

Supreme Court No. 88694-6
(Court of Appeals No. 67726-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERISTUS JORDAN J.,

Juvenile Petitioner.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR 27 PM 4:41

PETITION FOR REVIEW

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STATE OF WASHINGTON

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A. INTRODUCTION

In the seminal First Amendment case of *Houston v. Hill*, the Supreme Court said, “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” Although a person may be convicted of a crime for physically obstructing police in the exercise of their duties, he may not be convicted for verbally criticizing law enforcement officers.

But that is exactly what happened in this case. Jordan’s little sister, Ruby, was being detained by three policemen in the driveway of their home. When one of the officers raised his baton, Jordan became concerned and started yelling at the men. The officers ordered him to go inside the house and close the door, but Jordan insisted on closing only the screen door so he could observe the officers’ treatment of Ruby. He stood behind the screen door and yelled at the officers, and for this, he was convicted of obstructing a law enforcement officer.

Jordan’s conviction violates the First Amendment. Furthermore, his actions do not constitute obstruction under the statute, which must be construed to be constitutional. The fact that our justice system burdens children who exercise their constitutional rights with criminal convictions is a matter of substantial public concern. This Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Juvenile petitioner Eristus Jordan J.¹ asks this Court to review the opinion of the Court of Appeals in *State v. E.J.J.*, No. 67726-8-I. A copy is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The First Amendment protects the rights to observe and criticize police activity. Jordan was convicted of a crime for standing on his own property, insisting on remaining in view of three policemen who were detaining his little sister, and criticizing their use of force. Does the conviction violate the First Amendment?

2. Statutes must be interpreted so as to preserve their constitutionality and this Court has narrowly construed the obstruction statute in light of the First Amendment. In applying the obstruction statute to this case, did the Court of Appeals impermissibly broaden the scope of the statute?

D. STATEMENT OF THE CASE

Jordan J. is a high school student who lives with his mother, Geraldine, and sister, Ruby, in Seattle. One day Geraldine called the police because Ruby, who was underage, had gotten drunk and was

¹Jordan goes by his middle name.

fighting with her mother. Three armed policemen went to the home. CP 13-14; RP 31, 47-48, 67-69.

The officers escorted Ruby out of the house, and also asked Jordan to step outside while one officer spoke to his mother. While two policemen detained Ruby in the driveway, the third officer talked to Geraldine and obtained bus fare for Ruby to go elsewhere. When the third policeman re-joined the others in the driveway, Ruby was acting hostile and belligerent because she did not want to leave. One of the officers grabbed her and held her down. Jordan advised his sister to calm down and comply with the officers' directives. RP 17-18, 20, 27-28, 31, 35.

However, when one of the officers unsheathed his baton and raised it against Ruby, Jordan became alarmed. RP 69-71, 78-79, 96-97. He swore at the officer and said, "that's my sister, that's my sister." RP 44-45. An officer directed Jordan to go back inside the house and close the door. RP 40. Jordan did not immediately comply, because he was concerned for his sister. As he later explained, "I was questioning why I had to go inside, you know, I lived there and I should be able to observe this just to make sure my sister was safe." RP 71. Jordan had witnessed police violence in the past, and did not want Ruby to meet a similar fate. RP 71.

Eventually, one of the officers escorted Jordan back inside. CP 15; RP 41. Jordan did not resist and did not attempt to return to the front yard. He stood behind the wrought iron door, and continued to monitor the interaction between Ruby and the other two policemen. The third officer ordered Jordan to close the solid door so he would not be able to see what was happening outside. CP 15; RP 52. Jordan refused. He later said, “I felt like as a citizen in this United States I felt like that everybody should have the right to observe the scene ... just to make sure that everybody is safe. ... I should be able to make sure that my sister is all right....” RP 73.

Jordan continued to observe and criticize the police officers from behind the screen door, which was 10-15 feet away from where the officers were dealing with Ruby. While Jordan was yelling and swearing at the officers, the officers were yelling and swearing back at him, repeatedly ordering him to close the solid door and warning him that he would be arrested for obstruction of justice if he did not close the solid door. Jordan stayed inside behind the screen door, but did not close the solid door. An officer subsequently arrested him for obstructing a law enforcement officer. CP 15-16; RP 30, 43, 49, 75, 97, 99, 100.

At trial, the State argued Jordan was guilty of obstruction because his presence, yelling, and refusal to close the solid door hindered the officers’ detention of Ruby. Jordan argued he did not commit obstruction

under this Court's decision in *State v. Williams*, which narrowly construed the obstruction statute in light of First Amendment concerns. RP 86-87.

The Juvenile Court recognized that Jordan never threatened the officers. CP 14; RP 42, 53, 63, 95. Nor did he touch them or even move in between them and Ruby. The court nevertheless found Jordan guilty of obstructing a law enforcement officer. CP 17.

The judge said that if Jordan had simply stood behind the wrought iron door and observed the situation without opening his mouth there would probably not be sufficient evidence of obstruction. RP 99.

However, because he did not stand quietly behind the door and instead yelled at the police officers, he was guilty of the crime:

[T]he fact that [Jordan] refused to close the door made the situation worse because it wasn't as if at that point he was simply standing in his house observing, which he would have every right to do, but [Jordan] was engaged in a [verbal] back-and-forth with the officers. The word "taunting" came up. I don't know whether that accurately describes what went on here, but it's very clear to the court that by raising his voice and calling the officers names, he was making his presence known to his sister, and the testimony was that through his presence, it made it more difficult for the officers to do their job. So I am finding [Jordan] guilty beyond a reasonable doubt of obstructing these law enforcement officers.

RP 100. The court emphasized that it was finding Jordan guilty because he "lost his cool" and "created a climate that was extremely adversarial."

RP 101.

The Court of Appeals affirmed. It expressed bewilderment at the proposition that yelling is protected by the First Amendment. It stated that the conviction was proper because: (1) “[Jordan’s] presence escalated the situation with [Ruby];” (2) “[Jordan] was irate, calling the officers names, yelling, and using profanity;” and (3) “[Jordan] refused the officers’ repeated requests to leave the scene.” Slip Op. at 16.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Contrary to the Court of Appeals’ opinion, Jordan had a constitutional right to be present at his own home, to monitor the scene while police wrestled with his sister, and to use distasteful language in criticizing the officers. The Court of Appeals’ opinion constitutes a disturbing expansion of the obstruction statute – an expansion that violates the First Amendment and subjects this State’s citizens, including children like Jordan, to criminal records based on the exercise of constitutional rights. This Court should grant review under RAP 13.4(b) (3) and (4).

- 1. This Court should grant review because the question of whether a person has a right to stand on his own property and observe and criticize police activity is a significant issue of constitutional law.**

The obstruction statute provides, “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 statute is in tension with the First Amendment, which “protects a significant amount of verbal criticism and challenge directed at police officers.” *Houston v. Hill*, 482 U.S. 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); U.S. Const. amend. I. Thus, “courts have long limited the application of obstruction statutes based upon speech” in order to comply with the Constitution. *State v. Williams*, 171 Wn.2d 474, 478, 251 P.3d 877 (2011).

Hill involved facts remarkably similar to this case. Raymond Hill observed two police officers detaining his friend. *Hill*, 482 U.S. at 453. Because he was worried the officers were going to hit his friend, Hill yelled, “Why don’t you pick on somebody your own size?” *Id.* at 454 & n.1. Hill and the officer engaged in a verbal back-and-forth, and Hill was arrested for violating a Houston ordinance which made it unlawful to interrupt a police officer in the performance of his duties. *Id.* at 454-55.

Although he was acquitted, Hill challenged the ordinance in a civil rights suit, and the U.S. Supreme Court invalidated the law under which Hill was arrested. The Court noted that although governments may criminalize *physical obstruction* of police action, they may not punish verbal criticism of law enforcement officers. *Hill*, 482 U.S. at 462-63.

Washington’s obstruction statute is similar to the ordinance struck down in *Hill*, but this Court has saved it by construing it narrowly. In

Williams, this Court reaffirmed that RCW 9A.76.020 is “intended to prohibit *conduct*.” *Williams*, 171 Wn.2d at 482 (emphasis added). It was properly applied, where, for example, a defendant “not only refused to give his name, he *threatened the officer and lunged at him*.” *Id.* at 484 n.10 (citing *State v. Turner*, 103 Wn. App. 515, 525, 13 P.3d 234 (2000)). But it does not extend to speech, and therefore this Court reversed the conviction of a man who had hindered a police investigation by telling officers he was someone other than who he was. *Id.* at 475.

The Court of Appeals’ expansion of the statute to apply to Jordan’s case violates the First Amendment under *Hill* and *Williams*. As in *Hill*, Jordan observed and criticized police action because he was concerned about the officers’ use of force against his loved one. As in both *Hill* and *Williams*, the fact that his words may have delayed a police officer in the exercise of his duties does not remove Jordan’s speech from the protection of the First Amendment. *See Hill*, 482 U.S. at 463 n.12 (verbal challenge may “impair the working efficiency of government agents, yet the countervailing danger that would lie in the stifling of all individual power to resist – the danger of an omnipotent, unquestionable officialdom – demands some sacrifice of efficiency”).

Only a few narrow categories of speech may be proscribed, and *Hill* makes clear that yelling at police is not such a category. If Jordan had

issued a “true threat,” his speech would not have been protected, but the officers testified and the trial court explicitly found that Jordan never threatened the police. CP 14; RP 95; *see State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). The trial court and Court of Appeals relied on the fact that Jordan’s “speaking in a loud and excited voice” caused Ruby to become “agitated.” CP 14; Slip Op. at 16. But Jordan had a First Amendment right to “speak in a loud and excited voice” in response to police use of force, and the fact that his criticism agitated Ruby is of no moment. *Hill*, 482 U.S. at 461. Only if Jordan’s speech had incited Ruby to such violence that there was a clear and present danger of imminent substantial harm would his “speaking in a loud and excited voice” not be protected. *Id.*; *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

Finally, Jordan’s conviction cannot be supported by his refusal to “leave the scene” or close the solid door instead of just the screen door. Jordan has a Fourth Amendment and article I, section 7 right to be at his own home, and a First Amendment right to observe the police. *See State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) (utmost protection of privacy is in the home); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) (First Amendment protects right to observe and record police in exercise of their duties). Jordan

understood he had this right and responsibility: “I felt like as a citizen in this United States I felt like that everybody should have the right to observe the scene... just to make sure that everybody is safe.” RP 73.

In the end, the trial court recognized this as well, telling Jordan “we might not be here” if he had simply stood behind the wrought iron door and observed the situation. RP 99. The court convicted Jordan because he did not simply observe, but engaged in a verbal back-and-forth with police. RP 100. But this verbal “taunting,” as the juvenile court described it, is protected under the First Amendment, and cannot be punished as a crime. *Hill*, 482 U.S. at 461. Jordan had a constitutional right to be present at his own home, to observe police in the exercise of their duties, and to criticize the officers’ use of force against his sister. The Court of Appeals’ expansion of the obstruction statute is unconstitutional. This Court should grant review. RAP 13.4(b)(3).

2. This Court should grant review because the application of the obstruction statute to chill speech critical of police use of force is a matter of substantial public interest.

Jordan was worried about his sister after one of the three policemen surrounding her raised his baton. Although some big brothers confronted with this situation may have physically intervened, Jordan used his words. His restraint was rewarded with a criminal conviction. The

improper use of the obstruction statute to arrest and convict people protesting police action will chill speech that is supposed to be subject to the highest level of protection. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (“debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

Jordan had witnessed police violence in the past. RP 71. He knew it was important to observe and protest the use of force against his sister, and that he had a right and responsibility to do so. RP 73. As the ACLU noted in its amicus brief in the Court of Appeals, the recent Justice Department investigation of the Seattle Police Department bears out Jordan’s concerns. Brief of Amicus Curiae American Civil Liberties Union of Washington at 17-18.² Furthermore, it is only because citizens exercised their rights to observe and criticize police activity that the problems of excessive force came to light. *Id.* It is a matter of substantial public concern that government may now be allowed to suppress this lawful activity.

² (citing Investigation of the Seattle Police Department, http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf at 3) (last visited December 14, 2012)).

As the ACLU also points out, selective enforcement of the obstruction statute is another concern. ACLU brief at 15-16. A recent study found Seattle police officers arrest African Americans “for the sole crime of obstruction – when it is not accompanied by an underlying charge – at a rate more than eight times as often as whites.” *Id.* at 15 (citing Eric Nalder, et. al, “Anti-Crime Team Has a Tough Reputation – Maybe Too Tough: Unit Racks Up Most ‘Obstructing’ Arrests,” *Seattle Post-Intelligencer* (Feb. 8, 2008)). Yet people of color also tend to be the targets of unlawful use of force by police. *Id.* at 17-18 (citing Justice Department Investigation). It is a matter of substantial public interest that minority citizens are more likely to be victims of excessive force, but also more likely to be arrested for challenging the police. A properly limited obstruction statute could alleviate these inequities. For this reason, too, this Court should grant review. RAP 13.4(b)(4).

F. CONCLUSION

Jordan J. respectfully requests that this Court grant review.

DATED this 27th day of March, 2013.

Respectfully submitted,



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APPENDIX A

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Seattle*

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March 4, 2013

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CASE #: 67726-8-1

State of Washington, Respondents v. E.J.J.

King County, Cause No. 11-8-00459-9 SEA

CASE #: 67726-8-1

State of Washington, Respondents v. E.J.J.
King County, Cause No. 11-8-00459-9 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Bruce Heller

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|----------------------|---|----------------------|
| STATE OF WASHINGTON, |) | |
| |) | DIVISION ONE |
| Respondent, |) | |
| |) | No. 67726-8-1 |
| v. |) | |
| |) | UNPUBLISHED OPINION |
| E.J.J., |) | |
| D.O.B. 11/29/93 |) | |
| |) | |
| Appellant. |) | FILED: March 4, 2013 |

DWYER, J. — E.J.J., a juvenile at the time of his adjudication, was found guilty by the trial court of obstructing a law enforcement officer based upon an incident in which police officers were called by his mother to their home due to the behavior of E.J.J.'s highly intoxicated sister. On appeal, E.J.J. contends that the obstruction statute, RCW 9A.76.020(1), is facially overbroad because, he asserts, it prohibits constitutionally protected speech. He further contends that insufficient evidence supports his adjudication of guilt. Finally, E.J.J. asserts that the obstruction statute is unconstitutional as applied because, he alleges, his actions were protected by various constitutional provisions.

Because our Supreme Court has construed the obstruction statute to require conduct in addition to pure speech, E.J.J.'s facial overbreadth challenge fails. Moreover, based upon the evidence presented, any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt.

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No. 67726-8-1/2

Thus, sufficient evidence supports E.J.J.'s adjudication of guilt. Finally, with regard to his as-applied challenge, E.J.J. did not raise in the trial court the alleged constitutional infirmities that he asserts on appeal; nor did he challenge the lawfulness of his arrest or seek to exclude the presentation of any evidence that was admitted. On appeal, his contention is limited to his assertion that his words and actions could not result in a constitutionally valid conviction.

Accordingly, in reviewing E.J.J.'s as-applied challenge, we determine whether the obstruction statute is unconstitutional as applied to those of E.J.J.'s actions the evidence of which was necessary to establish the elements of the offense. In other words, we examine whether the challenged statute was applied so as to criminalize speech or conduct that could not constitutionally be criminalized. After such consideration, we conclude that E.J.J.'s as-applied challenge lacks merit. Accordingly, we affirm the trial court's disposition.

I

Geraldine Johnson called the police to her home on the evening of February 14, 2011. Her juvenile daughter, R., was attempting to fight with Johnson and to break the windows of the home with rocks. Officers Barreto, Jenkins, and Mullins responded to the scene, where, Officer Barreto later testified, they found R. to be "highly intoxicated" and "very belligerent." For several minutes, the officers attempted "to calm her down while [they] worked out the situation between her and her mother."

According to Officer Jenkins, "just as things kind of started to settle," E.J.J., R.'s 17-year-old brother, stepped outside of the home and approached R.

and the officers. Officer Jenkins informed E.J.J. that the officers were "in the middle of an active investigation" and asked him to go back inside the house and close the door. Although the officer repeated this request "four or five times," E.J.J. refused to comply. Indeed, E.J.J. became "hostile" when the officer made this request. According to Officer Barreto, E.J.J.'s presence made it "very difficult" to calm his sister, and, as a result of his presence, the scene "escalated very quickly into a very hostile situation." Officer Jenkins similarly testified that, although R. had become calm, she "began to escalate" when E.J.J. came outside. Officer Jenkins described E.J.J. as "irate" during this exchange, calling the officers names, yelling, and using profanity. E.J.J. was advised by the officers that he could be "arrested for obstructing" if he refused to comply with their orders.

Eventually, Officer Jenkins, without touching E.J.J., escorted him back to the house. The officer then asked E.J.J. multiple times to close the door to the house, and E.J.J. repeatedly refused. Several times, Officer Jenkins closed the door, and E.J.J. reopened it. The home had two doors, an outer "wrought iron door" that someone inside the home could see through and an inner "solid door." Officer Jenkins wanted E.J.J. to close the solid door because, when only the wrought iron door was closed, E.J.J. "was still able to see what we were doing." This concerned the officer because if E.J.J. "chose to harm us, he'd have the ability to do so without us knowing." The officers had searched neither E.J.J. nor the home for weapons. Several feet away from the doorway was a window through which someone standing inside the home could see the area in which

the officers and R. were located.

The exchange between the officers and E.J.J. lasted for approximately 20 minutes before Officer Jenkins arrested E.J.J. E.J.J. was thereafter charged with obstructing a law enforcement officer in violation of RCW 9A.76.020(1).

An adjudication hearing was held on August 23, 2011. E.J.J. testified that he approached R. and the officers after seeing an officer take out a "nightstick," with which E.J.J. thought the officer was going to hit his sister. He stated that he wasn't trying to "intervene" in the situation, but that he wanted to "observe" and "supervise" to ensure that his sister was safe. E.J.J. did not deny calling the officers "inappropriate names," but he stated that the officers were also shouting profanities at him.

Following the adjudication hearing, the trial court entered findings of fact and conclusions of law. The court concluded that the State had proved beyond a reasonable doubt the elements of obstructing a law enforcement officer and, accordingly, determined E.J.J. to be guilty as charged.

E.J.J. appeals.

II

E.J.J. contends that the statute criminalizing obstructing a law enforcement officer, RCW 9A.76.020(1), prohibits a substantial amount of constitutionally protected speech and, accordingly, is facially overbroad. However, our Supreme Court has construed the obstruction statute to require conduct, in addition to pure speech, in order to avoid such a constitutional infirmity. State v. Williams, 171 Wn.2d 474, 251 P.3d 877 (2011). Thus, E.J.J.'s

overbreadth challenge fails.

"A statute is overbroad if it chills or sweeps within its prohibition constitutionally protected free speech activities." State v. Hahn, 162 Wn. App. 885, 900, 256 P.3d 1267 (2011), rev'd on other grounds, 174 Wn.2d 126, 271 P.3d 892 (2012). Such overbreadth, however, must be "substantial"; the United States Supreme Court has "repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" Osborne v. Ohio, 495 U.S. 103, 112, 100 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). Thus, we have held that, "[w]hen analyzing a statute for overbreadth, the key determination is 'whether the enactment reaches a substantial amount of constitutionally protected conduct.'" State v. Dyson, 74 Wn. App. 237, 242, 872 P.2d 1115 (1994) (internal quotation marks omitted) (quoting City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)). See also Hahn, 162 Wn. App. at 901 (holding that criminal solicitation statute is not overbroad because it "does not prohibit a substantial amount of speech"). "Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" Osborne, 495 U.S. at 112 (alterations in original) (internal quotation marks omitted) (quoting New York v. Ferber, 458 U.S. 747, 770 n.25, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

Moreover, a statute may survive overbreadth scrutiny where the state supreme court has placed a limiting construction upon the statute, thus restricting its scope to unprotected conduct. Osborne, 495 U.S. at 112-14. In Osborne, the defendant challenged his conviction pursuant to an Ohio statute prohibiting the possession of child pornography, asserting that the statute was overbroad under the First Amendment. 495 U.S. at 107. However, as the United States Supreme Court noted, the Ohio Supreme Court, relying on statutory exceptions, read the statute “as only applying to depictions of nudity involving a lewd exhibition or graphic focus on a minor’s genitals.” Osborne, 495 U.S. at 107. Accordingly, the state supreme court affirmed Osborne’s conviction. Osborne, 495 U.S. at 107. Evaluating the statute as construed by the state supreme court, the United States Supreme Court similarly rejected Osborne’s First Amendment arguments, holding that “Osborne’s overbreadth challenge, in any event, fails because the statute, as construed by the Ohio Supreme Court on Osborne’s direct appeal, plainly survives overbreadth scrutiny.” Osborne, 495 U.S. at 112-13. The Court explained that it has “long respected” the ability of state supreme courts “to narrow state statutes so as to limit the statute’s scope to unprotected conduct.” Osborne, 495 U.S. at 120.

Here, E.J.J. challenges the constitutionality of our state’s obstruction statute, which provides: “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). He asserts that the statute is unconstitutionally overbroad

because, he contends, it prohibits a substantial amount of protected speech.

Our Supreme Court, however, has construed the obstruction statute to avoid such a constitutional infirmity, adhering to its "jurisprudential history of requiring conduct in addition to pure speech in order to establish obstruction of an officer." Williams, 171 Wn.2d at 485. There, Williams was convicted of obstructing a law enforcement officer when, in an apparent attempt to prevent a police officer from discovering an outstanding warrant, he gave his brother's name, instead of his own, to the officer. Williams, 171 Wn.2d at 475. Williams appealed from his conviction, asserting that legislative history and decisional authority demonstrate that the statute requires some conduct in addition to making false statements. Williams, 171 Wn.2d at 475.

Following an extensive review of case law interpreting the former and current obstruction statutes, the court concluded that conduct is required in addition to pure speech to support a conviction for obstructing a law enforcement officer. Williams, 171 Wn.2d at 478-86. The court determined that, in enacting RCW 9A.76.020, our legislature was aware that "in order to find obstruction statutes constitutional, appellate courts of this state have long required conduct." Williams, 171 Wn.2d at 485. Our courts have required such conduct, the court explained, in part due to "concern that criminalizing pure speech would implicate freedom of speech." Williams, 171 Wn.2d at 485; see also State v. Budik, 173 Wn.2d 727, 735-36, 272 P.3d 816 (2012) (citing Williams in holding that mere false disavowal of knowledge was insufficient to support a conviction for rendering criminal assistance and, instead, an affirmative act was required);

State v. Grant, 89 Wn.2d 678, 685-86, 575 P.2d 210 (1978) (holding that former obstruction statute, the language of which is almost identical to that of the current statute, "focuses on conduct other than speech"). Thus, the court held that, "[i]n order to avoid constitutional infirmities, we require some conduct in addition to making false statements to support a conviction for obstructing an officer."

Williams, 171 Wn.2d at 486.

Nevertheless, E.J.J. contends that the statute is overbroad because it "criminalizes any speech, so long as that speech, together with conduct, 'hinders, delays, or obstructs' a law enforcement officer." Appellant's Br. at 28 (quoting RCW 9A.76.020(1)). This contention, however, fails to recognize that conduct may be constitutionally regulated "even though intertwined with expression and association." Cox v. Louisiana, 379 U.S. 559, 563, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965) (holding that statute prohibiting "picketing and parading" near a courthouse did not infringe upon the constitutionally protected rights of free speech and free assembly). Indeed, the "examples are many of the application" by the United States Supreme Court "of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." Cox, 379 U.S. at 563. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Cox, 379 U.S. at 563 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)).

Moreover, the case to which E.J.J. cites in support of his overbreadth

challenge, City of Houston, Tex. v. Hill, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987), is inapposite. There, Hill challenged as overbroad a city ordinance making it “unlawful for any person to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty.” Hill, 482 U.S. at 461 (quoting Code of Ordinances, City of Houston, Tex., §§ 34-11(a) (1984)). The evidence showed that the ordinance had been employed to make arrests for “arguing,’ [t]alking,’ [i]nterfering,’ [f]ailing to remain quiet,’ [r]efusing to remain silent,’ [v]erbal abuse,’ ‘cursing,’ [v]erbally yelling,’ and [t]alking loudly, [w]alking through the scene.” Hill, 482 U.S. at 457 (quoting Hill v. City of Houston, Tex., 789 F.2d 1103, 1113-14 (5th Cir. 1986)).¹ The Supreme Court invalidated the ordinance, determining that the ordinance, which prohibited “verbal interruptions of police officers,” dealt “not with core criminal conduct, but with speech.” Hill, 482 U.S. at 460-61. Importantly, the Court determined that the ordinance at issue in Hill had “received a virtually open-ended interpretation” and, thus, was “susceptible of regular application to protected expression.” 482 U.S. at 466-67 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 136, 94 S. Ct. 970 (1974) (Powell, J., concurring in the result)). Moreover, the Court concluded that the ordinance was unambiguous and, thus, not susceptible to a limiting construction: “The enforceable portion of this ordinance is a general prohibition of speech that ‘simply has no core’ of constitutionally unprotected expression to which it might be limited.” Hill, 482 U.S. at 468-69 (quoting Smith

¹ Indeed, Hill himself was arrested for “wilfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation.” Hill, 482 U.S. at 454.

v. Goguen, 415 U.S. 566, 578, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)). Thus, the Court held that the ordinance "criminalize[d] a substantial amount of constitutionally protected speech" and, accordingly, was unconstitutionally overbroad. Hill, 482 U.S. at 466.

In contrast, the obstruction statute challenged here has been construed by our Supreme Court to require conduct in addition to speech in order to establish the offense.² Williams, 171 Wn.2d at 485. As in Osborne, this construction narrows the obstruction statute "so as to limit the statute's scope to unprotected conduct." 495 U.S. at 120. Moreover, a statute is not rendered unconstitutional unless its overbreadth is both real and substantial in relation to its "legitimate sweep." Osborne, 495 U.S. at 112 (quoting Broadrick, 413 U.S. at 615). Because the obstruction statute does not reach a substantial amount of constitutionally protected conduct, it is not, as E.J.J. contends, unconstitutionally overbroad.³

² E.J.J. asserts that "the caselaw shows that speech is frequently criminalized under [the obstruction] statute when the speech accompanies conduct." Appellant's Br. at 25. E.J.J. cites to only two cases in support of this assertion, State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998), and State v. Williamson, 84 Wn. App. 37, 924 P.2d 960 (1996), and neither case demonstrates that speech is "frequently criminalized" pursuant to RCW 9A.76.020(1). In Contreras, the court held that the defendant's refusal to answer questions was not sufficient to support his obstruction conviction; rather, the court upheld the conviction based upon Contreras's conduct of disobeying the officer's orders to put his hands in view, exit the car in which he was sitting, and keep his hands on top of the car, and giving the officer a false name. 92 Wn. App. at 316. In Williamson, the court did not address the defendant's challenge to the sufficiency of the evidence because the court reversed the obstruction conviction on the basis of a defective information. 84 Wn. App. at 46.

³ To the extent that the obstruction statute may interfere with an individual's constitutionally protected right to free speech, we note that "the exercise of that right, even in public forums, is subject to valid time, place, and manner restrictions." City of Seattle v. Abercrombie, 85 Wn. App. 393, 399, 945 P.2d 1132 (1997) (upholding the City of Seattle's obstruction ordinance against an overbreadth challenge). Such restrictions are valid so long as they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." City of Seattle v. Huff, 111 Wn.2d

III

E.J.J. additionally contends that there was insufficient evidence to support his adjudication of guilt for obstructing a law enforcement officer. Because, based upon the evidence presented, any rational trier of fact could have found the essential elements of the offense proved beyond a reasonable doubt, we disagree.

When reviewing a challenge to the sufficiency of the evidence, we must determine “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.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). This standard of review is so oft-repeated that lawyers and judges infrequently consider the meaning of its words. The purpose of the standard is to ensure that the fact finder “rationally appl[ied]” the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of an offense only upon proof beyond a reasonable doubt. Jackson, 443 U.S. at 317-18. In other words, the Jackson standard is designed to ensure that the defendant’s due process right in the trial court was properly observed. Pursuant to the Jackson standard, we look neither to the particular fact finder in the case nor to the specific theory of the case presented by the State.⁴ Rather, we look to the evidence admitted at trial to

923, 926, 767 P.2d 572 (1989) (internal quotation marks omitted) (quoting Bering v. Share, 106 Wn.2d 212, 222, 721 P.2d 918 (1986)).

⁴ Whether the trier of fact was a jury or, as here, a judge “is of no constitutional significance.” Jackson, 443 U.S. at 317 n.8. Indeed, in Jackson itself the Supreme Court

determine whether, viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could conclude that the elements of the offense were proved beyond a reasonable doubt.

Here, E.J.J. challenges the sufficiency of the evidence for his adjudication of guilt for obstructing a police officer. The obstruction statute provides that “[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 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 [or her] official powers or duties; (3) knowledge by the defendant that the public servant is discharging his [or her] 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) (quoting State v. CLR, 40 Wn. App. 839, 841-42, 700 P.2d 1195 (1985)). Because a rational fact finder could determine that these elements were proved beyond a reasonable doubt, the evidence is sufficient to support E.J.J.’s adjudication of guilt.

The State presented evidence, through the testimony of Officers Barreto and Jenkins, that E.J.J. approached the scene just as the officers were beginning to successfully calm R. from her agitated state. E.J.J. did not simply stand near R. and the officers; rather, he was “irate,” yelling, using profanity, and calling the

reviewed a conviction resulting from a bench trial. 443 U.S. at 317 n.8. On the other hand, in the first Washington case to apply the Jackson standard, the conviction at issue resulted from a jury’s verdict. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

officers names. According to the testimony, E.J.J.'s presence caused R. to again become agitated, resulting in the escalation of the situation into a "very hostile" one. E.J.J. then refused to comply with Officer Jenkins' repeated requests that he go back inside the house. Finally, Officer Jenkins was compelled to escort E.J.J. back to the house.

Viewed in the light most favorable to the prosecution, sufficient evidence supports a determination that, at this point, E.J.J. had hindered or delayed the officers in performing their official duties. Accordingly, based upon this evidence, any rational fact finder could determine beyond a reasonable doubt that E.J.J. was guilty of obstructing a law enforcement officer in violation of RCW 9A.76.020(1). E.J.J. was, therefore, not denied due process of law. Whether additional evidence was admitted is of no moment to the determination of the sufficiency of the evidence.⁶

IV

Finally, E.J.J. asserts that the obstruction statute is unconstitutional as applied. Specifically, he contends that his adjudication was based in part on constitutionally protected speech, that he cannot be penalized for conduct occurring within his own home, and that his adjudication violates an alleged substantive due process right to observe police officers performing their official

⁶ E.J.J. challenges the conduct of the officers after he was escorted back to the house. However, application of the Jackson standard does not necessitate that we consider evidence other than that pertinent to the question of whether the standard was met.

duties.⁶ But E.J.J. neither asserted these purported constitutional infirmities in the trial court nor sought to exclude the admission of related evidence. Neither did he challenge the lawfulness of his arrest. Thus, we review his as-applied challenge by determining whether the statute is unconstitutional as applied to evidence of his actions that was necessary to establish the elements of the offense. Because, upon such review, we determine that no speech or conduct was criminalized that could not constitutionally be criminalized, we find E.J.J.'s as-applied challenge to be without merit.

We review de novo challenges to a statute's constitutionality. State v. Steen, 164 Wn. App. 789, 809, 265 P.3d 901 (2011), review denied, 173 Wn.2d 1024 (2012). "An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." City of Redmond v. Moore, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). "A decision that a statute is unconstitutional as applied does not invalidate the statute but, rather, prohibits the statute's future application in a similar context." Steen, 164 Wn. App. at 804.

On appeal, E.J.J. contends that his adjudication of guilt was based upon constitutionally protected speech and conduct, and, thus, that the obstruction statute is unconstitutional as applied. He asserts that his adjudication of guilt cannot constitutionally be based upon his speech, conduct occurring while he

⁶ E.J.J. does not cite to material case law authority in support of his contention that such a constitutional right has been found to exist. We need not examine that question in order to decide this appeal.

was inside his home, or his "observation" of the police officers while they performed their official duties.⁷ Neither E.J.J. nor the State, however, briefed on appeal the question, "as applied to what?" Stated differently, to which of E.J.J.'s "actions or intended actions," Moore, 151 Wn.2d at 668-69, was the statute unconstitutionally applied?

To answer this question, we must look to how the case was litigated and briefed by the parties. E.J.J. made no challenge in the trial court to the lawfulness of his arrest; nor did he allege that an unlawful search or seizure had occurred. Moreover, no motion was made and no relief sought to exclude the presentation of the evidence that we have set forth herein. E.J.J. did not challenge the admission of evidence of his speech or his conduct occurring within his home. Nor did E.J.J. assert a substantive due process right to observe the police officers while performing their official duties. Thus, there was no contention in the trial court—nor explicitly on appeal—that due process standards were not observed in the admission of evidence.

Based on the manner in which this case was litigated in the trial court and briefed on appeal, the answer to the question "as applied to what?" is clear—E.J.J.'s only viable as-applied challenge is with respect to the sufficiency of the evidence to support his adjudication of guilt.⁸ Thus, we review his challenge by

⁷ E.J.J. contends that his speech is protected by the First Amendment, that conduct occurring within his home is protected by the Fourth Amendment and article I, section 7 of our state's constitution, and that his "observation" of the police officers is subject to the alleged substantive due process right to observe police officers performing their official duties.

⁸ "[S]ufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal." State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995) (alteration in original) (quoting City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989)).

determining whether, as applied to those of E.J.J.'s actions evidence of which was necessary to establish the elements of the offense, the obstruction statute is unconstitutional. In other words, we determine whether the statute was applied in such a manner that evidence of constitutionally protected speech or conduct must necessarily be relied upon in order to satisfy the Jackson test for sufficiency of the evidence.

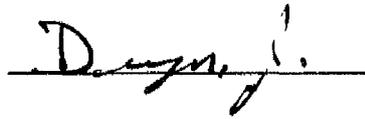
As explained above, our Supreme Court held in Williams that the statute lawfully criminalizes conduct in addition to speech. 171 Wn.2d at 485. Accordingly, so long as it is coupled with conduct, a defendant's speech can be considered in determining whether sufficient evidence supports an adjudication or conviction of obstructing a law enforcement officer. Considering evidence allowed by Williams to meet the sufficiency standard set forth in Jackson is not constitutionally prohibited, given that, pursuant to Williams, constitutionally protected conduct is not prohibited by the obstruction statute.

At a bare minimum, the following facts support the trial court's determination that E.J.J. was guilty of obstructing a law enforcement officer: E.J.J. approached the officers and his sister while the officers were engaged in calming R. in order to defuse the situation between R. and her mother. E.J.J.'s presence escalated the situation with R. E.J.J. was "irate," calling the officers names, yelling, and using profanity. E.J.J. refused the officers' repeated requests to leave the scene. Due to E.J.J.'s refusal to comply, an officer was eventually required to escort E.J.J. away from R., back to the house, thus hindering and delaying the officers' ability to calm R. and defuse the situation.

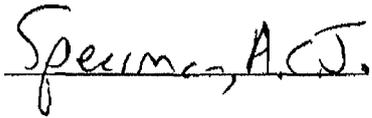
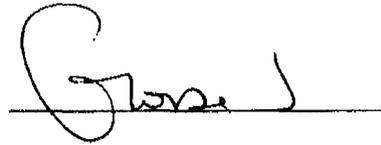
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The admission of none of this evidence was prohibited by Williams. This evidence is properly referenced to evaluate the evidence at trial in accordance with the Jackson standard. Thus, the challenged statute was not unconstitutionally applied to the evidence at trial. E.J.J.'s assertion of error must fail.

Affirmed.

A handwritten signature in cursive script, appearing to read "D. J. Williams", written over a horizontal line.

We concur:

A handwritten signature in cursive script, appearing to read "Spencer, A.C.J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "G. J. Goss", written over a horizontal line.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 67726-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Dennis McCurdy, DPA
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


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Date: March 27, 2013