No. 84714-2

J.M. JOHNSON, J. (dissenting)—Federal and state constitutional guaranties of free speech and privacy do not protect the utterance of false and misleading statements to police during the course of a murder investigation. Kenneth Budik sat in the passenger seat while a shooter approached and fired through his window to kill the driver of the car. Budik not only repeatedly denied any knowledge of the identity of the shooter in this case, but he also provided a false account to police that later contradicted statements made to the victim's mother. As a result, investigating police were confused and unable to identify the perpetrator.

Additionally, the state legislature has the power to determine the tools available to law enforcement in bringing criminals to justice, including criminalizing "obstruct[ing] . . . anyone from performing an act that might aid in the discovery or apprehension" by a law enforcement officer. RCW 9A.76.050(4). If the state legislature chooses to further require an affirmative act or statement requirement as part of former RCW 9A.76.070 (2003), it

could have done so in the text of the statute. I would hold that there is sufficient evidence to support Budik's conviction for first degree rendering criminal assistance and thus dissent.

A. Freedom of Speech and Privacy

Article I, section 5 of the Washington State Constitution guarantees that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Although article I, section 5 generally "provides broader free speech protection than the first amendment to the United States Constitution," *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 8 n.6, 891 P.2d 720 (1995), "the inquiry must focus on the specific context in which the state constitutional challenge is raised," and "it does not follow that greater protection is provided in all contexts," *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 115, 937 P.2d 154 (1997).

The nature of this case requires holding that state constitutional free speech protection in the criminal investigative context is no greater than that provided under the First Amendment to the United States Constitution. The United States Supreme Court has never directly addressed federal free speech protection in the criminal investigative context, but its case law in the

commercial context is instructive. Commercial speech is not protected by the First Amendment if it is either unlawful or misleading. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Similarly, false and misleading statements made to police in the criminal investigative context are not protected under federal and state constitutional free speech provisions. This is because there is even greater public interest in deterring false statements in the criminal investigative context than there is in the commercial context. As the Court of Appeals aptly noted, "[W]hile Mr. Budik may not have had any obligation to speak, . . . if he chose to speak, he was not privileged to mislead police." *State v. Budik*, 156 Wn. App. 123, 128, 230 P.3d 1094, *review granted*, 170 Wn.2d 1008, 249 P.3d 624 (2010).

Article I, section 7 of our state constitution also provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." While article I, section 7 "'provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution,'" *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004) (quoting *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002)), it

focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass," *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). However, "[i]f no search occurs, then article 1, section 7 is not implicated." *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). Here, Budik "was not the focus of the investigation" and "was not a suspect or under arrest when asked questions by the police." *Budik*, 156 Wn. App. at 130. Simple questioning by a police officer did not constitute a search.

Unlike the majority's characterization, a literal reading of the term "deception" does not require us to ignore our holding in *State v. Williams*, 171 Wn.2d 474, 251 P.3d 877 (2011). Majority at 11. There, defendant Michael Williams challenged his conviction of obstructing an officer under RCW 9A.76.020, which makes it a crime "if [a] person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." *Williams*, 171 Wn.2d at 477. Williams had provided law enforcement with false self-identifying information, after leaving a car dealership without paying for requested repairs, in order to obscure an outstanding arrest warrant against him. *Id.* at 475-76. We held that the state

constitution required "conduct in addition to pure speech in order to establish obstruction of an officer" in this context. *Id.* at 485.

The difference between *Williams* and the current case, however, is obvious; Budik was not a suspect at any time during the course of the criminal investigation, and as a result, the right against self-incrimination was never implicated. *Budik*, 156 Wn. App. at 130; *see also Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Accordingly, the concerns regarding an "end run" around constitutional guaranties are not present because this case is significantly different from the "stop-and-identify" statute that was condemned in *State v. White*, 97 Wn.2d 92, 96-97, 640 P.2d 1061 (1982). Instead, by creating a broader interpretation of free speech and privacy, the majority is weakening an important tool of law enforcement to investigate and punish wrongdoers and ensure community safety. We therefore should not read an affirmative act or statement requirement into the text of former RCW 9A.76.070, which the legislature did not include.

B. Legislative Intent

As the majority indicates, our objective in this case is to determine the

legislature's intent in enacting former RCW 9A.76.070, majority at 6, but "[t]he surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we 'give effect to that plain meaning,'" *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation marks omitted) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). "In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Id.* The majority's characterization of related provisions and the statutory scheme as a whole, however, does not compel a finding that the legislature intended to include an affirmative act or statement requirement, which it did not expressly include.

Admittedly, the text of RCW 9A.76.020 does not contain an affirmative act requirement. Still, the majority relies on this statute as evidence of the legislature's intent to the contrary. Majority at 8-9. We held in *Williams* that the state constitution required "conduct in addition to pure speech in order to establish obstruction of an officer" under RCW 9A.76.020, *Williams*, 171 Wn.2d at 485, but the same concerns in *Williams* with former

RCW 9A.76.070 are not present in this case. The majority is not justified in amending the statutory scheme of the legislature in former RCW 9A.76.070 when there is no constitutional infirmity in the statute's plain meaning.

The majority also points unconvincingly to other examples in the legislature's statutory scheme. Majority at 8. If anything, RCW 9A.76.175 demonstrates that the legislature knew how to include a material statement requirement as part of a statute and chose not to include a similar requirement in the text of former RCW 9A.76.070. The majority's citation to cases and statutes in other states also does not evidence intent on the part of the state legislature with respect to the statute at issue. Thus, this court should not read an affirmative act or statement requirement into former RCW 9A.76.070, and it should uphold Budik's conviction of first degree rendering criminal assistance.

C. Sufficiency of the Evidence

In evaluating a sufficiency of the evidence challenge, "we view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d

1007 (2009). Here, Budik indicated to police on multiple occasions that he did not know who was responsible for the shooting of the driver sitting next to him. Budik even concocted a false account that "he bent over to get his drink" while "[s]omeone shot several rounds into the truck through the open passenger window." *Budik*, 156 Wn. App. at 126. This concocted story also conflicted with Budik's statements to the victim's mom that he knew who was responsible for the shooting constituted more than a simple disavowal. *Id.* The evidence of Budik's interactions with the police demonstrated his methodical and deliberate attempt to confuse and delay the progress of the criminal investigation into the death.

Arguments regarding a lack of sufficiency with respect to the "deception" or "performing an act" elements of the statute are equally unpersuasive. As to the argument that Budik's statements were not deceptive, the spent casing that police found inside the cab of the truck and Budik's statements to the victim's mom that he knew who was responsible for the shooting sufficiently demonstrated the falsity of Budik's previous statements to police. *Id.* Additionally, the police did not have to actually believe all of Budik's statements in order for those statements to fulfill the

"deception" element. Any resulting investigative confusion and delay and cost would be sufficient. As to the argument that there was no identifiable act that Budik's statements prevented the police from performing, the statute does not require the State to precisely pinpoint how the police investigation was interfered with. As a detective testified, Budik's false assertions caused delay and confusion and impeded the progress of the murder investigation. *See id.* at 127. Our cases require deferential review of the jury's verdict. Here, we should conclude that a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt especially if the evidence is viewed in the light most favorable to the prosecution, as required.

Conclusion

I would hold that former RCW 9A.76.070 does not contain a constitutional infirmity that justifies judicial amendment to include a new element, an affirmative act or statement. The constitutional guaranties of free speech and privacy do not protect false and misleading statements made to police during the course of a murder investigation. Because Budik said and did much to obstruct this murder investigation, his statements were not mere disavowals. Thus, I would reject Budik's sufficiency of the evidence

challenge and uphold his conviction under former RCW 9A.76.070. The issue was whether to believe Budik or believe the other witnesses. The jury considered all the evidence, and it unanimously found Budik guilty. For the foregoing reasons, I respectfully dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: