APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF WASHINGTON

CITY OF SHORELINE, RESPONDENT,	)	
v.	)	No. 95707-0
SOLOMON MCLEMORE, Petitioner.	)	Filed APR 18 2019

Gonzalez, J.— This case involves a clash of deeply significant public policies. As a modem society, we condemn domestic violence and have vested police with the power and duty to investigate and to intervene. As a society governed by our constitutions, there are limits on the State's power to punish speech, to demand an individual's active cooperation, or to intrude into a home.

Our homes hold a special place in our constitutional jurisprudence. It is the first place specifically called out in our constitution, and it is called out to give it special protection. Under our constitution, "[n]o person shall be disturbed in his private affairs, *or his home invaded,* without

authority of law." CONST. art. I, § 7 (emphasis added). "In no area is a citizen more entitled to his privacy than in his or her home. For this reason, 'the closer officers come to intrusion into a dwelling, the greater the constitutional protection'." *State v. Young,* 123 Wash.2d 173, 185, 867 P.2d 593 (1994) (citation omitted) (quoting *State v. Chrisman,* 100 Wash.2d 814, 820, 676 P.2d 419 (1984)). Officers must have a warrant or a well-established exception to the warrant requirement before intruding into a home. *Id.* at 181, 867 P.2d 593. Our constitutions also rigorously protect speech, even obnoxious speech. *State v. E.J.J.,* 183 Wash.2d 497, 501, 354 P.3d 815 (2015).

Here, a bystander called 911 about a loud, late-night argument in a home. Police officers, appropriately concerned about domestic violence, went to that home to investigate. They heard an argument and demanded entry. Solomon McLemore and his girlfriend, Lisa,[1] lived in that home, refused to open their door, and told the officers to go away. Instead, the officers broke down that door under a well-established exception to the warrant requirement: community caretaking. However, when the officers found that no one was injured and that there was no evidence of any other crime, they arrested McLemore for obstruction of a law enforcement officer. This arrest appeared to be mostly based on McLemore's belligerent refusal to open his door. He was subsequently convicted of the charge. We must decide whether, under the

[1] We use only Lisa's first name to avoid subjecting her to unwanted publicity. No disrespect is intended.

obstruction statute as properly limited to its constitutional scope and the facts of this case, the conviction may stand. It may not.

FACTS

Late one night, a bystander heard a disturbance and called 911. Three Shoreline police officers responded and heard the sounds of an argument coming from an apartment above a dry cleaner's shop. Police heard a woman shouting, " '[Y]ou can't leave me out here,' " " 'I'm going to call the police,' " and "something along the lines of 'I'm reconsidering our relationship'." Clerk's Papers (CP) at 149. The officers knocked on the door of the apartment, rang the doorbell, announced they were Shoreline police, and demanded to be let in. No one in the apartment replied, but the sounds of the argument stopped. Using amplification and much profanity, the officers insisted they would break down the door if they were not let in. McLemore told them to leave. After several minutes of this, police heard the sound of breaking glass. The officers started to break down the door.

McLemore and Lisa lived together with their six month old son in that apartment. The couple had had a difficult night. McLemore had accidentally broken a window, and Lisa was upset about having to repair it. McLemore had told Lisa he would clean up the glass but instead went to play pool with a friend. When he came home at about one o'clock in the morning, he and Lisa argued. Since their child was asleep, they took their argument outside to a balcony. McLemore claimed he accidentally locked

Lisa outside on that balcony when he came in. Minutes after he let Lisa back in, the police started banging on their door. McLemore told the officers that they were okay, that he was recording the incident, and that they should leave. At McLemore's insistence, Lisa confirmed that she was fine and that she also wanted the officers to leave. Instead, rightfully concerned about domestic violence, the officers broke down her door.

After the door was "completely destroyed," CP at 152, the officers entered with their guns drawn, handcuffed McLemore, and put Lisa and McLemore into separate police cars. Officers determined Lisa was not injured. Lisa told the officers that the couple had not opened the door because they were afraid one of them would be arrested if they did. Officers arrested McLemore for obstruction of a law enforcement officer under RCW 9A.76.020. No other charges were filed.

Before trial, McLemore moved to dismiss the charge on the grounds the city had offered "no evidence that McLemore willfully hindered or delayed an officer's lawful investigation as the law does not require any duty of a person to act in a warrantless search of their residence." CP at 139. The judge denied the motion, concluding that the charges were sustainable under *State v. Steen*, 164 Wash.App. 789, 265 P.3d 901 (2011). The judge also excluded any defense related to McLemore's assertion that the officers did not have the right to enter without a warrant.

In closing argument, the city stressed that most of the elements were not in dispute. Instead, the "element that gets the bulk of the argument ... and the bulk of the scrutiny in this testimony was did the defendant willfully hinder or delay or obstruct the discharge of [officers'] duties." CP at 468. The city characterized McLemore's refusal to open the door as a willful obstruction. Defense counsel argued that "[it is] not McLemore's job to help" the police and that "he did nothing. He simply sat in his house." Id. at 478.

During deliberations, the jury sent out one question: "Does a person have the legal obligation to follow the police instructions, in this case?" Id. at 43. The court responded, "[Y]ou have been provided with the law in this case in the jury instructions." Id. The instructions, including the to-convict instruction, mirrored the pattern jury instructions, and no specific instruction on a citizen's obligation to open a door to a warrantless entry was included. See, e.g., id. at 59; 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 120.02, at 519 (4th ed. 2016). McLemore was convicted.

McLemore appealed, first to the superior court, then to the Court of Appeals, and finally here. We granted review. *City of Shoreline v. McLemore*, 191 Wash.2d 1001, 422 P.3d 916 (2018).

ANALYSIS

We stress that we are not asked to determine whether the officers' forced entry in McLemore's

home was lawful. McLemore, wisely, does not challenge the trial court's conclusion that the officers were exercising their community caretaking function at the time. Based on this record, the officers had the lawful power to enter McLemore's home to assess whether domestic violence had occurred and to take appropriate action if it had. See *Danny v. Laidlaw Transit Servs., Inc.,* 165 Wash.2d 200, 208-19, 193 P.3d 128 (2008) (plurality opinion) (surveying Washington's public policy of combating domestic violence); ch. 10.99 RCW (establishing that domestic violence is a serious crime and setting forth minimum standards for official responses).[2] Analogously, officers have the statutory authority to break into a home to make an arrest "if, after notice of [their] office and purpose, [they] be refused admittance." RCW 10.31.040. It is undisputed that the officers here responded appropriately and lawfully to a potential domestic violence situation in which both Lisa and the child reasonably appeared in immediate danger.

But McLemore was not charged with a crime of domestic violence. Instead, he was charged with

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[2] The dissent states that "everyone, including McLemore, agrees that the officers responding to the domestic violence call had the constitutional authority to demand entry pursuant to the community caretaking exception to the warrant requirement" and that "McLemore did have a duty to comply with lawful police orders to open the door." Dissent at 1, 8. We respectfully disagree with this characterization of the case. We agree that the officers had the constitutional authority to enter the home pursuant to the community caretaking exception to the warrant requirement. We do not agree that McLemore had a duty to comply with the police's demand to open the door.

violating RCW 9A.76.020(1), which provides in relevant part 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." In effect, McLemore contends that this statute cannot be constitutionally applied to his inaction. "We review such constitutional challenges de novo. In the context of the First Amendment, this requires a review of the record to determine that the conviction could not have been based only on constitutionally protected speech." *E.J.J.*, 183 Wash.2d at 501, 354 P.3d 815 (citation omitted) (citing *State v. Abrams*, 163 Wash.2d 277, 282, 178 P.3d 1021 (2008)); U.S. CONST. amend. I.

This court has long "noted that [obstruction] statutes can 'result in disturbing intrusions into an individual's right to privacy and can implicate other rights specifically enumerated in the Bill of Rights.' " State v. Williams, 171 Wash.2d 474, 481, 251 P.3d 877 (2011) (quoting State v. White, 97 Wash.2d 92, 97, 640 P.2d 1061 (1982)). "To save the obstruction statute from being unconstitutionally overbroad in a First Amendment setting, we have construed the statute narrowly. Our cases have consistently required conduct in order to establish obstruction of an officer." E.J.J., 183 Wash.2d at 501-02, 354 P.3d 815 (citing *Williams*, 171 Wash.2d at 485, 251 P.3d 877). We narrowly construe the obstruction statute even when the parties are not directly raising a constitutional challenge. *Williams*, 171 Wash.2d at 477-78, 251 P.3d 877.

We use this narrow construction for two reasons. First, we are required to interpret statutes as constitutional, if possible, and our narrowing construction accomplishes this task. See *In re Pers. Restraint of Matteson*, 142 Wash.2d 298, 307, 12 P.3d 585 (2000) (quoting *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wash.2d 503, 510, 730 P.2d 1327 (1986)). We also limit the scope of this statute to avoid chilling the exercise of constitutional rights. See *State v. Rupe*, 101 Wash.2d 664, 705, 683 P.2d 571 (1984) (plurality opinion) (citing *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981)); see also *E.J.J.*, 183 Wash.2d at 501-02, 354 P.3d 815.

Criminalizing the refusal to open one's own door to a warrantless entry would be enormously chilling and inconsistent with our deeply held constitutional values. As the United States Supreme Court observed:

> From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle. As early as the 13th Yearbook of Edward IV (1461-1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party. Remarks attributed to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches incident to the

enforcement of an excise on cider, eloquently expressed the principle:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

Miller v. United States, 357 U.S. 301, 306-07, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) (footnotes omitted) (quoting THE OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953)). Even under the more limited protections afforded by the Fourth Amendment than our own constitution, "[w]hen 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." *Kentucky v. King*, 563 U.S. 452, 469-70, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (citing *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion)); U.S. CONST. amend. IV; see also *United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978) (holding the right to refuse a warrantless entry is not a crime or evidence of a crime (citing *Camara v. Mun. Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *District of Columbia v. Little*, 339 U.S. 1, 7, 70 S.Ct. 468, 94 L.Ed. 599 (1950))).

Similarly, our Court of Appeals found the refusal to allow an officer into a home without a warrant was not sufficient to sustain an obstruction conviction. *State v. Bessette*, 105 Wash.App. 793, 799, 21 P.3d 318 (2001). The officer had been pursuing a juvenile who was spotted holding a beer bottle. *Id*.

Under the limited construction of the statute required by our constitution, a defendant's conduct that amounts to passive delay will not sustain an obstruction charge.[3] As we ruled recently in a case where a juvenile defendant refused to retreat into his home while police were arresting his sister in the front yard:

> 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 consistent[ ] with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances."

E.J.J., 183 Wash.2d at 506, 354 P.3d 815 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501-02, 69 S.Ct. 684, 93 L.Ed. 834 (1949)). Lack of cooperation does not become obstruction of justice merely because it causes the police delay. "As

[3] The dissent claims that "refusal to obey lawful orders of law enforcement has always been deemed sufficient conduct to support an obstruction conviction." Dissent at 11. We have never so held, and, under our limiting construction of the obstruction statute, it cannot be.

a general proposition, there is no obligation to cooperate with the police." *State v. D.E.D.*, 200 Wash.App. 484, 494, 402 P.3d 851 (2017) (citing *State v. Budik*, 173 Wash.2d 727, 272 P.3d 816 (2012)). "The duty imposed by the obstructing statute is not to hinder or delay the police investigation; there is no duty to cooperate." *Id.* at 495, 402 P.3d 851 (citing *State v. Holeman*, 103 Wash.2d 426, 693 P.2d 89 (1985)).[4] While cooperation with the police might have been wise, the failure to do so was not criminal under these circumstances.

The city analogizes this to cases where officers had a warrant or other court order. But the officers here did not have a warrant or other court order. No impartial magistrate authorized the intrusion. These cases are not helpful to the city. See, e.g., *State v. Miller*, 74 Wash.App. 334, 873 P.2d 1197 (1994). The city also analogizes to cases where a defendant actively resisted officers' warrantless entry. In *State v. Line*, the defendant physically struggled with officers, ripping their clothing. 121 Haw. 74, 81, 214 P.3d 613 (2009). In *Dolson v. United States*, the court stressed that "one has a Fourth Amendment right to deny police officers and other government officials a warrantless entry into

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[4] Indeed, the jury's question during deliberation, "Does a person have the legal obligation to follow the police instructions, in this case?" touches on this vital principle. CP at 43. We do not fault the judge for not answering it during deliberations. But this case does turn on when a person has a legal obligation to follow an officer's directions.

(continued . . .)

one's home, and thus one's assertion of this right cannot serve as the basis for a criminal conviction or evidence of a crime." 948 A.2d 1193, 1201 (D.C. 2008) (citing *Camara*, 387 U.S. at 540, 87 S.Ct. 1727; *Little*, 339 U.S. at 7, 70 S.Ct. 468; *Prescott*, 581 F.2d at 1350-51). The court declined to extend that principle to locking and holding a gate closed against an officer in pursuit. *Id.* at 1202.[5] There was no evidence here that McLemore locked the door to exclude officers, held it closed, or physically resisted. These cases are not helpful to the city either.

In contrast, in the vast majority of cases called to our attention, courts have held that there is no obligation to open a home to an officer's warrantless demand for entry. The city of Columbus, for example, prosecuted a man who refused to open the door to allow officers responding to a potential domestic violence call to enter his home. *City of Columbus v. Michel*, 55 Ohio App.2d 46, 47-48, 378 N.E.2d 1077 (1978). Officers spoke with the person who made the call, saw broken glass, knocked for 7 to 10 minutes, and told the occupants to either let them in or have their door broken down. *Id.* at 46-47, 378 N.E.2d 1077. The court noted that the officers were "justified in breaking open the door of the apartment to determine whether anyone was

[5] This, of course, is what distinguishes Dolson's conduct from McLemore's. Dolson shut his gate, locked it, and held it shut to keep out the police. Dolson, 948 A.2d at 1197. McLemore refused to open an already-locked door. Because of Dolson's active resistance, he was not entitled to a passive resistance instruction. Id. at 1201. McLemore did not resist, he simply did not open the door. But see dissent at 16 (treating Dolson's active resistance as analogous).

injured in the apartment." *Id.* at 48, 378 N.E.2d 1077. But the "defendant's failure to open the door to the apartment is not made a crime" under the ordinance. Id.; see also *Beckom v. State*, 286 Ga.App. 38, 41, 648 S.E.2d 656 (2007) (refusing to open the door or answer the phone, "without more, does not constitute obstruction of the police, even if it is the police doing the knocking and ringing"); *State v. Berlow*, 284 N.J.Super. 356, 364, 665 A.2d 404 (Law Div. 1995) (purpose of both the Fourth Amendment and the parallel provision of the New Jersey Constitution "is to stop governmental intrusion at the door. One cannot be penalized for passively asserting that right"). Recently, the New Jersey Supreme Court, on almost identical facts, unanimously held failure to act was not obstruction. *State v. Fede*, 202 A.3d 1281 (N.J.2019).

The one exception to these cases brought to our attention by the city is *Steen*, 164 Wash.App. 789, 265 P.3d 901. Over a vigorous dissent, *Steen* held that the failure to open the door and leave a travel trailer when commanded to by an officer exercising community caretaking functions can constitute obstruction. *Id.* at 800, 265 P.3d 901.

But the *Steen* court relied heavily on case law that involved motor vehicles, not homes. See *id.* at 800-02, 265 P.3d 901 (discussing *State v. Contreras*, 92 Wash.App. 307, 966 P.2d 915 (1998)). In *Contreras*, police responded to a report of a possible vehicle prowl and found Contreras sitting in the car. Contreras, who seemed " 'out of it,' " did not raise his hands, did not exit the vehicle, and gave only a first name. 92 Wash.App. at 309-10, 966 P.2d 915.

Contreras was arrested for (though not charged with) obstruction of a law enforcement officer. *Id.* at 309, 966 P.2d 915. Contreras argued there was insufficient grounds for the arrest because he merely refused to speak to the officer. The court noted that mere refusal to talk to an officer is insufficient grounds to support an arrest for obstruction. But "Contreras did more than merely refuse to talk. He also disobeyed the officer's orders to put his hands up in view of [the officer], to exit the car, to keep his hands on top of the car, and to provide his name." *Id.* at 316, 966 P.2d 915.

Not surprisingly, *Contreras* itself also relied largely on cases involving motor vehicles. See *Contreras*, 92 Wash.App. at 316-17, 966 P.2d 915 (citing *State v. Hudson*, 56 Wash.App. 490, 497-98, 784 P.2d 533 (1990); *State v. Little*, 116 Wash.2d 488, 497, 806 P.2d 749 (1991) (plurality opinion); *State v. Mendez*, 88 Wash.App. 785, 792-93, 947 P.2d 256 (1997), *rev'd*, 137 Wash.2d 208, 970 P.2d 722 (1999); *City of Sunnyside v. Wendt*, 51 Wash.App. 846, 851-52, 755 P.2d 847 (1988)). *Hudson, Mendez*, and *Wendt* all implicated statutes that require drivers to cooperate with law enforcement. *Little* was brought under a former version of the obstruction statute that was significantly revised after being repeatedly held unconstitutional. See S.B. REP. ON S.B. 6138, 53d Leg., Reg. Sess. (Wash. 1994); *White*, 97 Wash.2d at 103, 640 P.2d 1061 (describing the previous version of the statute as "flagrantly unconstitutional"). Washington law imposes on drivers and witnesses to traffic accidents a duty to cooperate with officers in many circumstances. E.g., RCW 46.61.020, .021. While

Washington law vests officers with the statutory authority to break into a house under certain circumstances, see, e.g., RCW 10.31.040, there is no law requiring people to open their own doors to officers seeking warrantless entry.

Location matters. A home is entitled to constitutional protections that a moving vehicle is not. See *State v. Ferrier*, 136 Wash.2d 103, 112, 960 P.2d 927 (1998). " '[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection.' " *Id.* (internal quotation marks omitted) (quoting *Young*, 123 Wash.2d at 185, 867 P.2d 593). To the extent *Steen* suggests it is obstruction to not open the door to a home in response to a warrantless knock, it is inconsistent with Washington law and is overruled. See *Williams*, 171 Wash.2d at 485, 251 P.3d 877; *White*, 97 Wash.2d at 97, 640 P.2d 1061.

Under the limited construction we are required to give the obstruction statute to render it constitutional, the city presented insufficient evidence to sustain this conviction. Taken in the light most favorable to the city, McLemore refused to open the door, loudly insisted he had no obligation to do so, and told Lisa to tell the officers she was okay. None of this is punishable "conduct" under our limiting construction of the obstruction statute. Further, our review of the record leaves us with an abiding concern the jury could have convicted on speech alone. See *E.J.J.*, 183 Wash.2d at 501, 354 P.3d 815 (citing *Abrams*, 163 Wash.2d at 282, 178 P.3d 1021). Much of the evidence focused on what McLemore and the officers shouted at one another.

There was no evidence presented that McLemore closed his door to prevent the officers' entry or prevented Lisa from opening it. Accordingly, we reverse.[6]

CONCLUSION

We hold the city presented insufficient evidence to sustain McLemore's conviction and remand to the trial court for further proceedings consistent with this opinion.

s/ Gonzalez, J.

WE CONCUR:

s/ Fairhurst, C.J.

s/ Johnson, J.

s/ Gordon McCloud, J.

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[6] Given our disposition, we do not reach the remaining arguments. We note in passing that it is questionable whether a defendant can appeal the denial of a *Knapstad* motion after the case has gone to trial. *State v. Zakel*, 61 Wash.App. 805, 811 n.3, 812 P.2d 512 (1991) (declining to review a denial of a *Knapstad* motion after trial); *State v. Knapstad*, 107 Wash.2d 346, 729 P.2d 48 (1986); CrR 8.3(c)(3) ("A decision denying a motion to dismiss under this rule is not subject to appeal under RAP 2.2.").

STEPHENS, J. (dissenting)

In asking this court to overturn his conviction, Solomon McLemore appeals broadly to privacy rights, free speech rights, and the fact that individuals owe no duty to assist law enforcement. These appeals obscure the fact that everyone, including McLemore, agrees the officers responding to the domestic violence call had the constitutional authority to demand entry pursuant to the community caretaking exception to the warrant requirement. And, settled precedent makes clear that refusing to obey lawful commands to take a specific action is conduct sufficient to support an obstruction conviction. I disagree with the lead opinion that McLemore's conviction rests "mostly" on speech and involves only passive "inaction" while inside his home. Lead opinion at 1162, 1163–64, 1166–67.

I would continue our long tradition of holding that individuals cannot willfully disobey law enforcement orders without facing legal consequences. Though no one owes an affirmative obligation to assist the police, obstruction in violation of RCW 9A.76.020 involves more than the mere refusal to assist. On the night in question, McLemore's right to privacy in his home yielded to the officers' authority to demand entry in order to verify the safety of the occupants inside. His obstruction conviction rests not on pure speech or mere inaction but on his willful conduct that hindered, delayed, or obstructed law enforcement in the discharge of their official duties. I would affirm

the Court of Appeals and uphold McLemore's conviction.

ANALYSIS

This case arises in the context of officers responding to a late-night domestic disturbance call. Upon arriving outside McLemore's building, officers heard shouting and then the sound of glass breaking. When they loudly knocked on the door, all went silent. Clerk's Papers (CP) at 304, 324, 362, 365. Despite being given several explanations as to why officers were at his door and several chances to comply, McLemore refused to open the door to allow officers to verify the safety of McLemore's girlfriend, Lisa,[1] and the couple's child. Deputy Ben Emmons testified:

> [I gave v]ery basic commands, clear and concise. This is Shoreline Police Department, please open the door. Shoreline Police Department, come and talk to us. Shoreline Police Department, let me see your face. Shoreline Police Department, call 911. I want to give as many options as possible. I know some people are antsy about contacting the police face to face so I took that into account. If they wanted to call 911 that was fine. If they want to peek over the balcony that was fine too. I just wanted to

[1] Consistent with the lead opinion, and to avoid subjecting her to unwanted publicity, I refer to McLemore's girlfriend solely by her first name. No disrespect is intended.

> establish some kind of back and forth and I was getting none.

CP at 364-65. When officers finally did get a response, they once again clearly explained that their intention was to verify the safety of all occupants in the home:

> So as we continued kind of in this repetitive loop of conversation, at some point a female comes to the door and he said tell them you're okay. We had been telling him we need to make sure that everyone is okay. We need to know that everyone is okay because of what is going on here. So the female at some point comes to the door and he says, tell them you're okay. The female said I'm okay. A[t] this point they both said something like we're scared or something of that nature. But we tell them, we can't just take your word for it. You telling her to tell us you're okay isn't enough for us to verify that you're okay. He could be forcing you to say this. We have no idea. You're behind a door and we have no idea what's going on. We need to investigate.

CP at 330-31 (Test, of Deputy Jeremy Dallon).[2] The record continues to detail repeated instances

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[2] The lead opinion downplays the fact that McLemore told Lisa how to respond, see lead opinion at 1162 ("At McLemore's insistence, Lisa confirmed that she was fine and that she also wanted the officers to leave."), ultimately concluding there is (continued . . .)

where the officers make clear that they are giving a lawful order to open the door so they can verify the safety of the occupants inside. See CP at 302, 304-05, 314-15, 324-31, 361-80. McLemore acknowledged this fact in his testimony:

> They said we're coming in. We need to come in. We need to make sure everybody is okay. And I asked them all the relevant questions as to why—legal entry. Do you have anything to show me that shows me you can come in?
>
> ....
>
> ... They tell me they don't have to. They don't need to show me anything to get in.

"no evidence" he did anything to prevent her from opening the door. Id. at 1166–67. The testimony and a recording of the incident support a different conclusion. Deputy Dallon testified that Lisa "sounded like she had been crying. ... [I]t didn't sound like a calm, normal individual." CP at 331. He explained, "[McLemore] saying tell them you're okay seemed very coercive"; officers "have the legal obligation to investigate to make sure that someone who needs help isn't being prevented from getting help because of various reasons." Id. On cross-examination, McLemore grudgingly acknowledged that he told Lisa she needed to talk to the police and she needed to act mad. CP at 440. He also told her that if she opened the door and went outside, he was going to jail. CP at 441. Given this evidence, even if McLemore's own refusal to open the door might be characterized as mere "inaction"—a dubious characterization under our case law—evidence that he directed Lisa's response to the officers' commands plainly supports the jury's finding of obstruction.

(continued . . .)

> And then I tell them, well then in that case you need to go away.

CP at 414. McLemore acknowledged that the officers even gave him the option to call 911 to verify that they were the police. CP at 438; see also CP at 329 ("You can call the police, 911. They'll tell you that we're the police, let us in.") (Test, of Deputy Dallon).

Though the lead opinion describes the issue in this case as whether an individual has the duty to assist a warrantless search or seizure, the officers made no demand to search the home. See CP at 294-381. The record makes clear that the officers wanted to fulfill their statutory duty to verify Lisa's safety as part of their community caretaking responsibility.[3]

McLemore's conduct falls squarely within the ambit of the obstruction statute, and his conviction is fully consistent with constitutional guaranties of privacy and free speech. Because there is no

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[3] RCW 10.99.030 imposes specific requirements on law enforcement when responding to a domestic violence report. For example, officers are required to "take a complete offense report including the officer's disposition of the case" and "advise victims of all reasonable means to prevent further abuse, including advising each person of the availability of a shelter or other services in the community, and giving each person immediate notice of the legal rights and remedies available." RCW 10.99.030(6)(b)-(7). The responding officers testified that it would have been difficult to fulfill their statutory duties in this instance without a visual verification of Lisa's safety and the ability to speak with her separate from McLemore. CP at 330-31, 363, 371.

constitutional infirmity in McLemore's conviction, I believe our judicial role requires us to apply the statute the legislature has seen fit to adopt and the executive branch has seen fit to enforce, and to respect the jury's verdict. To explain why, I first address the statute, RCW 9A.76.020, and then consider the privacy and free speech rights asserted to excuse McLemore's violation of the statute.

I. Sufficient Evidence Supported the Jury's Finding That McLemore Committed Obstruction under RCW 9A.76.020

The statute under which McLemore was convicted 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). It is undisputed that the officers responding to the 911 call were discharging their official powers or duties. Mot. for Discr. Review at 3; lead opinion at 1163. Absent a constitutional privilege, McLemore had a statutory duty not to willfully hinder, delay, or obstruct law enforcement.

The lead opinion frames this case in terms of a "duty to cooperate" with law enforcement and invokes the general rule that no such duty exists. See lead opinion at 1164–65. In so doing, it characterizes McLemore's conduct as involving only "passive delay" and observes that behavior causing minor delay or inconvenience does not amount to obstruction. *Id.* at 1164–65 (quoting *State v. E.J.J.*, 183 Wash.2d 497, 506, 354 P.3d 815 (2015)). I believe

this misstates both the facts of this case and the valid reach of the obstruction statute. While individuals interacting with the police owe no affirmative duty to cooperate, it is well recognized they may not engage in conduct that interferes in specific ways with law enforcement officers' discharge of their powers or duties. See *State v. D.E.D.*, 200 Wash.App. 484, 494-95, 402 P.3d 851 (2017) (recognizing valid reach of obstruction statute despite no general obligation to cooperate with a police investigation); *State v. Steen*, 164 Wash.App. 789, 802 n.8, 265 P.3d 901 (2011) (recognizing obstruction statute does not criminalize a "citizen's mere refusal to assist police officers performing their community caretaking duties"). Hindering or causing material delay in lawful police efforts is punishable as obstruction. See *D.E.D.*, 200 Wash.App. at 495, 402 P.3d 851 (describing examples of obstruction: interfering in the arrest of another, refusing to obey commands designed to control the scene, and failing to obey commands to exit a car and keep hands in sight).

In *D.E.D.*, the Court of Appeals overturned an obstruction conviction because the charged conduct involved only "[p]assive resistance" to an unlawful arrest. 200 Wash.App. at 496, 402 P.3d 851. Central to the reasoning in *D.E.D.* was the fact that a separate resisting arrest statute (RCW 9A.76.040(1)) imposed a duty not to resist only in situations of a lawful arrest and the defendant's arrest was plainly unlawful. *Id.* Under the obstruction statute, the court held that D.E.D. did not "hinder or obstruct the officer since he had no

obligation to cooperate with the officer." *Id.*[4] The court cautioned against extending its narrow holding beyond the context of "[p]assive resistance consistent with the lack of a duty to cooperate." *Id*.

Unlike the juvenile in *D.E.D.*, McLemore did have the duty to comply with lawful police orders to open the door and allow officers to verify Lisa's safety. Describing his refusal to open the door in this context as akin to *D.E.D.'s* "passive resistance" requires ignoring that McLemore testified he made an intentional—found to be willful—decision to disobey a direct, lawful order. I recognize that it may be difficult in some situations to distinguish between an affirmative duty to cooperate and a duty not to hinder or delay police, but this is not one of them.

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[4] This is not to say that individuals may violate unlawful police commands without legal consequences. The court in *D.E.D.* surveyed precedent recognizing that a person "cannot respond to police illegality by performing a criminal act in return." 200 Wash.App. at 492, 402 P.3d 851; see also *State v. Holeman*, 103 Wash.2d 426, 693 P.2d 89 (1985) (illegality of arrest did not justify hindering officers). The main rationale for this rule is public safety: the right to be free from illegal police conduct "can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom." *State v. Westlund*, 13 Wash.App. 460,467, 536 P.2d 20 (1975); see also *United States v. Pryor*, 32 F.3d 1192, 1195 (7th Cir. 1994) (stating the "indignity and inconvenience" of an improper arrest is less serious than injuries "engendered by encouraging suspects to make their own snap judgments about the legality of official demands"); *State v. Hatton*, 116 Ariz. 142,147-48, 568 P.2d 1040 (1977) ("If resistance to an arrest or a search made under the color of law is allowed, violence is not only invited but can be expected.").

Indeed, the facts of this case align with the cases the court in *D.E.D.* was careful to distinguish. 200 Wash.App. at 495, 402 P.3d 851; see *State v. Little*, 116 Wash.2d 488, 498, 806 P.2d 749 (1991) (plurality opinion) (flight from officers and refusal to stop when ordered to do so constituted obstruction of a public servant); *Steen*, 164 Wash.App. at 802, 265 P.3d 901 (refusal to open trailer door and exit with hands up held punishable under the obstruction statute); *State v. Contreras*, 92 Wash.App. 307, 316-17, 966 P.2d 915 (1998) (refusal to comply with orders to keep hands in view, exit the vehicle, and keep hands on top of the car supported obstruction conviction). The lead opinion recognizes the affinity between this case and these prior authorities, and its only response is to overrule *Steen* and to distinguish any case involving a car or a prior version of the obstruction statute. Lead opinion at 1165–66. This approach does not withstand scrutiny.

The lead opinion's dismissal of *Steen* appears to rest solely on the fact that *Steen* "relied heavily on case law that involved motor vehicles, not homes." Id. at 1166 (citing *Contreras*, 92 Wash.App. 307, 966 P.2d 915). This undeveloped analysis misapprehends the key distinction in Washington law that is explained in *Steen*—between the duty to follow lawful orders given by law enforcement as opposed to no duty to assist with an unlawful arrest. Compare *Steen*, 164 Wash.App. at 801, 265 P.3d 901 (duty to obey officer's commands), with *D.E.D.*, 200 Wash.App. at 496, 402 P.3d 851 (no duty to cooperate in unlawful arrest). Far from supporting an automobile/home distinction, *Steen* explicitly

states that it is following the precedent set in *Contreras* that "an individual's failure to follow police officers' lawful orders authorized the individual's warrantless arrest for obstruction." *Steen*, 164 Wash.App. at 801, 265 P.3d 901. Just as failure to comply with officer's demands to keep his hands in view and exit the vehicle constituted conduct for the purposes of the obstruction statute under *Contreras*, so too "refusal to open the trailer door and exit the trailer with his hands up" constituted conduct in *Steen* sufficient to support an obstruction conviction. *Id.* at 801-02, 265 P.3d 901. The decision in *Steen* is not an outlier but instead a correct application of our precedent recognizing that failure to obey a lawful order constitutes conduct sufficient for an obstruction conviction.

That precedent includes this court's decisions in *Williams* and *Little*. See *State v. Williams*, 171 Wash.2d 474, 251 P.3d 877 (2011); *Little*, 116 Wash.2d at 488, 806 P.2d 749. In *Williams*, we traced the development of obstruction statutes and free speech protections and narrowly construed RCW 9A.76.020 to require some conduct in addition to making false statements in order to support a conviction. 171 Wash.2d at 481-82, 251 P.3d 877. In the course of our analysis, we cited *Contreras* ("refusal to put hands up in view, to exit the car, and to keep hands on top of car as instructed and providing a false name") as an example of what constitutes conduct as opposed to pure speech. *Id.* at 483, 251 P.3d 877. In *Little*, which involved a *Terry*[5]

[5] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

stop at an apartment complex, we recognized that the willful refusal to obey direct police orders violated the obstruction statute. 116 Wash.2d at 498, 806 P.2d 749 ("flight from the officers and refusal to stop when ordered to do so constituted an obstruction of a public servant").

The lead opinion attempts to minimize *Little* as having been decided under a former version of the obstruction statute, which we later declared unconstitutional. Lead opinion at 1166. The aspect of the statute we invalidated, however, involved a requirement that individuals stop and identify themselves when directed by law enforcement. See *State v. White*, 97 Wash.2d 92, 96-97, 640 P.2d 1061 (1982). As recently explained in *E.J.J.*, the constitutional problem with the former statute was a provision that forced individuals to speak up and provide information to law enforcement, i.e., it punished pure speech. 183 Wash.2d at 502, 354 P.3d 815. But, we recognized that our decision in *White* "left intact subsection (3) [of former RCW 9A.76.020 (1975)], which made it a misdemeanor to ' "knowingly hinder, delay, or obstruct" ' a public servant." *Id.* (quoting *White*, 97 Wash.2d at 96, 640 P.2d 1061 (quoting former RCW 9A.76.020)). While the wording of the obstruction statute has evolved to recognize that speech alone cannot support an obstruction conviction, see *Williams,* 171 Wash.2d at 481-83, 251 P.3d 877, the refusal to obey lawful orders of law enforcement has always been deemed sufficient conduct to support an obstruction conviction when it hinders, delays, or obstructs the performance of official duties. See *id.*; *Little*, 116 Wash.2d at 498, 806 P.2d 749; *Contreras*, 92

Wash.App. at 317, 966 P.2d 915; *Steen*, 164 Wash.App. at 802, 265 P.3d 901. As a result, the relevant question in this case is not whether McLemore was in his home or in a vehicle, as the lead opinion would suggest. Instead, the relevant question, according to precedent, is whether McLemore's refusal to obey lawful police orders hindered, delayed, or obstructed the officers in the performance of their duties.

Sufficient evidence exists to support McLemore's conviction for obstruction based on his willful failure to obey a lawful police order to open the door (or to allow Lisa to open the door) in order for officers to verify the safety of the occupants inside the home. It cannot be denied that McLemore's actions had specific consequences that both hindered and delayed the officers from performing their community caretaking duties. Officers spent several minutes trying to convince McLemore or Lisa to open the door; then, after hearing glass shattering, they attempted unsuccessfully to break the door or lock with a pickax, before finally having the Shoreline Fire Department arrive with breaching tools to help police forcibly enter the home. All essential elements of the obstruction statute are supported by evidence sufficient to sustain McLemore's conviction, and we should not disturb it unless McLemore can demonstrate that his conduct was constitutionally privileged. As discussed below, he has not demonstrated that his conviction violates either his privacy rights or his free speech rights.

II. McLemore's Obstruction Conviction Does Not Offend His Privacy Rights under the Fourth Amendment and Article I, Section 7 Because the Officers Acted with Authority of Law

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." While the gold standard for authority of law is a judicially issued warrant, "there are a few ' "jealously and carefully drawn" exceptions' to the warrant requirement which 'provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.' " *State v. Houser*, 95 Wash.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979)). Relevant here, the community caretaking exception "allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." *State v. Thompson*, 151 Wash.2d 793, 802, 92 P.3d 228 (2004). Once the community caretaking exception applies, police officers are allowed to conduct a noncriminal investigation, "so long as it is necessary and strictly relevant to performance of the community caretaking function." *State v. Kinzy*, 141 Wash.2d 373, 388, 5 P.3d 668 (2000).

Both McLemore and the lead opinion acknowledge that the officers responding to the 911

call had authority of law under the community caretaking warrant exception. See Mot. for Discr. Review 8-16; lead opinion at 1163 ("McLemore, wisely, does not challenge the trial court's conclusion that the officers were exercising their community caretaking function at the time."). "Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants" of a home. *State v. Raines*, 55 Wash.App. 459, 465, 778 P.2d 538 (1989), *review denied*, 113 Wash.2d 1036, 785 P.2d 825 (1990). This duty is recognized in statute. RCW 10.99.030(5) provides that "[t]he primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party." In addition, the legislature has decided that it is not enough for a police officer to simply observe the safety of a potential victim; even in cases where the officer has "not exercised arrest powers or decided to initiate criminal proceedings by citation or otherwise," officers are still required to "notify the victim of the victim's right to initiate a criminal proceeding" and advise all parties of the importance of preserving evidence. RCW 10.99.030(6)(a). Bearing these requirements in mind, the lead opinion concedes that "[i]t is undisputed that the officers here responded appropriately and lawfully to a potential domestic violence situation in which both Lisa and the child reasonably appeared in immediate danger." Lead opinion at 1163.

One is left to wonder why, then, the lead opinion embarks on a detailed privacy analysis under the Fourth Amendment of the United States and article I, section 7. Its eloquent exposition of an individual's right to keep the government from crossing the threshold to his home presupposes a different set of facts—officers seeking a warrantless entry without constitutional authority of law. See lead opinion at 1164–65. Here, the officers correctly explained to McLemore that they did not need a warrant to justify the limited intrusion they were seeking. The lead opinion seems to suggest that McLemore's refusal to open the door would be viewed differently had the officers held an actual warrant instead of authority of law under a warrant exception. Lead opinion at 1165. But, it does not explain why. Certainly, from the perspective of a person refusing an officer's command to open a door, there is no reason why the officer's assertion that he has a warrant would be any more persuasive than his assertion that he has other authority of law. Moreover, neither the chilling of privacy rights that the lead opinion is concerned about nor the constitutional authority of law the officers possess varies between the warrant scenario and the warrant exception scenario. The case law the lead opinion cites speaks to a privacy right McLemore did not possess here—the right to refuse entry to officers acting entirely without authority of law under either a warrant or a recognized warrant exception.

In attempting to create legal justification for McLemore's actions, the lead opinion misreads *Dolson v. United States*, 948 A.2d 1193, 1201 (D.C. 2008). Lead opinion at 1165. While *Dolson* explains

that individuals have a Fourth Amendment right to deny police officers warrantless entry into a home, *Dolson* makes clear that "[t]his right to deny entry to a warrantless officer is not unlimited, however, despite the constitutional right involved." *Dolson*, 948 A.2d at 1201. It provides no solace in McLemore's case because, even absent authority of law under an exception to the warrant requirement, Dolson concludes that "just as no one has the right to resist an unlawful arrest, no one has the right to resist an unlawful entry to make an arrest." *Id.* (footnote omitted). This holding is consistent with the precedent noted previously, recognizing that a person's recourse to unlawful police activity is through a court action, not self-help.

Simply stated, McLemore's conduct cannot be excused on the basis of a nonexistent privacy right. His right to deny the officers entry to his home necessarily yields to valid authority of law, under a warrant exception just as surely as under a warrant. While the lead opinion is correct that McLemore's privacy in his home is entitled to greater constitutional protection than a person's privacy in a vehicle or on the street, the greater weight of the privacy interest has no bearing on the question before us. Heightened privacy protections in the home affect the court's determination as to when authority of law exists to justify an intrusion. But regardless of whether individuals are in a home, in a vehicle, or on the street, once they receive a lawful order from law enforcement, they have a statutory duty to comply. Because all parties agree that McLemore received a lawful order from the officers, we cannot excuse his willful refusal to comply with

this order simply because it involved opening the door to his home.

III. McLemore's Obstruction Conviction Is Consistent with Free Speech Protections Because It Does Not Rest on "Speech Alone"

Having established that McLemore had no privacy-based right to disobey lawful police commands and that his refusal to open the door is punishable under the obstruction statute, I turn to the remaining proposition: that McLemore's conviction rests purely on speech rather than conduct. To avoid constitutional infirmities, Washington law requires "conduct in addition to pure speech in order to establish obstruction of an officer." *Williams*, 171 Wash.2d at 485-86, 251 P.3d 877; see also *E.J.J.*, 183 Wash.2d at 502, 354 P.3d 815 ("a conviction for obstruction may not be based solely on an individual's speech because the speech itself is constitutionally protected").

Consistent with prior case law, McLemore's actions constituted punishable conduct and his conviction did not rest on "speech alone." *E.J.J.*, 183 Wash.2d at 503, 354 P.3d 815. His conduct included willfully and repeatedly refusing to open the door, as well as directing Lisa's response to the officers' commands, supporting a jury inference that he prevented her from opening the door. Contrary to the lead opinion's view, it is not enough to observe that "[m]uch of the evidence focused on what McLemore and the officers shouted at one another." Lead opinion at 1167. The cases that have invalidated obstruction convictions on free speech

grounds all involve speech alone without sufficient evidence of accompanying conduct. In *State v. Williamson*, for example, the defendant was charged with obstruction for falsely telling police his name was " 'Christopher Columbus.' " 84 Wash.App. 37, 45, 924 P.2d 960 (1996). Similarly, in *Williams*, the defendant was convicted for giving a false name to police during a traffic stop. 171 Wash.2d at 476, 251 P.3d 877. In *E.J.J.*, we reviewed our state and related federal precedent imposing free speech limits on obstruction convictions and vacated a juvenile adjudication where there was "insufficient evidence of conduct," 183 Wash.2d at 506, 354 P.3d 815, and where we could not "be certain that *E.J.J.'s* conviction was not based on his speech alone," *Id.* at 508, 354 P.3d 815. Here, in contrast, McLemore plainly engaged in conduct in addition to speech, and there is no constitutional infirmity when both speech and conduct are present. See *Williams*, 171 Wash.2d at 477-78, 251 P.3d 877; *Little*, 116 Wash.2d at 498, 806 P.2d 749; *E.J.J.*, 183 Wash.2d at 502, 354 P.3d 815.

Without doubt, our precedent confirms that obstruction statutes may be constitutionally applied to punish individuals for willful conduct in refusing to obey law enforcement directives when such conduct hinders, delays, or obstructs the performance of official duties—even when speech is also involved. Such punishment under the obstruction statute is wholly consistent with constitutional constraints because it does not rest on "speech alone." *E.J.J.*, 183 Wash.2d at 503, 354 P.3d 815; see also *Williams*, 171 Wash.2d at 485, 251 P.3d 877 ("We hew to our jurisprudential history of

requiring conduct in addition to pure speech in order to establish obstruction of an officer."). As discussed above, the metaphysical distinction the lead opinion draws between action and inaction is nowhere to be found in our precedent. When a law enforcement officer tells a person to "put your hands up" or "open the door," the willful refusal to obey this command constitutes conduct—and such conduct violates RCW 9A.76.020.

CONCLUSION

Thankfully, in this case there was no physical harm to any of the parties involved. But recognizing the sort of "privilege to obstruct" that McLemore seeks will encourage individuals to "make their own snap judgments about the legality of official demands," *Pryor*, 32 F.3d at 1195, and "violence is not only invited but can be expected." *Hatton*, 116 Ariz. at 148, 568 P.2d 1040. There is no precedent that supports recognizing this privilege and no constitutional privacy or free speech rights at issue here that justify it. While reasonable minds might disagree about whether the officers or the prosecutor were overzealous in charging McLemore with obstruction or even whether the legislature should criminalize the refusal to obey police orders to open one's door, courts must leave those decisions to other branches of government. Our judicial role is constrained to invalidating arrest and prosecution decisions only when they result in constitutional violations. Because McLemore's conviction does not violate his constitutional rights, I would affirm the Court of Appeals and uphold his conviction.

s/ Stephens, J.

s/ Owens, J.

s/ Yu, J.

s/ Wiggins, J.

APPENDIX B

[FILED APRIL 19, 2019 WASHINGTON STATE SUPREME COURT]

IN THE SUPREME COURT OF WASHINGTON

CITY OF SHORELINE, RESPONDENT,	)	No. 95707-0
v.	)	ORDER AMENDING OPINION
SOLOMON MCLEMORE, PETITIONER,	)	

It is hereby ordered that that the lead opinion of Gonzalez, J., filed April 18, 2019 in the above entitled case is changed as indicated below.

On page 17, line 2 of the slip opinion, beginning with "We", strike all material down to and including "opinion." on line 3 and insert:

> We in the lead opinion would hold the city presented insufficient evidence to sustain McLemore's conviction and remand to the trial court for further proceedings consistent with this opinion. However, we recognize this opinion has garnered only four signatures. "Therefore, there

being no majority for the reversal of the judgment of the trial court, it necessarily stands affirmed, and the order of this court is that the judgment appealed from be and it is hereby affirmed." *Peterson v. City of Tacoma*. 139 Wash. 313, 313, 246 P. 944 (1926).

DATED this 19th day of April, 2019.

s/ Farihurst, CJ
Chief Justice

Approved:

s/ Gonzalez, J.

APPENDIX C

[FILED MAY 30, 2019 WASHINGTON STATE SUPREME COURT]

IN THE SUPREME COURT OF WASHINGTON

CITY OF SHORELINE, RESPONDENT,	)	No. 95707-0
v.	)	ORDER AMENDING OPINION
SOLOMON MCLEMORE, PETITIONER,	)	

It is hereby ordered that the dissenting opinion of Stephens, J., filed April 18,2019, in the above entitled case is amended as indicated below.

On page 2, line 7 of the slip opinion, after "would" strike "affirm the Court of

Appeals and".

On page 20, beginning on line 1 of the slip opinion, after "would" strike "affirm the Court of Appeals and".

DATED this 30th day of May, 2019.

s/ Fairhurst, C.J.
Chief Justice

Approved:

s/ Wiggins, J.

s/ Owens, J.

s/ Stephens, J.

s/ Yu, J.

APPENDIX D

[FILED May 30, 2019 WASHINGTON STATE SUPREME COURT]

THE SUPREME COURT OF WASHINGTON

CITY OF SHORELINE, RESPONDENT,	)	**ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION FOR CLARIFICATION**
v.	)	
	)	No. 95707-0
SOLOMON MCLEMORE, PETITIONER,	)	Court of Appeal No. 77094-2-I
	)	King County No. 16-1-07811-2 SEA

The Court (Justice Madsen did not sit) considered Petitioner's "MOTION FOR RECONSIDERATION TO THE WASHINGTON STATE SUPREME COURT" and "RESPONDENT'S MOTION TO CLARIFY OPINION".

Now, therefore, it is hereby

ORDERED:

That Petitioner Solomon McLemore's motion for reconsideration is unanimously denied. Respondent City of Shoreline's motion to clarify is denied by majority.

DATED at Olympia, Washington this 30th day of May, 2018[sic].

For the Court

s/Fairhurst, C.J.
CHIEF JUSTICE

APPENDIX E

CITY VS MCLEMORE

CASE # 616010940

[FILED AUG 17, 2016 KCDC – West Division Shoreline Courthouse]

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 PARY INCLUDE:

RESIDENTIAL NATURE OF CALL

TIME (2AM) OF CALL

TIME (3/1/16) OF 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.

8/17/2016

s/ Douglas J. Smith, Judge

APPENDIX F

[FILED KING COUNT, WASHINGTON JUNE 02, 2017 SUPERIOR COURT CLERK DEBRA BAILEY TRAIL DEPUTY]

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON,	)	
Appellant,	)	NO. 16-1-07891-3 SEA
	)	DECISION ON RALJ
v.	)	APPEAL
	)	
SOLOMON MCLEMORE,	)	
RESPONDENT,	)	CLERK'S ACTION
_____	)	REQUIRED

This appeal came on regularly for oral argument June 2, 2017 pursuant to RALJ 8.3, before the undersigned Judge of the above-entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reasoning Regarding Assignment of Error:

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 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. right as it was irrelevant and not impactful on the elements of the crime.

IT IS HERBY ORDERED that the cause is: Affirmed; COSTS Waived

REMANDED to King County District Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

DATED: 6/2/2017

s/Steven G. Rosen
Judge

s/ Carmen McDonald
Counsel for Respondent

Approved as to form:
s/David Iannotti 37542
Counsel for Appellant

APPENDIX G

THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

November 29, 2017

CASE #: 77094-2-I
CITY OF SHORELINE, RESPONDENT V. SOLOMON MCLEMORE, PETITIONER

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,

S/Richard D. Johnson
Richard D. Johnson
Court Administrator/Clerk

APPENDIX H

[FILED COURT OF APPEALS DIV I STATE OF WASHINGTON 2018 MAR – 7 PM 12:12]

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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

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.

s/ Cox,. J

s/ Schindler, J.

APPENDIX I

Washington Statutes Annotated
Title 9A Washington Criminal Code

West's RCWA 9A.76.020

9A.76.020. Obstructing a law enforcement officer
Effective May 14, 2001

(1) 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.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.