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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH R. BUDIK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction for rendering criminal assistance.
2. Counsel provided ineffective assistance by failing to request a jury instruction on duress.

B. ISSUES

1. Under the First, Fourth and Fourteenth Amendments, which prohibit criminalizing harmless speech, can a victim of an assault be convicted of hindering or delaying the discovery of a felon based on his assertion the he does not know the identity of his assailant, even if a jury determines this assertion to be false?
2. The victim of an assault and witness to a murder, who tells police he is afraid for his family's safety, and who, along with many of the witnesses to the assault and murder, appears to believe he would be in danger if he revealed the identity of his assailant, is charged with rendering criminal assistance by denying knowledge of the assailant's identity. Under the Sixth Amendment, does defense counsel provide

ineffective assistance by failing to request a jury instruction on duress?

C. STATEMENT OF THE CASE

Kenneth Budik was sitting in the passenger seat of Adama Walton's truck. (RP 55, 146) Three individuals walked up to the window next to him and opened fire. (RP 146) Mr. Budik was shot in the chest and leg. (RP 83) Mr. Walton was shot in the neck and died of his injuries a few minutes later. (RP 86)

Officer Kevin King arrived at the scene and found Mr. Budik lying in the street near the truck. (RP 54-55) Asked what had happened, Mr. Budik replied that he was shot. (RP 56) Asked who did it, he said he didn't know. (RP 56) Officer King continued asking Mr. Budik what had happened, but Mr. Budik did not provide any useful information. (RP 56-58) Officer King felt that Mr. Budik was hostile. (RP 58)

Officer Baldwin arrived at the scene and found Mr. Budik still lying in the street. (RP 82) He appeared excited, alert, and intoxicated. (RP 83-84) After reassuring Mr. Budik that medics were on their way, Officer Baldwin asked him who shot him, and Mr. Budik responded, "I don't know." (RP 84) Mr. Budik identified the driver of the truck as Adama Walton and told the officer he and Mr. Walton were leaving a

party in Mr. Walton's truck. (RP 86-88) Officer Baldwin continued questioning Mr. Budik but once again Mr. Budik failed to identify the shooter. (RP 87-88)

Officer Baldwin spoke with Mr. Budik again after he had been transported to Sacred Heart Hospital for treatment of his injuries, and again asked him to provide information. (RP 88-89) Mr. Budik again declined to give any specific information. (RP 88) Detective Ferguson also interviewed Mr. Budik without obtaining the desired information. (RP 145)

Detective Kip Hollenbeck was convinced that Mr. Budik must have seen the shooter. (RP 146) He visited Mr. Budik in the hospital the day after the shooting. (RP 147) Mr. Budik described events leading up to and subsequent to the shooting, and answered a number of the detective's questions. (RP 148-155) He again declined, however, to identify any of the suspects. (RP 155)

Mr. Budik told the detective that he was leaning over getting a beer when the shooting began. (RP 151) Detective Hollenbeck did not believe Mr. Budik and felt the explanation was inconsistent with the location of Mr. Budik's injuries. (RP 152-53) The detective found Mr. Budik evasive and less than forthcoming. (RP 154-55)

The detective believed that Mr. Budik was fearful and didn't want to provide information because he feared retaliation. (RP 156) According to the detective, when gangs are involved in shootings it is not unusual for witnesses to fear retaliation. (RP 158) He attempted to persuade Mr. Budik that law enforcement is willing to try to keep the names of such witnesses confidential until the time they have to be disclosed to defense attorneys. (RP 158-59)

According to Detective Hollenbeck, none of the witnesses to the shooting were cooperative: "This is probably one of the most difficult cases I have ever investigated when it comes to actually getting people to talk to us. There was a lot of fear in that culture . . ." (RP 146) Witnesses were only willing to provide information after months of encouragement. (RP 147) The detective found this case "very incredibly frustrating . . ." (RP 147)

Shortly after the shooting, Officer Scott Haney went to Mr. Budik's family home to tell his family that he had been shot and was concerned about the safety of his family. (RP 132) He spoke with Mr. Budik's mother, and told her that her son had been injured in a shooting and that Mr. Budik had told police that the people who shot him might come to her house. (RP 133) Officer Haney advised the mother to leave, which she did. (RP 133)

Investigating officers eventually concluded that the shooting was gang related. (RP 140) They identified three suspects, Freddie Miller, Titus Davis and Juwuan Nave. (RP 142) Mr. Miller was arrested on the night of the shooting, and Mr. Davis was arrested several months later. (RP 142-43) Both were charged with first degree murder. (RP 142-43)

A week after the shooting, the State charged Mr. Budik with one count of first degree rendering criminal assistance, RCW 9A.76.070. (CP 1) At the time of Mr. Budik's trial, the State still lacked sufficient evidence to arrest Mr. Nave for Mr. Walton's murder. (RP 143)

The jury found Mr. Budik guilty and the court imposed a standard range sentence of 13 months incarceration. (CP 50, 56)

D. ARGUMENT

This case presents the issue of whether an individual who is not even suspected of a crime, and who is indeed the victim of a crime, may be charged with a felony for refusing to identify the perpetrator in response to police questioning.

The power of law enforcement to compel an individual to answer questions is limited under the constitution:

Although a person may be briefly detained on the basis of reasonable suspicion 'while pertinent questions are directed to him ... the person stopped is not obliged to answer,

answers may not be compelled, and refusal to answer furnishes no basis for an arrest ...'

State v. White, 97 Wn.2d 92, 106, 640 P.2d 1061, 1069 (1982) quoting *Terry v. Ohio*, 392 U.S. 1, 34, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (White, J., concurring). Unless a person is reasonably suspected of engaging in criminal activity, he has no obligation to answer police questions: "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

White held that provisions of the obstructing statute, former RCW 9A.76.020, criminalizing the failure to truthfully answer questions lawfully required by a public servant were flagrantly unconstitutional. 97 Wn.2d at 103-04. Accordingly, the "refusal to provide information" to an officer, without more, is not a crime. *Staats v. Brown*, 139 Wn.2d 757, 765, 991 P.2d 615 (2000) citing *State v. Hoffman*, 35 Wn. App. 13, 16-17, 664 P.2d 1259 (1983); *State v. Barwick*, 66 Wn. App. 706, 833 P.2d 421 (1992).

White identified several constitutional considerations implicated by the statute, including violation of first amendment rights.

97 Wn. 2d at 97, n.1. One of these is the right not to speak: “[T]he 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.” *Wooley v. Maynard* 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (U.S.N.H., 1977) A statute that purported to criminalize speech, even false speech, without regard to whether it caused any identifiable harm, would run afoul of the First Amendment.

The legislative history of RCW 9A.76.020 demonstrates the legislature’s intent to eliminate the making of false statements as a means of hindering, delaying or obstructing a public servant. *See State v. Williamson*, 84 Wn. App. 37, 44-46, 924 P.2d 960 (1996). In 1995, the legislature amended former RCW 9A.76.020 to distinguish between the making of false or misleading statements and the acts of hindering, delaying or obstructing. Laws, 1995, ch. 285, § 33.

In 2001, the alternative offenses were recodified, clarifying the distinction between giving false statements and conduct that hinders, delays or obstructs by segregating them into two distinct offenses. Laws of 2001, ch. 308, § 3. The giving of false statements, under specific circumstances, is now prohibited under RCW 9A.76.175:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. ‘Material statement’ means a written or oral

statement reasonably *likely to be relied upon* by a public servant in the discharge of his or her official powers or duties.

RCW 9A.76.175 (emphasis added).

Under this statute, the mere making of a false statement is insufficient to establish the offense; the statement must be one likely to be relied upon by an official in the discharge of official duties.

The legislature's distinction between giving false statements and conduct that obstructs a public servant is equally applicable to the rendering criminal assistance statute. Rendering criminal assistance includes both conduct, *i.e.*, the use of force, and speech, *i.e.*, the use of threats or deception. RCW 9A.76.070. Nevertheless, under either statute, First Amendment considerations preclude criminalizing a false statement without regard to whether it causes some harm. Under RCW 9A.76.175, the mere making of a false statement is insufficient to establish deception for the purpose of hindering a public servant; it must be one upon which the public servant is likely to rely. Likewise, the mere making of a false statement does not constitute preventing or obstructing the apprehension or discovery of a felon by deception unless the recipient of the statement is likely to rely on it.

No officer was prevented from any action by reason of Mr. Budik's assertion that he did not know the identity of the shooter. His

knowledge, or lack thereof, was not information that had any effect on the actions or inactions of the officers who heard it.

1. THE STATE'S EVIDENCE DID NOT PROVE
THE CRIME OF RENDERING CRIMINAL
ASSISTANCE.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence, and all reasonable inferences therefrom are drawn in the light most favorable to the State. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant's guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The elements of rendering criminal assistance are contained in the court's instruction to the jury:

A person commits the crime of rendering criminal assistance in the first degree when, with intent to prevent, hinder, or delay the apprehension or prosecution of a person who he or she knows has committed or is being sought for murder prevents or obstructs by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person.

(RP 246-47) At a minimum, in order to render criminal assistance a person must (1) intend to prevent, hinder, or delay the apprehension or

prosecution of another, and (2) in fact prevent or obstruct, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person.

The jury would have to have found that Mr. Budik's intent in failing to provide this information was to prevent or delay the apprehension of his assailants. The State presented substantial evidence that Mr. Budik, if he knew his assailant's identity, feared retaliation if he disclosed their identity and his intent was to prevent such retaliation.

Detective Hollenbeck testified that Mr. Budik appeared fearful, that other witnesses in this case feared retaliation, and that he could only assure Mr. Budik that his identity could be kept secret until it had to be revealed in the course of prosecuting the suspects. Officer Haney testified that Mr. Budik told police he feared imminent retaliation against his family.

The State presented no evidence that Mr. Budik intended to prevent the apprehension of his assailants. The only basis for such a finding would be that the effect of Mr. Budik's reticence was to delay the apprehension of his assailants, and that people usually intend the effect of their action or inaction. Under the facts of this case, that basis is insufficient to prove such intent beyond a reasonable doubt.

But even assuming that Mr. Budik hoped and intended the police would be hindered by his insistence that he did not know the answers to their questions, and even if his assertions of ignorance were false and deceptive, and even if the officers were in fact deceived (which the record discloses is not the case), there is no evidence that his deception in fact hindered anyone in any way. Whether he knew the answers or not, and whether the officers believed him or not, Mr. Budik was under "no legal obligation to provide the officers with any information." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *State v. White* 97 Wn.2d at 106. The actual effect of Mr. Budik's attempt to deceive the officers as to whether he knew the identity of the shooters was to eventually cause them to stop asking him questions that he had no intention of answering, and which they could not legally compel him to answer. *Terry v. Ohio, supra* 392 U.S. at 34. When Mr. Budik answered "I don't know" he did not prevent the officers from doing anything they could otherwise have done. The State failed to prove beyond a reasonable doubt that Mr. Budik would ever have disclosed the identity of his assailants.

2. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO REQUEST AN INSTRUCTION ON DURESS.

Mr. Budik received ineffective assistance of counsel when his attorney failed to request a jury instruction on the defense of duress.

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend 10) guarantee the accused the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) Defense counsel provides ineffective assistance if (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687; 127 Wn.2d at 334-35, (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). The basis for a claim of ineffective assistance must be apparent from the record. *McFarland*, 127 Wn.2d at 333.

The first element, deficient representation, is shown when the defendant is entitled to a particular jury instruction and there is no legitimate strategic or tactical reason for trial counsel's failure to request

it. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001);
State v. Alires, 92 Wn. App. 931, 938, 966 P.2d 935 (1998).

An accused has a right to have the court instruct the jury on his theory of the case, so long as the evidence is sufficient to support that theory. *See State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). In determining the sufficiency of evidence to support a proposed instruction, the trial court must consider the evidence and inferences therefrom in the light most favorable to the party requesting the instruction. *State v. Hanson*, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990).

(1) In any prosecution for a crime, it is a defense that:

- (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and
- (b) That such apprehension was reasonable upon the part of the actor; and
- (c) That the actor would not have participated in the crime except for the duress involved.

RCW 9A.16.060.

Detective Hollenbeck and Officer Halsey provided substantial evidence that Mr. Budik believed that if he disclosed the identity of the shooter(s) he or his immediate family was in danger of death or grievous bodily harm. At the time he was questioned, Mr. Budik had just a crime

and been shot. Mr. Budik told officers he thought his family was in danger. When questioned about the shooting he appeared frightened. Other potential witnesses also appeared frightened. Mr. Budik had already been the victim of assault and had received two serious gunshot wounds.

This evidence, viewed in the light most favorable to Mr. Budik, supports the inference that his denial of knowledge of the shooter's identity was the result of threats, actual or implied, and the use of force immediately preceding his interviews, that caused him to believe that if he revealed the shooter's identity he or a member of his family was in immediate danger of grievous bodily injury.

Duress is an affirmative defense that the defendant must prove by a preponderance of the evidence. *State v. Riker*, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994). The defense of duress admits that the defendant committed the unlawful act, but asserts that the defendant had an excuse for his actions. *See State v. Russell*, 47 Wn. App. 848, 853, 737 P.2d 698, *review denied*, 108 Wn.2d 1032 (1987). The duress defense excuses the defendant's conduct even though the conduct violates the language of the law. *State v. Peters*, 47 Wn. App. 854, 859, 737 P.2d 693, *review denied*, 108 Wn.2d 1032 (1987).

While Mr. Budik never admitted knowing the identity of his shooters, he admitted making the statements attributed to him and which

allegedly constituted the commission of the offense. His counsel could have requested an instruction on duress and argued to the jury that Mr. Budik feared for the life of himself and his family, not only at the time of the shooting, and immediately following the shooting, but even at the time of trial.

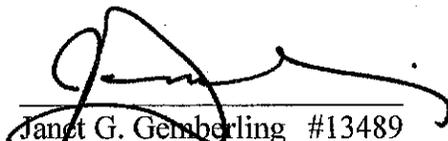
Mr. Budik was legally entitled to an instruction on duress, and had the instruction been given it is reasonably likely he would have been acquitted.

E. CONCLUSION

Mr. Budik's conviction for failing to assist the police in finding his assailant or assailants is inconsistent with the requirements of the First, Fourth and Fourteenth Amendments; the evidence was insufficient to support his conviction under any reasonable, constitutionally valid construction of the statute under which he was convicted. His conviction should be reversed and dismissed.

Dated this 12th day of May, 2009.

GEMBERLING & DOORIS, P.S.


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Attorney for Appellant

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 Respondent,) No. 27547-7-III
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) OF MAILING
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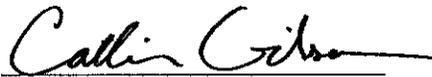
I certify under penalty of perjury under the laws of the State of Washington that on May 12, 2009, I mailed a copy of the Appellant's Brief in this matter to:

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