Fare v. Michael C.*, 442 U.S. 707, 724–25, 99 S.Ct. 2560, 61 L. Ed, 2d 197 (1979)).

Here, Officer Auderer merely told Shea the reason for his arrest. Ex. 1; RP 1-9 (Verbatim Transcript of Exhibit 1). And since Shea's friends has surrounded Officer Auderer and threatened with harm, it is apparent that Officer Auderer also intended to justify and explain his actions to those who had surrounded him. RP 141; Ex. 1; RP 1-9 (Verbatim Transcript of Exhibit 1). There Officer Auderer's conduct or speech was not designed to manipulate an incriminating response. Instead, the totality of the circumstances shows that Officer Auderer attempted to state the reason he was arresting Shea, Shea voluntarily and spontaneously protested that his arrest was unjustified, but in the process made statements that were marginally incriminating. Ex. 1; RP 9 (Verbatim Transcript of Exhibit 1).

Still more, two eyewitnesses, Officer Auderer and Grant Manning, both testified that Shea struck Manning with his car, stopped with his tire

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on Manning's foot, and then drove away without providing identification or insurance information. RP 135-36, 175-79.

Admission of a statement obtained in violation of *Miranda* can be harmless. *State v. Reuben*, 62 Wn. App. 620, 814 P.2d 1177 (1991). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under the "overwhelming untainted evidence" test employed in Washington, the reviewing court looks at only the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* at 426.

Here, Shea's qualified admissions are relevant only to the hit and run charge and are relevant only to suggest that he knew he had been involved in an accident with a pedestrian. But there were two eyewitnesses who testified unqualifiedly to the same facts (RP 135-36, 175-79); so, it is apparent that the jury would have reached the same result even in the absence of Shea's admissions.

4. Shea asserts that his trial counsel was ineffective because there were several motions that his trial counsel should have raised but did not raise. But because none of these motions were meritorious, Shea has not shown that his trial counsel was

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ineffective for failing to bring them, and even if one or more of the motions had merit, Shea has not shown that there is any probability that the outcome of the trial would have been different had his counsel raised these motions.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, Shea must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

i) Was defense counsel ineffective for failing to move for a CrR 3.5 hearing to suppress Shea's confession?

As argued in section three, above, Shea made two sets of confessions, and he stipulated to admission of the first set, but demanded a CrR 3.5 hearing and challenged the admissibility of the second set. RP 9. The State contends that defense counsel was not ineffective for failing to move for suppression of the first set of confessions because those

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confessions were spontaneous, voluntary, statements that Shea made in immediate response to Officer Auderer's initial contact with him and were not the result of any kind of interrogation. RP 154.

Simply put, there was no basis for suppression. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Therefore, counsel was not ineffective for failing to move for suppression. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). Still more, because there was other, competent evidence (eyewitness testimony at RP 135-36, 175-79) to prove the same facts as were proved by Shea's confession, Shea cannot show prejudice. Therefore, Shea's claim of ineffective assistance of counsel is legally deficient. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

ii) Was Shea's trial counsel ineffective for failing to move for suppression of the contents of his wallet under CrR 3.6?

An attorney's failure to make a meritless objection or motion does not constitute ineffective assistance of counsel. *Jones v. Smith*, 231 F.3d 1227, 1239 n. 8 (9th Cir.2000) (citing *Boag v. Raines*, 769 F.2d 1341,

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1344 (9th Cir.1985)). *See also, Rupe v. Wood*, 93 F.3d 1434, 1445 (“the failure to take a futile action can never be deficient performance”).

As argued in response to Shea’s other assignments of error, above, incident to a lawful arrest, officers may lawfully search property associated with the arrestee that the arrestee possessed at the time of arrest or immediately prior to the arrest, and they may do so “without showing the search was motivated by particularized concerns for officer safety or evidence preservation.” *State v. Byrd*, 178 Wn.2d 611, 614, 310 P.3d 793 (2013); *see also, State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014).

Counsel was not ineffective for failing to bring a motion that is unsupported by and contrary to existing law. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

iii) Was trial counsel ineffective for failing to strike Juror No. 7 from the panel?

The trial court excused Juror No. 7 prior to opening statements. RP 117. After the trial was underway and several witnesses had testified, which was shortly before the State rested, “the juror in seat number seven” informed the bailiff that, after the last witness testified, the juror realized that he works with the witness’s son. RP 117. The juror reported to the bailiff that this circumstance would make no difference to how he heard or

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decided the case, and he reported that he had never heard anything about the case. RP 117. The trial court judge informed the parties about this circumstance and asked whether either party had an objection. RP 117-18. Neither party made an objection, and Shea's trial counsel explicitly stated that he did not want to inquire of the juror directly. RP 117-18.

Shea has not shown that there was any basis to strike the juror from the panel; nor has he shown how he suffered any prejudice because the juror was on the panel. To prevail on his claim of ineffective of assistance of counsel, Shea must show both that his counsel's performance was deficient and that the deficient performance has resulted in a trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). Shea has made neither showing. Therefore, Shea's claim of ineffective assistance of counsel on this point is legally deficient. *Id.*

iv) Was Shea's trial counsel ineffective for failing to move for dismissal of Count III?

In count III of the information that was tried to the jury, the State charged Shea with the offense of obstructing a law enforcement officer. CP 79. On appeal, Shea contends that his trial counsel was ineffective for

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failing to move for dismissal of count III. Br. of Appellant at 40-41. Shea cites no authority to support his contention. Instead, Shea reiterates his prior argument that the obstruction charge was unsupported by the evidence because he did not make a false statement. Br. of Appellant at 41. And he argues that count III prejudiced him because it allowed the jury to view him “as an individual who disrespects authority.” Br. of Appellant at 41.

As argued by the State in response to Shea’s other claims, above, an attorney’s failure to make a meritless objection or motion does not constitute ineffective assistance of counsel. *Jones v. Smith*, 231 F.3d 1227, 1239 n. 8 (9th Cir.2000) (citing *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir.1985)). *See also, Rupe v. Wood*, 93 F.3d 1434, 1445 (“the failure to take a futile action can never be deficient performance”).

Still more, legitimate trial tactics are not deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The State continues to aver that the evidence supported the charge of obstruction in this case and that the verdict of guilty on that charge is supported by sufficient, ample, and overwhelming evidence, but even if for the sake of argument the charge of obstruction was unsupported by the evidence, the charge would have allowed Shea to demonstrate that the State was

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overzealous in its accusations, thus lending plausibility to Shea's arguments that the State was overzealous in regard to the other two counts. Thus, Shea is unable to show that his attorney's actions were not a legitimate trial tactic. *Id.*

But more importantly, Shea cannot show error because his trial counsel's performance was not deficient because there was no basis to move for dismissal of the obstruction charge. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

D. CONCLUSION

Shea misconstrues the crime of obstruction of a law enforcement as defined by RCW 9A.76.020(1) to require as an element of the offense proof that the offender made a false statement in addition to committing some act to obstruct the law enforcement officer. But RCW 9A.76.020(1) does not require proof of a false statement. Instead, mere speech, or a mere false statement is insufficient to sustain a conviction for obstruction, because some act in addition the false statement is needed in order to sustain the conviction in such cases. But false statement is not an element of obstruction. And in cases that do not involve a false statement, acts or

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omissions alone, as in the instant case, may constitute the crime of obstruction. The evidence in the instant case was sufficient to show that Shea willfully hindered or obstructed law enforcement officers in the execution of their official duties by struggling against the officers' commands, emptying his pockets, and throwing his wallet.

The trial court did not err by not suppressing evidence found in a search of Shea's wallet incident to his lawful arrest. Current, controlling case authority holds that when executing a lawful arrest, officers may search the unlocked items are closely associated with the arrestee at the time of arrest, which includes items that the arrestee possessed immediately prior to the arrest, and this search may be made without regard for weapons or a search for evidence of the crime of arrest.

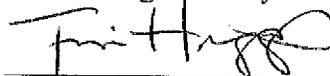
The trial court did not err by admitting Shea's statements into evidence. Even though Shea made the statements before officers could provide him complete Miranda warnings, Shea made the statements while an officer was trying to place him under arrest, and he made the statements spontaneously, voluntarily, and not in response to any interrogation or design to elicit an incriminating response. And, even if error had occurred, the error would be harmless beyond a reasonable doubt because

there was other overwhelming evidence from two eyewitnesses to provide proof of the same points proved by the statements.

Finally, Shea alleges that his trial counsel was ineffective because he failed to bring several motions that Shea contends that his counsel should have raised in the trial court. But Shea has not shown that any one of his motions had merit, and even if one or more of the motions had merit, Shea has not shown that he suffered prejudice or that the result of the trial would have been different had his counsel raised these motions. Thus, Shea's claim of ineffective assistance of counsel is legally deficient.

DATED: May 14, 2015.

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