FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 95707-0

Court of Appeals No.: *77094-2 I*

THE SUPREME COURT OF WASHINGTON

SOLOMON MCLEMORE,

Petitioners/Defendants

v.

CITY OF SHORELINE,

Respondent/Plaintiff

MOTION FOR DISCRETIONARY REVIEW OF THE COURT OF APPEALS TO THE WASHINGTON STATE SUPREME COURT

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1. IDENTITY OF MOVING PARTY

Solomon McLemore, by and through counsel of record, David Iannotti, ask this court to accept review of the Court of Appeals' decision designated in part 2 of this response.

2. DECISION

McLemore is respectfully requesting pursuant to RAP 13.5 that this Court grant his Motion for Discretionary Review of the March 7, 2018, Court of Appeals Order denying his Motion to Modify the ruling of the Commissioner filed on November 29, 2017. Appendix 1, March 7, 2018 Order Denying Motion to Modify, Appendix 2, November 29, 2017, Ruling by Commissioner Mary Neal. The Commissioner's ruling denied McLemore's Motion for Discretionary Review of the Superior Court decision on RALJ appeal affirming his conviction for Obstructing.

The Commissioner's ruling and the prior Courts' rulings are in direct conflict with Washington case law and the Constitution. The rulings in this case hold that a private citizen has an affirmative obligation to assist police when police are performing their community caretaking function. No such duty exists and finding so is in error. There is no law or statutory authority that supports this position.

McLemore was found guilty for refusing to open the door to his home when police wanted to conduct a warrantless search. There was no

evidence that McLemore had done anything beyond not unlocking a door that was already locked. McLemore did not barricade the door, lock any doors, hide from the officers, or prevent the other occupant of the apartment from cooperating with the Officers or unlocking the door.

The Trial Court denied McLemore's Knapstad motion, finding that a person needs to assist the police when police are performing their community caretaking function. The trial court also prohibited McLemore from presenting any evidence or arguing his belief that he could refuse to assist the officers because they did not have a warrant.

At RALJ, the Superior Court affirmed the conviction, ruling that a citizen has an affirmative duty to assist when police are performing their community caretaking function.

The Court of Appeal's Commissioner denied review, holding that "McLemore's refusal to open the door" to his house for a warrantless search "was willful" and therefor obstructing. Appendix 2 at p 4. These errors were of significant constitutional magnitude and/or an issue of public interest, as it is clear lower Courts do not understand how to interpret the Court's ruling in State v. Steen, 164 Wash. App. 789, 265 P.3d 901 (2011). Lower Courts have interpreted this ruling to require a duty for citizens to act where no such duty exist.

3. ISSUES PRESENTED FOR REVIEW

1. Whether there is any authority that would require a citizen to assist an officer conducting a warrantless search?

2. Whether a person is guilty of obstructing for refusing to unlock a door to their home for an officer conducting a warrantless search?

3. Whether the Trial Court erred by denying the Knapstad motion and by preventing McLemore from presenting evidence of his defense?

4. STATEMENT OF THE CASE

On March 1, 2017, around 1:30 in the morning, Solomon McLemore was in a verbal argument with his girlfriend, Lisa Janson. Report of Proceedings (hereinafter "RP") 32, 56-57, 94. At no point did the argument turn violent, nor did either party violate any laws. RP 44, 49, 116. A passerby overheard the argument and called 911.

Shoreline Officers reported to the verbal disturbance. RP 32, 56-57, 94. The Officers heard a woman yell "You can't leave me out here", "I'm going to call 911 or call the police", and "I'm reconsidering our relationship." RP 33. 59, 96. The officers determined that the yelling was coming from an apartment above a drycleaner. RP 35,36.

The Officers started knocking on the door, ringing the doorbell and announcing that they were Shoreline Police. RP 38, 39, 60, 63, 97. As soon as they started knocking, the argument ceased. Id. The Officers

estimated that they were knocking for about eight minutes. Id. They then proceeded to use the public-address system, telling the occupants of the apartment that they needed to come to the door or they would break the door down. RP 40. The officers then heard glass breaking two separate times. RP 41, 42. The officers then made the decision to break down the door. Id.

Dispatch had a line inside with someone talking on the phone, but there was no additional evidence as to what was discussed over the phone. RP 43. As the officers started using a hatchet to break down the door, McLemore contacted the officers through the door. RP 65. McLemore repeatedly told the officers that he did not have to let them in and that they were violating his civil rights, that they needed a search warrant. RP 66-68, 105, 149, 150, 168. The Officers eventually were able to breach the door with the aid of the Shoreline Fire Department and arrested McLemore for Obstructing. RP 44, 49, 107, 116. After interviewing McLemore and his girlfriend Lisa Janson, the officers determined that no other crimes had been committed. RP 44, 49, 116.

There was no additional evidence that McLemore had done anything beyond not unlocking the door to prevent the officers from entering the home. RP 118, 199. There was no evidence that McLemore barricaded

the door, locked additional doors, hid from the officers, or added additional locks to the door. Id.

There was no evidence that McLemore prevented the other occupant of the apartment, Janson from cooperating with the Officers or unlocking the door. RP in general. The City in its Response disingenuously claimed that McLemore "would not allow her to open the door or be presented visually to police." There was no evidence of this and in fact, the opposite is true. Janson testified that she went down on her own accord and told the Officers to leave. RP 189-197. She never testified that McLemore prevented her from answering the door or opening the door. *Id.* The City also attempted to place some emphasis on McLemore telling Janson to tell the Officers she's all right. But there was no evidence that this was coerced or false. The only issues in this case is whether the Officer's had legal authority to order McLemore to open the door and whether refusal of that order was obstructing.

McLemore filed a motion to dismiss and argued that a person cannot be convicted of obstructing for exercising the constitutional right to be free of warrantless searches and refusing the order to open his door. The Trial Court denied the motion finding that "Delay need to call Shoreline Fire for tools to break in the residence all make the community caretaking function an exception to 4th amendment privacy consideration." [sic] See

Appendix 3, Court Order dated August 17, 2016. The Court based the decision on State v. Steen, 164 Wn. App. 789 (2011).

The matter proceeded to trial and the Court prohibited McLemore from making any reference to the Officers not obtaining a search warrant or from arguing that the order to open the door was not a lawful order that McLemore was required to follow. The jury returned a verdict of guilty, but not before questioning this very issue. **The Jury asked "Does a person have the legal obligation to follow the police instructions, in this case."** Appendix 4, Inquiry from Jury and Court's Response.

The matter was appealed to Superior Court RALJ. Judge Rosen affirmed the Shoreline District Court ruling and upheld the conviction. In its oral ruling, the Court opined that a person does have an affirmative duty to assist officers in a search. McLemore filed a Motion for Discretionary Review, which was denied.

In the order denying McLemore's Motion for Discretionary Review this Court held that refusing to open a door during a warrantless search is Obstructing. Thus, the Court of Appeals has found that a citizen does have an affirmative obligation to assist officers during searches.

McLemore filed a Motion to Modify which was also denied. This Motion for Discretionary review of that decision was timely filed.

5. ARGUMENT

The issue in this case is whether a Police Officer has the authority to order a person to open a door during a warrantless search and whether it is obstructing to refuse such an order. The case law is pretty clear that no such authority exists. There is no law, statute or ordinance that creates a duty for a citizen to affirmatively assist police in a search. A citizen cannot interfere or intentionally do things to prevent the officers from doing their job, but there is no law that requires a citizen to do anything beyond staying out of the way.

Lower Courts have interpreted the ruling in State v. Steen to create such a duty, even though there is no law that supports this conclusion. State v. Steen, 164 Wash. App. 789, 802, 265 P.3d 901, 908 (2011), as amended (Dec. 20, 2011). The Court upheld Steen's conviction for Obstructing because he did not exit a trailer home with his hands up when ordered to do so by the police. *Id.* Buried in a footnote the Court in Steen noted that "A citizen's mere refusal to assist police officers performing their community caretaking duties, without more, is not a crime under the plain language of the obstruction statute." *See footnote 8 in* State v. Steen, 164 Wash. App. at 802, 265 P.3d at 908.

Unlike Steen, McLemore was not ordered to exit the apartment, he was ordered to unlock his door so the Officers could search his home.

McLemore refused to assist the officers, because he believed they were violating his constitutional rights.

There are no Washington cases that addresses whether a person attempting to exercise their rights under the 4th Amendment of the US Constitution and Article I, Section 7 of the Washington Constitution can be found guilty of Obstructing for not opening a door to their home during a search. There is Federal Case law directly on point that is ignored by the decisions in this case. See United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978).

A. The Court erred by denying McLemore's Motion to Dismiss, as the law does not require any duty of a person to act in a warrantless search of their residence.

The principal standard for the charging decision is the prosecution's ability to prove all elements of the charge. State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984); State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984); State v. Lee, 87 Wn.2d 932, 934, 558 P.2d 236 (1976). A trial court may dismiss a prosecution before trial if the State's pleadings, including any bill of particulars, are insufficient to make a prima facie case for all the elements of the charge. State v. Knapstad, 107 Wn.2d 346, 352-353, 729 P.2d 48 (1986). The defense is entitled to dismissal pursuant to Knapstad if, after considering all reasonable inferences from the evidence most favorably to the State, the court finds there is

insufficient evidence tending to prove a defendant committed every element of a charge. Id.

In this case, McLemore was charged with Obstructing pursuant to RCW 9A.76.020(1). In Washington State, the obstructing a law enforcement officer statute, RCW 9A.76.020, states:

> 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.

However, not all acts that hinder or delay law enforcement officers are sufficient to support a charge of obstructing. In Washington State, "Our cases have consistently required conduct in order to establish obstruction of an officer." State v. E.J.J.,183 Wn.2d 497, 502, 354 P.3d 815 (2015); State v. Williams, 171 Wn.2d 474, 485, 251 P.3d 877 (2011).

In E.J.J., the police kept telling E.J.J. to shut the door to the house. E.J.J., at 500. Instead, he kept opening the door and continued verbally abusing the police, who were 10-15 feet away. E.J.J., at 500. Multiple times the police walked back to the house and shut the door, only for EJJ to re-open it and continue to verbally assault the police. Id. Eventually the police arrested EJJ for obstruction. Id. The Washington State Supreme Court ruled

> "That E.J.J.'s behavior may have caused a minor delay is of no import. Although the officer's request that E.J.J. return to his home and close both doors might have been an attempt for a more

> convenient resolution of the situation, '[s]tates cannot consistently [sic] with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances.' In the First Amendment context, we must be vigilant to distinguish between obstruction and inconvenience." E.J.J., at 506(quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 501-502, 69 S. Ct. 684, 690, 93 L. Ed. 834 (1949)). (emphasis added).

In State v. Bessette, the Washington Court of Appeals held that the defendant could not be convicted of obstruction for refusing to allow police to enter his residence without a warrant in order to arrest a third party. State v. Bessette, 105 Wash.App. 793 (2001). The court held a citizen does not commit the crime of obstructing when he exercises his right under the Fourth Amendment and Article 1 Section 7 of the Washington Constitution to refuse to allow police warrantless entry in his home. Id. at 800.

Another example of an act that did not amount to obstructing occurred in State v. Mendez. In Mendez, police instructed a vehicle passenger to stay where he was after police stopped the vehicle, but the passenger ran away and was ultimately convicted of obstruction for doing so. State v. Mendez, 137 Wn.2d 208 (1999). The Washington Supreme Court held that, absent reasonable suspicion or danger to an officer, police may not detain a vehicle's passenger without individualized reasonable suspicion.

Therefore, the defendant's act of leaving the vehicle when police had no legal basis to detain him did not constitute obstructing. Id. at 225.

Just recently the Division 3 Court of Appeals weighed in on the issue. The Court held that "there is no general obligation to cooperate with a police investigation. **Whenever such a duty exists, it frequently is imposed by statute**...where the suspect is personally the target of the investigative detention, we think the lack of an obligation to assist the police precludes use of the obstructing statute to enforce cooperation." State v. D.E.D., 200 Wash. App. 484, 495, 402 P.3d 851, 857 (2017). **Emphasis added.**

Court's in other states have repeatedly held that refusing to open a door in response to a police order is not obstruction. See, e.g., Beckom v. Georgia, 286 Ga. App. 38, 41-42, 648 S.E.2d 656 (2007) (holding that refusal to answer police's knocking on door, ringing of doorbell, and phone calls is not obstruction); Adewale v. Whalen, 21 F. Supp. 2d 1006, 1011 n.4 (D. Minn. 1998) (holding that refusing to open the door for police is not obstruction); City of Columbus v. Michel, 55 Ohio App. 2d 46, 47-48, 378 N.E.2d 1077 (1978) (holding that refusing to open door in response to police officer's repeated requests is not obstruction); Henderson v. County of L.A., No. 05-3019, 2009 WL 943891, at *5 (C.D. Cal. April 6, 2009) (acknowledging that refusal to cooperate with police,

such as refusing to open door or allow entry, is not obstruction); Kansas v. Robinson-Bey, No. 98,614, 2008 WL 3916007, at *4-6 (Kan. Ct. App. Aug. 22, 2008) (holding that defendant's refusal to comply with police instructions to come out of a house was not obstruction); Ohio v. Prestel, No. 20822, 2005 WL 2403941, at *2 (Ohio Ct. App. Sept. 30, 2005) ("[R]efusing to answer the door when police knock and identify themselves and refusing to obey an officer's request for information does not constitute obstructi[on].").

Indeed, the law is clear that citizens have an affirmative constitutional right under the Fourth Amendment not to assist the police in these types of circumstances. Allowing this case to proceed establishes a rule allowing citizens to be punished for exercising their Fourth Amendment rights.

In United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978), the Ninth Circuit held that a citizen's "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing" because to hold otherwise would be to impose "an unfair and impermissible burden" on "the assertion of a constitutional right." Id. at 1351. The court explained:

> When the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular

> case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. Nor can it be evidence of a crime.

Id. at 1350-51 (citations omitted); see also Camara v. Mun. Court of S.F., 387 U.S. 523, 540, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (holding that the defendant could not constitutionally be convicted for refusing to allow warrantless inspection); District of Columbia v. Little, 339 U.S. 1, 7, 70 S. Ct. 468, 94 L.Ed. 599 (1950) (holding that the right to privacy "holds too high a place in our system of laws to" allow "criminal punishment on one who does nothing more" than make verbal protests and refuse to unlock her door); Kentucky v. King, 563 U.S. 452, 469–70, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865 (2011), ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.").

These settled constitutional principles have been repeatedly applied to hold that citizens constitutionally cannot be convicted of obstruction for refusing police demands for entry. For example, in New Jersey v. Berlow, 284 N.J. Super. 356, 360-65, 665 A.2d 404 (1995), the court reversed a conviction for obstruction on Fourth Amendment grounds where the

defendant had slammed and locked his door in response to the police's demand for entry. (Here, by contrast, McLemore simply did not open his door and demanded the police obtain a warrant). The court expressly held that "[o]ne cannot be punished" for obstruction "for passively asserting" one's Fourth Amendment right to deny entry. Id. at 408.

Other courts have persuasively held likewise. See, e.g., Ohio v. Howard, 75 Ohio App. 3d 760, 772, 600 N.E.2d 809 (1991) ("Appellant's assertion of his constitutional right to refuse to consent to the entry and search cannot be a crime and cannot be used as evidence against him for purpose of establishing the elements of obstruction of justice. Courts disapprove of penalties imposed for exercising constitutional rights."); Illinois v. Hilgenberg, 223 Ill. App. 3d 286, 293-294, 585 N.E.2d 180 (Ill. App. Ct. 1991) (holding that the defendant had a Fourth Amendment right to refuse entry requested by police and that "the assertion of that right does not constitute a crime"); Strange v. Tuscaloosa, 652 So.2d 773, 776 (Ala. Crim. App. 1994) (holding that defendant's actions to prohibit a warrantless entry and search "cannot subject her to a criminal conviction"). The rule should be at least as strong in Washington, given that the right of privacy embodied in Article I, Section 7 of the Washington Constitution is generally interpreted to be broader than the

Fourth Amendment. See, e.g., State v. White, 97 Wash. 2d 92, 110-112, 640 P.2d 1061, 1070 (1982).

State v. Steen, is the closest Washington case on point. However, Division 2 did not address a Fourth Amendment analysis, because Steen never claimed he was exercising his 4th amendment. (The dissent recognized that there is an issue under the Fourth Amendment.) Id. at 817-818.

The lower Courts' reliance on Steen is misplaced, but understandably so. Steen specifically states in a footnote that:

> We do not hold, as the dissent suggests, that "private citizens have an affirmative obligation to assist police when they are performing their community caretaking function." Dissent at 915 n. 15. Private citizens have no such affirmative duty. Nor do we hold, as the dissent suggests, that private citizens commit obstruction of a law enforcement officer "every time they refuse to assist the police in performing their community caretaking function." Dissent at 916. **A citizen's mere refusal to assist police officers performing their community caretaking duties, without more, is not a crime under the plain language of the obstruction statute.** Steen, 164 Wash. App. at 802.

However, even though Steen had no obligation to assist police he was still found guilty for not assisting the police. This is what makes the decision so confusing and misleading to courts.

Unlike Steen, who refused an order to exit a trailer with his hands up, McLemore refused to unlock the door to his house so the Officers could

search his house. Based on the ruling in this case, a person would be guilty for refusing to unlock a phone during a search without an order stating such from a judge, for refusing to unlock a garage, trunk, glove compartment, etc... A search does not give Officer's the authority to make Citizens act. There is no statute or code that says otherwise.

McLemore did not disobey a lawful order. The Officer's can ask him to unlock the door, but there is no authority that requires him to do it. McLemore has no duty to act. If the officers believe they have the right to enter without a warrant, there is no statute or case law that requires McLemore to assist the Officers. If the Officers believed they had the right to enter, then they can use force to do so. The inconvenience to the Officers for having to execute a warrantless search does not amount to obstructing.

Considering all reasonable inferences from the evidence most favorably to the City, there was insufficient evidence to prove that McLemore was guilty of obstructing. If the City's pleadings were insufficient to establish a prima facie case for each element of the crime charged then the court should have dismissed the case prior to trial. Knapstad, 107 at 352-53.

B. There was insufficient evidence that McLemore willfully hindered or delayed a law enforcement officer.

Assuming the Trial Court did not err by allowing the case to go forward to a jury, at the conclusion of the trial there was insufficient evidence to support a finding of guilt for the same reasons articulated above.

After all the evidence was admitted in trial, there was no evidence that McLemore did anything beyond refusing entry to the Shoreline Police Officers into his home. For these reasons, there is insufficient evidence that McLemore obstructed the Shoreline Officers by attempting to exercise his Constitutional rights.

C. The Court erred by prohibiting McLemore from presenting evidence of his defense.

McLemore has a fundamental due process right to present a defense. "[I]n plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798

(1988) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

Much like the trial Court in Prescott, the Trial Court in this case refused to permit the line of argument that McLemore was attempting to exercise his constitutional right. United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978). McLemore was not even given the opportunity to present his complete version of the incident.

Knowledge is an element the government is required to prove in order to find McLemore guilty of Obstructing. The Court prohibited McLemore from presenting any evidence of his belief and understanding of the situation. The City presented no evidence that the Officers had the authority to make McLemore open the door and McLemore was not able to argue that it was not a lawful order.

For the same reasons discussed above, McLemore should have been able to present evidence that he believed that he was exercising his constitutional rights and the Jury should have been instructed that a person cannot be found guilty of obstructing for exercising those rights.

6. CONCLUSION

Discretionary review is appropriate pursuant to RAP 2.3(d)(2) as this case involves a significant question of law under the Constitution of the State of Washington and of the United States.

Discretionary review is also appropriate pursuant to RAP 2.3(d)(3). This is a matter of public interest as it regards whether a person has an affirmative duty to assist police in searches. There is no precedent in this state that requires a citizen to assist officers in a search, even in situations where an officer has a warrant. In fact, if the lower Courts correctly interpreted the footnote in Steen, the law specifically says a citizen has no affirmative duty to assist an officer during a search. *See footnote 8 in* Steen, 164 Wash. App. at 802, 265 P.3d at 908. Additionally, there is Federal Case law that says otherwise. For these reasons, it is a matter of public interest and deserves review.

By misinterpreting Steen, ignoring the 9th Circuit decision and by preventing McLemore from presenting a defense, Discretionary review is appropriate pursuant to RAP 2.3(d)(4). The Trial Court has departed so far from the accepted and usual course of judicial proceedings.

For these reasons, review was appropriate and the Court of Appeal erred by denying review. McLemore respectfully requests the Supreme Court grant his request for discretionary review pursuant to RAP 13.5, so McLemore may argue his position in support of reversal of the Court of Appeals Order in this case.

Dated this 5th day of April, 2018.

Respectfully submitted,

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Appendix

Appendix 1: March 7, 2018, Court of Appeals Order Denying Motion to Modify

Appendix 2: November 29, 2017, Court of Appeals Ruling by Commissioner Mary Neal

Appendix 3: Shoreline Municipal Court Order dated August 17, 2016

Appendix 4: Inquiry from Jury and Court's Response.

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Appendix 1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SOLOMON MCLEMORE, Petitioner, v. CITY OF SHORELINE, Respondent.	)	No. 77094-2-I ORDER DENYING MOTION TO MODIFY

Petitioner, Solomon McLemore, has filed a motion to modify the commissioner's November 28, 2017 ruling denying his motion for discretionary review. The respondent, City of Shoreline, has filed a response. We have considered the motion under RAP 17.7 and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Cox, J.

Schindler, J.

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Appendix 2

RICHARD D. JOHNSON,
Court Administrator/Clerk

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November 29, 2017

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CASE #: 77094-2-I
City of Shoreline, Respondent v. Solomon McLemore, Petitioner

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 28, 2017, regarding petitioner's motion for discretionary review (RALJ):

"Solomon McLemore seeks discretionary review of the superior court decision on RALJ appeal affirming his conviction for obstructing a law enforcement officer. Review is denied.

Mr. McLemore was charged with obstruction based on an incident in the early morning hours of March 1, 2017. Three police officers responded to a report of a disturbance at an apartment building. When the officers arrived, the person who called 911 met them and said that he had heard a loud verbal argument and screaming coming from a nearby area. The officers heard a woman yelling things like, "You can't leave me out here," "I'm going to call 911 or call the police," "Let me go," and "I'm reconsidering our relationship." The officers located the apartment where the sound was coming from. They began knocking on the door, ringing the doorbell, and announcing they were Shoreline Police. The argument stopped, and no one responded. After eight minutes of knocking, ringing, and announcing, one officer shined a spotlight on the apartment balcony. For the next eight minutes or so, the officer spoke through a public address system, repeating that he was with Shoreline Police and that he needed to speak with the occupants to make sure everything was okay.

The officers were unsuccessful in obtaining a phone number for the apartment. The officers twice heard breaking/shattering glass in the space of less than a minute. The officers contacted the fire department to bring tools to break down the door. As the officers began working on the door, they continued saying that they needed to visually confirm the woman's safety. Mr. McLemore spoke to the officers through the closed door, repeatedly saying that he did not have to let them in, they were violating his civil rights, and they needed a warrant. The officers heard Mr. McLemore instruct the woman to tell the police she was okay. She did so, and also said she was holding a baby. Once the door was breached, the officers went in and arrested Mr. McLemore for obstruction. Mr. McLemore's girlfriend confirmed that she was fine, stating that Mr. McLemore broke the glass out of anger. After interviewing Mr. McLemore and his girlfriend, the officers determined that no other crimes had been committed.

Mr. McLemore was charged with obstructing in violation of 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.

Mr. McLemore filed a motion to dismiss, arguing that he could not be convicted for exercising his right to be free of a warrantless search. He argued there was no evidence he did anything beyond not unlocking the door, i.e., there was no evidence he barricaded the door, locked additional doors, hid from the officers, or the like. See State v. Knapstad, 107 Wn.2d 346, 251-53, 729 P.2d 48 (1986) (trial court may dismiss the charge if the State's pleadings are insufficient to raise a jury issue on all elements of the charge; the defense is entitled to dismissal if, viewing the evidence and reasonable inferences in the light most favorable to the State, there is insufficient evidence to prove every element).

The trial court denied the motion under the authority of State v. Steen, 164 Wn. App. 789, 265 P.3d 901 (2011). The court applied the community caretaking exception to the warrant requirement, relying on the residential nature of the call, the time of night (2:00 a.m.), the time of year (cold weather), the woman yelling she was locked out and would call the police, and hearing glass breaking.

The case was tried to a jury. The trial court granted the City's motion to exclude any reference to the fact that the officers did not have a warrant. The court did not allow Mr. McLemore to play a video of the incident because it included Mr. McLemore demanding a search warrant. The jury did hear the part of an audio recording in which Mr. McLemore apparently acknowledged hearing the police tell him to open the door so they could check on the occupants. The jury returned a verdict of guilty.

Mr. McLemore appealed to the superior court, which affirmed:

> (1) Defendant has not established that the court erred in denying the Knapstad motion. The evidence was sufficient to support a prima facie showing that the defendant committed the crime of obstructing pursuant to State v. Steen, 164 Wn. App. 789 (2011). (2) Further the evidence was sufficient to find beyond a reasonable doubt the defendant's guilt. (3) The trial court did not abuse its discretion in suppressing evidence of the defendant's belief he was exercising a const[tituional] right as it was irrelevant evidence and not impactful on the elements of the crime.

Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

> (1) If the decision of the superior court is in conflict with an [appellate] decision; or
> (2) If a significant question of [constitutional] law is involved; or
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

Mr. McLemore seeks discretionary review under RAP 2.3(d)(2), (3), and (4). He argues that he is raising an issue of first impression under Washington law, which he characterizes as: whether a person exercising his rights under the 4th Amendment and Article I, section 7 can be found guilty of obstructing for not opening a door to his home for a warrantless search. He argues that there are federal and out of state cases that support his argument that a person's passive refusal to consent to a warrantless search is privileged conduct that cannot be considered evidence of obstruction. See Motion for Discretionary Review at 9-13. He argues that Washington law requires evidence of some *conduct* in order to establish obstruction.

Washington courts require some conduct in addition to pure speech in order to establish obstruction of an officer. The requirement addresses the concern that police could use the obstruction statute to detain and arrest a person based solely on his speech. State v. E.J.J., 183 Wn.2d 497, 502-04, 354 P.3d 815 (2015); State v. Williams, 171 Wn.2d 474, 478, 251 P.3d 877 (2011). The present case is not one in which Mr. McLemore was charged and convicted of obstruction based solely on speech.

Nor is this a case in which police made a warrantless entry into the defendant's home in the absence of exigent circumstances. See State v. Bessette, 105 Wn. App. 793, 21 P.3d 318 (2001) (officer saw juvenile holding a beer bottle, chased him to Bessette's home, who refused the officer entry without a warrant; there were no exigent circumstances; superior court properly reversed district court judgment and sentence convicting Bessette of obstruction).

The trial court and superior court reasoned that this case is more like State v. Steen, 164 Wn. App. 789, 265 P.3e 01 (2011), rev. denied, 173 Wn.2d 1024 (2012). In Steen, police responded to a report of a disturbance involving a woman and possibly two men. Upon arriving, officers saw a woman exit a trailer on the property; she looked visibly upset. Officers looked around the property for other persons, finding no one. The woman did not have a key to the trailer. The officers knocked loudly on the trailer door for several minutes, identified themselves, and told the occupants to come out. Because the officers were concerned that someone in the trailer might need emergency assistance, one of them entered through an open window and unlocked the door. Steen came out of a bedroom and said he was sleeping. Officers handcuffed Steen and put him in the back of the patrol car. Steen refused to provide his name and date of birth. He was eventually identified and arrested on an outstanding warrant, and was charged with obstruction. The trial court concluded that the community caretaking exception to the warrant requirement justified the police warrantless entry, and Steen did not challenge this ruling. See State v. Smith, 165 Wn.2d 511, 522, 199 P.3d 386 (2009) (community caretaking exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police to render aid or assistance or when making routine checks on health and safety); Steen, 164 Wn. App. at 796, n.1. Steen was convicted of obstruction. The superior court affirmed, and Steen sought further review, challenging the sufficiency of the evidence. Among other things, Steen argued that his refusal to provide his name and birthdate was insufficient to establish obstruction. The court agreed, but the majority of the court further reasoned that Steen's refusal to open the trailer door and exit, when commanded to do so by officers lawfully entering pursuant to their community care function, amounted to conduct punishable under the obstruction statute. Steen, 164 Wn. App. at 801-02.

Here, Mr. McLemore argues that he did nothing other than refuse the officers entry into his home and that this passive refusal cannot constitute obstruction. Phrased as such, Mr. McLemore arguably raises a significant issue of constitutional law and/or an issue of public interest. But as in Steen, the officers had ample reason to be concerned about the welfare of individuals inside the home; they heard screaming and yelling when they arrived and twice heard breaking glass. The woman inside said she was holding a baby. Mr. McLemore refused to open the door to allow the officers to check on the wellbeing of the occupants, and he instructed the woman to say she was ok. Mr. McLemore does not argue that the officers warrantless entry under the community caretaking function was improper.

A person commits obstruction by willfully hindering, delaying, or obstructing a law enforcement officer in the discharge of his or her official powers or duties. RCW 9A.76.020. Steen, 164 Wn. App. at 798. It is undisputed that Mr. McLemore's refusal to open the door was willful. And there was evidence from which a rational trier of fact could find beyond a reasonable doubt that he hindered, delayed or obstructed the officers in performance of their community caretaking function. Steen, 164 Wn. App. at 800.

To the extent Mr. McLemore argues that the trial court erred in not allowing him to present evidence of his belief and understanding of the situation – i.e. that he did not have to open the door to the officers absent a warrant – he has not demonstrated a basis for review under RAP 2.3(d).

Therefore, it is

ORDERED that discretionary review is denied."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

Emp

c: The Honorable Steven G. Rosen

Appendix 3

CITY VS McLEMORE

CASE # 61601094D

CT FINDS BASED ON UNDISPUTED FACTS AND CASE OF ST v STEEN 164 WN App 789 THAT THE KNAPSTAD MOTION IS HEREBY DENIED

FACTS CONSIDERED MOST FAVORABLY TO THE NON-MOVING PARTY INCLUDED:

FILED
AUG 17 2016
KCDC - West Division
Shoreline Courthouse

RESIDENTIAL NATURE OF CALL

TIME (2AM) " "

" (34/1/16 " YEAR ie. COLD

WOMAN YELLING SHE IS LOCKED OUT AND WILL "CALL THE POLICE".

OFFICERS HEARING ARGUING, GLASS BREAKING (2X's) +

DELAY NEED TO CALL SHORELINE FIRE FOR TOOLS TO BREAK IN THE RESIDENCE ALL MAKE THE COMMUNITY CARETAKING FUNCTION AN EXCEPTION TO 4th AMENDMENT PRIVACY CONSIDERATIONS.

8/17/16 DOUGLAS T. SMITH

Appendix 4

KING COUNTY DISTRICT COURT
STATE OF WASHINGTON

City of Shoreline
Plaintiff

v.

Solomon McLemore
Defendant

Case No. 6166010940

INQUIRY FROM JURY AND COURT'S RESPONSE

FILED
SEP 29 2016
KCDC - West Division
Shoreline Courthouse

JURY INQUIRY:

Does a person have the legal obligation to follow the police instructions, in this case?

Keith Abernathy 9/29/17 9:45
FOREPERSON DATE/TIME

COURT'S RESPONSE:

You have been provided with the law in this case in the jury instructions.

Marcine Order
JUDGE

DATE & TIME RETURNED TO JURY: September 29, 2016 @ 9:50 AM

KCDCF #24/92

CERTIFICATE OF SERVICE

I certify that on the 5th day of April, 2018, I caused a true and correct copy of this Motion to be served on the following in the manner indicated below:

Carmen McDonald
Prosecuting Attorney
City of Shoreline
Office of the Prosecuting Attorney
17533 15th Ave. NE.
Shoreline, WA 98155
Phone (206)364-2965

Via hand, ABC Courier delivery and electronic delivery.

By: _____
David Iannotti

STEWART MACNICHOLS HARMELL INC PS

April 05, 2018 - 3:04 PM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	City of Shoreline, Respondent v. Solomon McLemore, Petitioner (770942)

The following documents have been uploaded:

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  Certificate of Service
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  The Original File Name was motion for Discretionary Review of the Court of Appeals - Solomon McLemore.pdf

A copy of the uploaded files will be sent to:

- carmenmcdonald@comcast.net

Comments:

The defendant/Petitioner Solomon McLemore is indigent and respectfully requests this court to waive any filing fees. Thank you

---

Sender Name: David Iannotti - Email: david@sbmhlaw.com
Address:
655 W SMITH ST STE 210
KENT, WA, 98032-4477
Phone: 253-859-8840

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