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No. 67726-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERISTUS JORDAN J.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY,
JUVENILE DIVISION

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Jordan J., a juvenile, was convicted of obstruction for standing in his doorway and watching police officers arrest his teenage sister, Ruby. His conviction cannot stand under the constitutions of Washington and of the United States.

Jordan was at home with Ruby and his mother when three police officers arrived. Ruby was upset and agitated and their mother wanted Ruby to leave. Ruby was outside in the yard when the officers arrived. Jordan went outside to tell his sister to calm down. The officers ordered Jordan to go back inside the house and close the front door. Jordan resisted, but eventually went back and stood in the doorway. As an officer began restraining Ruby, Jordan saw one of the officers pull out a nightstick. Jordan was concerned for the safety of his sister, who was struggling against the police.

The officers repeatedly told Jordan to close the solid front door to his house. He refused. Jordan began yelling at the officers and calling them names, and he was also shouting to Ruby. The officers in turn were yelling and swearing at Jordan. Jordan closed the wrought iron gate in the doorway, but kept

the solid wooden door open. An officer went to the doorway and attempted to reach in to close the front door, but was blocked by the wrought iron gate. Jordan continued to keep the door open, even as the officers told him that he would be charged with obstruction for watching the arrest. He was charged, and the juvenile court convicted him of obstructing a law enforcement officer for calling the police officers names, yelling to his sister, refusing to close the front door, and being present during the incident.

The officers' conduct and Jordan's conviction violate Jordan's basic constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and under Article I, § 7 of the Washington Constitution. His conviction must be reversed.

B. ASSIGNMENTS OF ERROR

1. The juvenile court erred in entering Finding of Fact (FF) 19 because it is not supported by substantial evidence.
2. The juvenile court erred in entering FF 21 because it is not supported by substantial evidence.

3. The juvenile court erred in entering Conclusions of Law (CL) 1–3 because they are based on constitutionally protected conduct described in the Findings of Fact.

4. There was insufficient evidence to convict Jordan J. of obstruction of a law enforcement officer.

5. The juvenile court erred in convicting Jordan of obstruction of a law enforcement officer.

6. RCW § 9A.76.020 is unconstitutional as applied because it criminalizes conduct that is protected under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, § 7 of the Washington Constitution.

7. RCW § 9A.76.020 is invalid on its face because it is overbroad under the First Amendment to the United States Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the First Amendment, the government may not abridge the freedom of speech unless the speech falls into one of the well-established exceptions to constitutional protection.

Here, Jordan was convicted for obstruction partly on the basis of protected speech in the form of calling officers names and calling

out to his sister. Did his conviction violate the First Amendment?

2. The Fourth Amendment and Article I, § 7 protect an individual's right to be free from unreasonable government intrusions into the privacy of his home. Here, the testimony showed that there was no reason to believe there was a threat of danger or any weapons present. But the police officers commanded Jordan to close his front door while Jordan was standing in his house. In addition, one police officer physically went to Jordan's door and attempted to close it. Did the officers' conduct and Jordan's conviction violate the Fourth Amendment and Article I, § 7?

3. Substantive due process under the Fifth and Fourteenth Amendments guarantees that the government will not abridge a fundamental liberty interest unless the intrusion is narrowly tailored to serve a compelling government interest. Individuals have a fundamental right to observe police officers performing official duties in public. Was Jordan's substantive due process right violated when the police repeatedly told him to close his front door so he could not see what was happening, and

then when the juvenile court convicted him for standing and observing an arrest?

4. Every element of a crime must be proved beyond a reasonable doubt in order to comport with due process. In addition, constitutionally protected conduct may not be punished. Here, Jordan's actions of observing the police, speaking to his sister and to the police, and keeping his front door open were all constitutionally protected conduct that cannot form the basis for a conviction. The juvenile court found no other evidence of obstruction. Without his constitutionally protected conduct, was there insufficient evidence to convict Jordan of obstruction?

5. A statute is facially overbroad under the First Amendment if it criminalizes a substantial amount of protected speech. Washington courts have interpreted RCW § 9A.76.020 to criminalize speech in addition to conduct, but the statute's application is not limited to unprotected speech; it encompasses any speech that hinders, obstructs, or delays an officer. Is the statute overbroad under the First Amendment?

D. STATEMENT OF THE CASE

On February 14, 2011, Seattle Police Officers German Berreto, Sean Jenkins, and Mark Mullins were dispatched to a home in the Beacon Hill neighborhood in response to a report of an altercation. RP 14–15. They encountered Ruby Johnson, a teenager, who appeared intoxicated. RP 17. Ruby’s stepmother, Geraldine Johnson, was upset and wanted Ruby to leave. RP 18.

Berretto took Ruby outside and began questioning her. RP 17. He then went back inside the house to ask Ms. Johnson for bus fare for Ruby. RP 18. When Berretto went back outside, Ruby’s brother, 17-year-old Jordan,¹ also went outside to talk to his sister. RP 19; CP 1 (showing birth date). Berretto was attempting to force Ruby to leave the residence. RP 22. Ruby was belligerent; Jordan encouraged his sister to “just go.” RP 27, 38. Jordan, on the other hand, was not hostile or belligerent. RP 28. He had also told his sister not to be hitting or fighting. RP 60.

¹ Appellant uses his middle name, Jordan, instead of his first name, Eristus. RP 26.

As Jordan watched, Berretto was physically holding Ruby. RP 31. Berretto was in full uniform, including pepper spray, baton, and handcuffs. RP 31. Mullins and Jenkins were in full uniform, and Jenkins carried a firearm. RP 47. Jordan saw one of the officers pull out his nightstick. RP 69, 78. Jordan worried that the officer was going to hit Ruby with it because she was being rowdy. RP 70. Jordan wanted to stay outside and watch and make sure that Ruby was safe. RP 71.

Jenkins and Berretto asked Jordan several times to go back in the house, and then informed him that he could be arrested for obstructing if he did not go back inside the house. RP 40–41. Jordan moved to stand inside the doorway, and eventually an officer pushed him inside and tried to close the door. RP 30, 75. Jordan opened the door. RP 75. The officer told him, “If you open that door again, you will be arrested for obstructing.” RP 75.

Berretto testified that making Ruby leave was more difficult to do because of Jordan’s presence. RP 23. He further testified that Jordan’s presence “compounded the situation.” RP 36. Jenkins testified that the officers needed Jordan to go back

inside because he jeopardized officer safety since he was not part of the investigation and “ha[d]n’t been patted down.” RP 42, 43. Jenkins stated that they could not continue the investigation until Jordan was inside with the door closed. RP 42. Jordan was not carrying a weapon and had made no threatening movements of any kind. RP 42.

While Jordan stood in the doorway, Jenkins approached him and told Jordan to close the door. RP 43. Jordan became upset and refused. RP 42. Jenkins instructed Jordan to close the door several times, and told Jordan that Jordan was obstructing the investigation. RP 43, 44. Jordan became upset and swore at Jenkins. RP 44. Ruby became agitated when she saw Jenkins dealing with Jordan; Jenkins was yelling. RP 45, 49. She said “That’s my brother, that’s my brother.” RP 45. Similarly, Jordan said “That’s my sister, that’s my sister.” RP 45.

At the entryway to the house, there was a wrought iron door in front of a solid wooden door. RP 51. Jenkins wanted Jordan to close the solid wooden door so Jordan would not be able to see out. RP 51, 52. Jenkins testified that it would not be enough to close the wrought iron door because Jordan “was still

able to see what we were doing as far as movements,” and “[I]f he chose to harm us, he’d have the ability to do so without us knowing.” RP 55. Jenkins testified that there was no reason to check the house for weapons. RP 56.

Jordan testified that he never intended to interfere with any investigation, but rather was just trying to watch and make sure that his sister was all right. RP 73. For that reason, he closed the gate door but wanted to leave the solid door open. RP 74.

As Jordan stood in the doorway, Jenkins asked Ms. Johnson to open the wrought iron door. Jenkins came in, “grabbed Jordan,” and arrested him. RP 53, 62.

Jordan was charged with Obstructing a Law Enforcement Officer, in violation of RCW 9A.76.020(1). CP 1. The juvenile court convicted him, and Jordan was sentenced to 18 hours of community service, 2 months supervision, and 4 days in detention. CP 8.

E. ARGUMENT

Jordan was convicted for conduct that is protected by the Washington Constitution and the Constitution of the United

States. See FF 8, 13–18. Absent Jordan’s constitutionally protected conduct—speaking and standing undisturbed in his own home—there was insufficient evidence to support a conviction for obstructing a law enforcement officer. See State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004) (reversing for insufficient evidence of a true threat). In addition, Jordan’s substantive due process right to observe police officers performing official duties in public was violated when the court convicted him of obstruction for standing in his doorway and watching Ruby, his juvenile sister, be arrested. Finally, the obstruction statute is facially overbroad under the First Amendment because it punishes a substantial amount of protected speech, when the speech accompanies conduct. See City of Houston v. Hill, 482 U.S. 451, 467, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). Jordan’s conviction must be reversed. State v. Immelt, 173 Wn.2d 1, 13–14, 267 P.3d 305 (2011) (statute’s overbreadth under First Amendment required reversal of conviction); State v. Spurell, 57 Wn. App. 383, 388–89, 788 P.2d 21 (1990) (reversal required where insufficient evidence did not support the elements of the offense); State v. Lively, 130 Wn.2d

1, 27, 921 P.2d 1035 (1996) (conviction reversed when government violated defendant's due process rights).

1. RCW §9A.76.020 IS UNCONSTITUTIONAL AS APPLIED TO JORDAN'S SPEECH, PRESENCE, AND REFUSAL TO CLOSE HIS FRONT DOOR.

The constitutionality of a statute is a question of law reviewed *de novo*. State v. Abrams, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008). An as-applied challenge alleges that the statute's enforcement in the context of the specific actions of a party is unconstitutional. City of Redmond v. Moore, 151 Wn.2d 664, 668–69, 91 P.3d 875 (2004). A holding that a statute is unconstitutional as applied will not invalidate the statute, but will prohibit the statute's future application in a similar context. Id. at 669. A party may raise a statute's constitutionality for the first time on appeal. RAP 2.5(a)(3); see, e.g., State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); State v. McHenry, 13 Wn. App. 421, 423, 535 P.2d 843 (1975).

In Jordan's case, RCW 9A.76.020 is unconstitutional as applied for three reasons. First, his conviction was based in part on protected speech, in violation of the First Amendment. U.S.

Const. amend. I, amend. XIV § 1; FF 8, 13, 14, 20, 23. Second, Jordan was convicted for refusing to take an action in the privacy of his own home, in violation of the Fourth Amendment to the United States Constitution and Article I, § 7 of the Washington Constitution. U.S. Const. amend. IV, amend. XIV § 1; Const. art. I § 7; FF 15–17, 20. Finally, Jordan’s conviction violates his substantive due process right to observe police officers performing official duties in public. U.S. Const. amend. V, amend. XIV § 1.

a. Jordan’s conviction may not be based, even in part, on protected speech. The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Here, the juvenile court applied the obstruction statute to abridge Jordan’s right to free speech by basing his conviction on the following findings of fact:

- 8: . . . when Respondent began speaking in a loud and excited voic[e], Ruby became agitated.
- 13: Respondent’s yelling . . . caused Ruby’s behavior to escalate.
- 14: Respondent called the officers several insulting names including, “Pig.”

“Honkey,” and “Motherfucker.” Respondent was yelling and swearing as Officer Jenkins walked him to the door.

20: [Respondent’s] yelling . . . escalated Ruby’s behavior.

Orally, the court found that Jordan’s “raising his voice made the situation worse for the officers,” and stated:

by raising his voice and calling the officers names, [Jordan] was making his presence known to his sister . . . it made it more difficult for the officers to do their job. So I am finding Mr. Johnson guilty beyond a reasonable doubt.

RP 100. Based on these findings, the court concluded that Jordan willfully hindered, delayed, or obstructed Officer Jenkins in the discharge of his duties. CP 17, CL 1. These were not incidental or extraneous findings: the findings of fact are reviewed to see if they support the conclusions of law. State v. Young, 86 Wn. App. 194, 198, 935 P.2d 1372 (1997); see State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (explaining that in bench trials, written findings of fact and law are mandated in order to facilitate appellate review). Thus, Jordan was convicted, at least in part, for his words. See State v. Williams, 171 Wn.2d 474, 485, 251 P.3d 877 (2011) (stating that

obstruction statute requires “conduct in addition to pure speech” (emphasis added).

In Williams, the Supreme Court explained that because of constitutional concerns, RCW § 9A.76.020 could not criminalize pure speech. See 171 Wn.2d at 484–86. Rather, some conduct was required in addition to speech. Id. at 486. But Williams did not state that speech itself could not be criminalized—it effectively held that speech could be criminalized if accompanied by conduct that hindered or delayed a police officer. See id. That is the case here. See FF 8, 13, 14, 20.

But criminalizing protected speech in any way does not comport with the First Amendment. That speech hinders or annoys a police officer does not render it less protected under the Constitution. Hill, 482 U.S. at 461. Rather, speech is “protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.” Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949). Speech that accompanies conduct that “hinders, delays, or obstructs” a police officer will

not necessarily be speech that “by [its] very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace.” Lewis v. City of New Orleans, 415 U.S. 130, 133, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (internal quotation marks omitted). Yet it is only the latter type of speech—“fighting words” and other narrowly drawn exceptions—that may be afforded less than full protection under the First Amendment. U.S. Const. amend. I; see Hill, 482 U.S. at 461–62.

If speech or expressive conduct does not fall within one of those well-recognized exceptions, the government may not abridge or regulate that conduct. See Kilburn, 151 Wn.2d at 42–43 (listing fighting words, libel, obscenity, true threats, and incitement to riot as among the established categories of unprotected speech). Here, Jordan’s *protected* speech—including yelling to his sister and calling police officers names—was explicitly punished as obstruction by the juvenile court. See FF 8, 13, 14, 20; RP 100; Williams, 171 Wn.2d at 485. This was a violation of Jordan’s First Amendment rights, and his conviction cannot stand. See Watts v. United States, 394 U.S. 705, 708, 89

S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (reversing conviction where conviction was based on protected speech).

b. Jordan may not be penalized for his conduct in the privacy of his own home. The Fourth Amendment states in part, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. Article I, section 7 of the Washington State Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I § 7.

Both constitutions afford special protection to conduct within the home. See, e.g., Payton v. New York, 445 U.S. 573, 589–90, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994); see also Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970) (“Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.”). Thus, as the Washington Supreme Court explained, “In no area is a citizen more entitled to privacy than in his or her home . . . For this reason, the closer officers come to intrusion into a dwelling,

the greater the constitutional protection.” Young, 123 Wn.2d at 185 (internal citations omitted).

An officer’s intrusion—or a “search” for constitutional purposes—does not depend on their physical presence within the home. Thus, an officer may be standing outside, but may invade the home nonetheless if his conduct is intrusive. Young, 123 Wn.2d at 185 (citing Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L. Ed. 2d 576 (1967)). This is true under both the Fourth Amendment and under Article I, § 7. Young, 123 Wn.2d at 185 (citing State v. Holeman, 103 Wn.2d 426, 429, 693 P.2d 89 (1985)).

The special protections afforded the home place a high burden on the State to show a compelling need for intrusion absent a warrant. State v. Chrisman, 100 Wn.2d 814, 822, 676 P.2d 419 (1984). Thus, “In cases of minor violations, where no danger exists, and where there is no threat of destruction of the evidence, we can find no compelling need to enter a private residence.” Id.

Such is the case here. The police officers’ orders to shut the door—and then Officer Jenkin’s action of going over to the

door, reaching in and closing it himself—violated Jordan’s constitutional right to be free from intrusion in his home. See FF 11, 15, 17, 18, 25. In addition, the court’s penalizing Jordan for the failure to comply with orders within his own home is a further violation of his privacy rights under the Fourth Amendment and Article I, § 7.

The trial court found that the officers’ request to shut the solid door were not unreasonable because the house had not been swept for weapons, Jordan’s presence was “escalating” Ruby’s behavior, because Jordan had not been patted down for weapons, and because Jordan could have observed what was going on from a window. FF 19, 20.

These excuses do not come close to justifying the officers’ egregious intrusion under the Fourth Amendment and Article I, § 7. Officer Jenkins testified himself that there was no reason to think that there were weapons in the house. RP 56. Furthermore, Jordan had made no threatening movements of any kind, and had not made any threatening statements. RP 42, 63, FF 10. Jenkins testified that he wanted Jordan to close the door because he did not want Jordan to be

able to see out. RP 52. The court's explanation that Jordan could just watch from a window would not have cured the officers' unfounded concerns for safety, since Jordan would have to open the window to hear, and would not cure Officer Jenkins's totally unexplained desire to keep Jordan from seeing what was going on. See FF 21, RP 52. The officers' intrusion into Jordan's home violated the Fourth Amendment and Article I, § 7. See Chrisman, 100 Wn.2d at 820, 822 (stating that warrantless entry into a home required specific, articulable facts justifying the entry); see also Payton, 445 U.S. at 589–90 (“[A]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” (quoting Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961) (second alteration in original))).

c. Jordan's conviction violates his substantive due process right to observe police officers performing official duties in public. Substantive due process under the Fifth and Fourteenth Amendments is concerned with an individual's liberty interest to be free from arbitrary government actions.

Becker v. Washington State University, 165 Wn. App. 235, 255, 266 P.3d 893 (2011); see U.S. Const. amend. V; amend. XIV.

When the State interferes with a fundamental right, the State action is subject to strict scrutiny, which requires that the infringement be narrowly tailored to serve a compelling state interest. Amunrud v. Board of Appeals, 158 Wn.2d 208, 221, 143 P.3d 571 (2006) (citing Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)).

Fundamental liberty interests are ones that are “rooted in [] traditions” and in the “conscience of our people.” Reno v. Flores, 507 U.S. 292, 303, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). The ability to watch police officers act in their official capacities in public spaces is a clear expectation of citizens of the United States, and of Washington. Police accountability through citizen monitoring is a defining characteristic of our free society. See Hill, 482 U.S. at 462–63.

Washington has long recognized that individuals have a right to transparent government, and the legislature codified this right in the Public Records Act. See RCW § 42.56; City of Federal Way v. Koenig, 167 Wn.2d 341, 343, 217 P.3d 1172

(2009). The Act, “a strongly-worded mandate for open government,” gives citizens broad access to public records. Rental Hous. Ass’n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 527, 199 P.3d 393 (2009); RCW § 42.56.070. As further evidence of our society’s belief in the right of people to observe police, the Seattle Police Department issued a Directive in 2008 outlining the policy stating that citizens were permitted “to remain as onlookers and/or photograph officers in the field performing their duties.” Seattle Police Department Directive, New DP & P Manual Section, Title 17.070 (June 5, 2008).

The belief that citizens have a right to observe police is so universal that Jordan, a juvenile, articulated that right on the stand. RP 73. The court agreed, stating, “Mr. J[.] himself testified that as a citizen he has a right to observe law enforcement, and the court certainly doesn’t disagree with that.” RP 99. The United States Supreme Court has recognized that citizens naturally witness police actions that happen in public, and that that observation decreases the likelihood of illicit police action. Berkemer v. McCarty, 468 U.S. 420, 438, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). This is particularly important at the

present time in Seattle, where the police department is under heightened scrutiny for its pattern of excessive force. See United States Department of Justice Civil Rights Division, “Investigation of the Seattle Police Department,” at 8–15 (December 16, 2011).

The Justice Department investigation found that SPD officers often use excessive force in response to minor offenses, when officers are acting in tandem against an individual, and where individuals are talking back. Id. Those circumstances were present in this case: Ruby was eventually arrested for Minor in Possession, a petty offense. FF 27. Ruby and Jordan were both reacting verbally to the officers. See, e.g., RP 45. And there were three adult officers present, compared to two juveniles. RP 14–15. Jordan’s right to observe the police officers under those circumstances—“just to make sure that everybody [was] safe”—was not only important; it was fundamental. See RP 73; Glucksberg, 521 U.S. at 721.

This fundamental right was abridged when the officers repeatedly told Jordan to close his front door, and then when the juvenile court based Jordan’s conviction on his standing and

observing the officers. FF 11, 15–18, 20; CL 1–3. The application of RCW § 9A.76.020 to prohibit the exercise of Jordan’s fundamental right to observe police officers is not narrowly tailored to advance a compelling state interest. See Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 726, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007). Jordan’s conviction must be reversed. See Lively, 130 Wn.2d at 27.

2. ABSENT JORDAN’S CONSTITUTIONALLY PROTECTED CONDUCT, THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HIM OF OBSTRUCTION.

The due process guarantees of Article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution require that every element of a charged crime be proved beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In Washington juvenile adjudications, the trial judge must file written findings of fact and conclusions of law. JuCR 7.11(d). The rule requires the findings to “state the ultimate

facts as to each element of the crime and the evidence upon which the court relied in reaching its decision.” Id; Head, 136 Wn.2d at 622. If a fact is missing from the trial court’s findings, the reviewing court must presume that the fact went unproven by the burdened party. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

After a bench trial, the appellate court first reviews the evidence to determine whether it supports the findings of fact. Next, the court determines whether the findings of fact support the conclusions of law, and then decides whether the conclusions of law sustain the judgment entered. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). Evidence is sufficient when, viewed in the light most favorable to the State, a rational fact-finder could find all of the elements of an offense beyond a reasonable doubt. Id. The State’s evidence and all resulting inferences are presumed to be true. Id.

Here, Jordan’s speech and failure to close the door were constitutionally protected conduct. Supra § E.1. An individual may not be punished for behavior sanctioned by the constitution. See, e.g., Terminiello, 337 U.S. at 6. The juvenile court’s findings

only indicate that Jordan attempted to watch the officers from outside and then inside his home, did not close the door, and yelled to Ruby and spoke to the officers. FF 7–9, 11, 13–17, 20. Without this protected conduct, there is not evidence that Jordan obstructed the police officers, in violation of RCW § 9A.76.020. When there is insufficient evidence to sustain a charge, the conviction must be reversed. State v. Budik, ___ Wn.2d ___, 272 P.3d 816, 822 (2012).

3. THE STATUTE IS FACIALLY OVERBROAD
BECAUSE IT PROHIBITS A SUBSTANTIAL
AMOUNT OF PROTECTED SPEECH.

As noted above, Williams clarified that for criminal liability under RCW § 9A.76.020, there must be conduct in addition to speech. Williams, 171 Wn.2d at 485. Williams did not say that the statute did not criminalize speech, or state that the statute criminalized conduct instead of speech; it stated that conduct “in addition to pure speech” would constitute obstruction of an officer. Id. Indeed, the caselaw shows that speech is frequently criminalized under this statute when the speech accompanies conduct. See, e.g., State v. Contreras, 92

Wn. App. 307, 316, 966 P.2d 915 (1998); State v. Williamson, 84 Wn. App. 37, 44–45, 924 P.2d 960 (1996).

RCW § 9A.76.020 is facially overbroad under the First Amendment.² See Hill, 482 U.S. at 467. The constitutionality of a statute is reviewed *de novo*. Abrams, 163 Wn.2d at 282. Statutes are generally presumed constitutional, and the party challenging the law bears the burden of proving the statute’s invalidity. Immelt, 173 Wn.2d at 6. But in the context of the First Amendment, the State “usually bears the burden of justifying a restriction on speech.” Id. (internal quotation marks omitted). In addition, criminal statutes are viewed with extra scrutiny. Hill, 482 U.S. at 459 (citing Winters v. New York, 333 U.S. 507, 515, 68 S. Ct. 665, 92 L. Ed. 840 (1948)). Thus, criminal statutes “that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate applications.” Hill, 482 U.S. at 459; see Immelt, 173 Wn.2d at 6.

² In State v. Lalonde this Court addressed a challenge that RCW § 9A.76.020 was vague and overbroad, but only applied an analysis for vagueness and not for overbreadth. 35 Wn. App. 54, 57–60, 665 P.2d 421 (1983).

In an overbreadth challenge, the Court is not required to review whether a defendant's actions were protected conduct in a particular case. Immelt, 173 Wn.2d at 7 (citing Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) and Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S. Ct. 116, 14 L. Ed. 2d 22 (1965)). This is an exception to the normal procedure for facial constitutional challenges, which requires the court to apply the statute to the actions of the party before the court. Members of the City Coun. of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798–99, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). Instead, a party may challenge a statute that would be unconstitutional were it applied to others even if not as applied to him. State v. Motherwell, 114 Wn.2d 353, 370–71, 788 P.2d 1066 (1990). This exception, premised on the “important rights protected by the First Amendment,” is designed to eliminate the chilling effect that an overbroad statute creates. Id. As the Washington Supreme Court wrote,

Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only

themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Immelt, 173 Wn.2d at 8 (quoting Virginia v. Hicks, 539 U.S. 113, 119, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)) (ellipsis in Immelt, emphasis in Hicks). Thus, the only question is whether the statute “impermissibly burdens” protected conduct. Immelt, 173 Wn.2d at 7.

On its face, RCW § 9A.76.020 reaches a substantial amount of constitutionally protected conduct. It 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.

The statute casts a wide net. It criminalizes any speech, so long as that speech, together with conduct, “hinders, delays, or obstructs” a law enforcement officer. See RCW § 9A.76.020; State v. Steen, 164 Wn. App. 789, 802, 265 P.3d 901 (2011).

In City of Houston v. Hill, the United States Supreme Court invalidated as overbroad a statute very similar to RCW §

9A.76.020. In that case, the operative section of a city ordinance read:³

It shall be 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 (citing Code of Ordinances, City of Houston, Texas, § 34-11(a) (1984)). Compare this to RCW § 9A.76.020:

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.

The Hill Court explained that the ordinance was overbroad because it was not limited to prohibiting low-value speech such as fighting words or obscenity, but rather condemned speech that “in any manner . . . interrupt[s]” an officer. 482 U.S. at 462. Such is the case here, where the Washington obstruction statute forbids any speech or expression which, when along with conduct, “hinders, delays, or obstructs” an officer. RCW §

³ The statute also prohibited striking or assaulting a police officer, but the Supreme Court explained that state law preempted that section. Hill, 482 U.S. at 460–61.

9A.76.020; see Steen, 164 Wn. App. at 802. As the statute has been interpreted by Williams, it is overbroad in violation of the First Amendment. Hill, 482 U.S. at 472; Williams, 171 Wn.2d at 485.

F. CONCLUSION

For the foregoing reasons, Jordan respectfully requests that this Court reverse his conviction for obstructing a law enforcement officer.

DATED this 20th day of April, 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	NO. 67726-8
Respondent,)	
)	
v.)	
)	
ERISTUS JOHNSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 20TH DAY OF APRIL, 2012, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

King County Prosecuting Attorney
Appellate Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Eristus Johnson
5209 25th Ave. S.
Seattle, WA 98108

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 20 PM 4:48

SIGNED IN SEATTLE, WASHINGTON THIS 20th DAY OF APRIL, 2012


