IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD CARL HOWARD, II, Appellant.	No. 38599-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Richard Carl Howard, II, appeals his conviction for obstruction of a law enforcement officer,[1] arguing that the evidence was insufficient to support his conviction. In his statement of additional grounds for review (SAG),[2] Howard further contends that the evidence was insufficient to support his conviction for unlawful possession of a controlled substance[3] and that his counsel was ineffective. We reverse his obstruction conviction and remand for entry of a conviction for attempted obstruction of a law enforcement officer. Otherwise, we affirm.

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[1] RCW 9A.76.020(1).

[2] RAP 10.10

[3] RCW 69.50.4013

FACTS

On April 29, 2008, Dupont Police Officer Dana Smitley noticed a car with expired registration tabs and conducted a traffic stop in a Jiffy Lube parking lot. He approached the vehicle and asked the driver for his license, registration, and proof of insurance. According to Smitley, when the driver said he had none of those forms of identification, he asked for the driver's name and the driver identified himself as Jason Carl Sacier, gave his birth date as December 28, 1979, and provided four digits of a social security number.

Smitley asked the driver to step out of the vehicle and handcuffed him prior to arrest for having no valid driving license. Smitley conducted a weapons search of the driver's person. During this search, Smitley found a Washington state identification card in the driver's pocket, identifying the driver as Richard Carl Howard. Smitley searched Howard's shoulder bag, which was on Howard's person, and found a blue pill. Smitley asked Howard what the pill was and Howard responded that it was ecstasy. The State's expert witness testified at trial that the pill was the illegal substance, 3,4-methylenedioxymethamphetamine (MDMA). Smitley advised Howard of his *Miranda*[4] rights and placed him in the rear seat of the patrol car.

Howard's trial testimony about the search differs from Smitley's. He testified that he did not give Smitley a false name and, while Smitley took Howard to the patrol car, an off duty police officer, Sergeant Ross Mathison, stopped by on his motorcycle and "browsed" through his car. Report of Proceedings (RP) (Oct. 30, 2008) at 101. After Smitley placed Howard in handcuffs and put him in the rear of the police car, Smitley showed Howard a blue pill and asked him what it was. Howard answered that it looked like a "Flin[t]stone . . . vitamin." RP (Oct. 30, 2008) at

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

103. He stated that Smitley asked Mathison, not him, what the pill was and Mathison replied that the pill was ecstasy. Then both officers searched his person, including the shoulder bag.

Smitley and Mathison both testified that Mathison was at the scene but that he was not involved in the arrest. Mathison also stated that he was "50 to100 feet away on [his] motorcycle" while Smitley searched Howard's car. RP (Oct. 30, 2008) at 86-87. He testified that his only contact with Howard was limited to "small talk." RP (Oct. 30, 2008) at 90.

The State charged Howard with unlawful possession of a controlled substance, first degree driving while in suspended or revoked status in the first degree, and obstruction of a law enforcement officer. A jury found Howard guilty as charged.

Howard appeals.

ANALYSIS

I. Sufficiency of the Evidence

Howard argues that the evidence was insufficient to support a conviction for obstructing a law enforcement officer because his false information did not "in fact" delay Smitley. Br. of Appellant at 4. In his SAG, Howard also claims that the evidence was insufficient to support a conviction for unlawful possession of a controlled substance.

The State concedes that there was insufficient evidence of actual obstruction but argues that sufficient evidence supported a conviction for attempted obstruction of a law enforcement officer. The State also argues that because the attempted obstruction is a lesser included offense of obstruction, "the proper remedy is to remand for judgment and sentencing on the lesser offense." Br. of Resp't at 8-9. We agree with the State and remand for judgment and resentencing on attempted obstruction. We reject Howard's other sufficiency claim regarding

unlawful possession of a controlled substance.

A. Standard of Review

We review a challenge to sufficiency of the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

B. Obstruction

"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). A mere refusal to answer questions cannot be the basis of an arrest for obstruction of a police officer.[5] *State v. Turner*, 103 Wn. App. 515, 525, 13 P.3d 234 (2000); *State v. Contreras*, 92 Wn. App. 307, 316, 966 P.2d 915 (1998). But if additional acts, such as

[5] Our Supreme Court has not addressed this specific issue. But in *State v. White*, the court held that, under an analysis from *Terry v. Ohio*, 392 U.S. 1, 34, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), a "detainee's refusal to disclose his name, address, and other information cannot be the basis of an arrest." 97 Wn.2d 92, 106, 640 P.2d 1061 (1982).

giving false information, in fact "hinder[ ], delay[ ], or obstruct[ ]" a law enforcement officer in the midst of discharging his duties and the defendant both knew that the officer was discharging his duties and intended to obstruct such duties, then defendant's acts support an arrest and conviction under RCW 9A.76.020.[6] RCW 9A.76.020(1); *Contreras*, 92 Wn. App. at 317; *City of Sunnyside v. Wendt*, 51 Wn. App. 846, 851-52, 755 P.2d 847 (1988) (citing former RCW 9A.76.020 (1975)).

Smitley testified that while the name, partial social security number, and the lack of other identification "raise[d his] suspicion," Howard's false information did not "slow [him] down." RP at 58-59. There was no other evidence that Smitley changed his course of action based on the false information or that the information caused delay. Accordingly, our own review of the record supports the State's concession on this issue and we hold that the evidence was insufficient for a conviction of actual obstruction.

We "may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2. When an appellate court finds the evidence insufficient to support a conviction for the charged offense, but only sufficient to support conviction of a lesser degree crime, it may direct a trial court to enter judgment on the lesser degree crime. *State v. Atterton*, 81 Wn. App. 470, 473, 915 P.2d 535 (1996). Washington courts have also applied this principle when the lesser crime is a lesser

[6] Our Supreme Court has not addressed this specific issue. Justice Johnson has commented that *Contreras* stands for the proposition that a defendant has a right to refuse to answer questions, but a defendant's failure to provide his name upon request is one reason supporting a charge for obstruction of justice. *See* Justice Charles W. Johnson, *Survey of Washington Search and Seizure Law*: *2005 Update*, 28 Seattle U. L. Rev. 467, 530 (2005).

included offense, as opposed to the lesser degree offense that *Atterton* considers.[7] *State v. Miles*, 77 Wn.2d 593, 604, 464 P.2d 723 (1970); *State v. Hughes*, 118 Wn. App. 713, 733-34, 77 P.3d 681 (2003).

"An attempted crime is a lesser included offense of the crime charged and the jury may convict a defendant of attempting to commit a crime charged, even though attempt was not specifically charged." *State v. Gallegos*, 65 Wn. App. 230, 234, 828 P.2d 37 (1992); RCW 10.61.010. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

Although Smitley's testimony was insufficient to show that Howard's false information in fact delayed Smitley in his duties, we hold that there was sufficient evidence that Howard attempted to obstruct a law enforcement officer. Howard gave the false name "Sacier" and an incomplete social security number to Smitley. RP (Oct. 30, 2008) at 40. This constitutes sufficient evidence that Howard intended to obstruct Smitley in his duties and that Howard took a "substantial step toward the commission of" the crime of obstruction, even though Howard testified that he did not give Smitley a false name. RCW 9A.28.020(1).

Because we defer to the trier of fact on issues of conflicting testimony and "a claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom," Howard's testimony does not change our conclusion that there is sufficient

[7] Although our courts have often used the terms "'lesser included offense'" and "'inferior degree offense'" interchangeably, the terms are in fact different. *State v. Tamalini*, 134 Wn.2d 725, 731-32, 953 P.2d 450 (1998). Unlike a lesser included offense, an inferior degree offense may have an element that is not an element of the greater offense. *State v. Peterson*, 133 Wn.2d 885, 889-892, 948 P.2d 381 (1997).

evidence that Howard attempted to obstruct Smitley. *Salinas*, 119 Wn.2d at 201; *Walton*, 64 Wn. App. at 415-16. Accordingly, we vacate Howard's judgment and sentence for obstruction of a law enforcement officer and remand for entry of adjudication on attempted obstruction of a law enforcement officer.

B. Unlawful Possession of a Controlled Substance

Howard appears to contend that the following arguments establish that the evidence was insufficient to support a conviction of possession of an unlawful substance: (1) there was a "discrepancy" in the testimony of Smitley and Mathison, (2) it was "impossible" for the officer to find the pill in Howard's bag because Howard was in handcuffs, (3) Mathison "planted" the pill on Howard, and (4) Mathison's actions were presumably captured on the video surveillance cameras of the businesses in the area. SAG at 1-2. Here, Smitley, Mathison, and Howard all testified.

In a prosecution for simple possession "there is no intent requirement. . . . Aside from the unwitting possession defense, possession is a strict liability crime." *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). "The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute[8]—the nature of the substance and the fact of possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (footnote added).

Smitley testified that he searched Howard's shoulder bag and found the pill. Smitley also

[8] RCW 69.50.4013(1) provides: "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." RCW 69.50.101(d) defines a "[c]ontrolled substance" as "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules." RCW 69.50.204(c)(7) includes "MDMA" as a controlled substance under Schedule I.

testified that, upon inquiry, Howard told him that the pill was ecstasy. The State's expert witness testified that the pill from Howard's arrest was MDMA, for which there are no "legitimate use[s]." RP (Oct. 30, 2008) at 71.

Smitley also testified that Mathison did not "assist . . . in any way" with the arrest of Howard. RP (Oct. 30, 2008) at 49. Mathison testified that, even though he was in the vicinity, he was not involved in the arrest or the search and his only contact with Howard was limited to "small talk." RP (Oct. 30, 2008) at 90. Again, we defer to the trier of fact credibility determinations and the weight of the evidence. *Walton*, 64 Wn. App. at 415-16. Because the testimony conflicted, the jury was required to make a credibility judgment and we do not review its conclusion. Thus, Howard's argument fails.

II. Ineffective Assistance of Counsel

In his SAG, Howard argues that his counsel was ineffective. Without pointing to any of counsel's actions or decisions, he suggests only that he was ineligible for public defense in the first place. But there is no evidence in the record to support these assertions,[9] and we do not consider matters outside the record in a direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We hold that his claim fails.

We reverse the obstruction conviction and remand to the trial court for entry of conviction for attempted obstruction of a law enforcement officer. We affirm the remainder of Howard's

[9] At sentencing, Howard stated that (1) an inspection of the shoulder bag will reveal that Smitley was lying that there was nothing else in the bag other than the blue pill and (2) there is a camera in front of the Jiffy Lube building. Presumably, the camera is relevant because it may have captured the arrest and Sergeant Mathison's actions, which, according to Howard, included planting the pill. He added that "[n]one of that was brought up." RP (Nov. 14, 2008) at 17. However, even these bare assertions after trial do not indicate that Howard's counsel disregarded the importance of the shoulder bag and the camera recording to Howard's case.

convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Quinn-Brintnall, J.