IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 84714-2
	)	
v.	)	En Banc
	)	
KENNETH RICHARD BUDIK,	)	
	)	Filed February 16, 2012
Petitioner.	)	
	)	

OWENS, J. -- Kenneth Budik was one of two victims of a shooting in the city of Spokane. The other victim, Adama Walton, died as a result of the shooting. Based on Budik's statements that he did not know who was responsible for the crime, he was charged with, and convicted of, first degree rendering criminal assistance. Insufficient evidence supports Budik's conviction; accordingly, we reverse the Court of Appeals and vacate Budik's conviction.

Facts[1]

In the early morning hours of September 14, 2007, 20 year old Budik

[1] Because this is a challenge to the sufficiency of the State's evidence, we assume the truth of the State's evidence, even where Budik provided conflicting testimony. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

accompanied 28 year old Walton to the Big Easy nightclub in downtown Spokane.

As club authorities had, at some earlier point, become aware that Budik's identification was fake, Budik waited in Walton's 2007 Chevrolet Avalanche pickup truck with a box of wine. Walton returned an hour later, around 2:00 a.m., and the two departed for an "after party." 2 Verbatim Report of Proceedings (VRP) at 199.

Arriving at the party, which was at a private residence, Budik got out and briefly mingled with several persons he knew in the front yard. Walton, meanwhile, remained in the truck and spoke to a number of individuals. After approximately 10 minutes, Walton gestured for Budik and Budik returned to the truck. Walton then drove to the next intersection, made a U-turn, and came to an abrupt stop in front of the party, squealing his tires. As Budik was sitting in the passenger seat, several gunshots rang out. One shot struck Budik through his left pectoral muscle, shattering a bone in his shoulder. Another bullet went through Budik's left leg just above the kneecap. Walton was even less fortunate, sustaining one gunshot wound to the abdomen and another that passed through both of his lungs and his heart. Walton stepped on the accelerator and the truck traveled a block and a half before colliding with two parked cars and overturning. Budik managed to pull himself from the truck, sought help from a nearby resident, and then called 911.

The first law enforcement officer to interact with Budik was Officer Kevin King. As he was responding to reports of a shooting, the officer had his gun drawn as

he approached Budik. Officer King asked Budik a number of questions, one of which was who was responsible for the shooting. Budik replied that he did not know. A second officer, Officer Eugene Baldwin, eventually joined Budik and Officer King. At Officer King's direction, Officer Baldwin patted Budik down for weapons and, finding none, then asked Budik several additional questions. When questioned about who was responsible for the shooting, Budik consistently answered that he did not know. Shortly after Budik was taken to the hospital, Officer Baldwin met Detective Ferguson at the hospital and resumed questioning Budik in the trauma room while doctors and nurses worked on him. Budik declined to give them any specific information.

The day after the shooting, Detective Kip Hollenbeck, with Detective Ferguson, paid a visit to Budik's hospital room. Based on a bullet casing found in the passenger side of the truck, Detective Hollenbeck believed that the shooters must have been so close to the vehicle that Budik would necessarily have seen them. Budik immediately said that he did not see anything. Detective Hollenbeck continued to press Budik for details, and Budik explained what had occurred leading up to and following the shooting. During this exchange, Budik told Detective Hollenbeck that he had been leaning over to pick up a beer when the first shot rang out, though, based on the wounds Budik sustained, the detective did not believe him. When Detective Hollenbeck persisted in asking Budik to identify the assailants, Budik shook his head

and asked the detectives to leave. Detective Hollenbeck was left with the belief that Budik feared retaliation.

Several days after the shooting, Walton's mother, Rae Ann Walton (Rae), went to Budik's home and left a note in the mailbox asking Budik to call her. Budik did so one or two days later. Rae asked Budik, "[W]ho killed my son?," and he replied, "Rascal [Juwuan Nave] did it." 1 VRP at 121. Budik went on to indicate that Nave had walked from behind Freddie Miller and that the shooting then began.

During their investigation, the police quickly became aware of three primary suspects: Titus Davis, Nave, and Miller. Police believed that these three individuals were gang members. Miller was detained and interviewed the day of the shooting and was later charged with murder. Police identified Davis as a suspect by September 15, 2007, and had heard of Nave's involvement "[e]arly on." 2 VRP at 183.

Detective Hollenbeck described the investigation as "one of the most difficult cases" that he had ever worked on, owing to the fear witnesses had of cooperating with the police. 1 VRP at 146. Ultimately, both Davis and Miller were charged with murder. Nave, however, was never charged because although police could place him at the scene, they could not connect him to the fatal shooting of Walton. Detective Hollenbeck testified that it would have been "helpful" had he known that someone had seen Nave participate in the shooting and that the investigation would "have been able

to take a different turn" if Budik had told him that Nave was the shooter. 1 VRP at 144; 2 VRP at 184. However, Detective Hollenbeck also testified that he did not credit the account Budik related to Rae; Detective Hollenbeck believed this was simply a rumor circulated to make Nave the "fall guy" for the shooting. 2 VRP at 183.

Based on Budik's repeated disavowals of knowledge of the shooters' identities, the State charged Budik with first degree rendering criminal assistance. The jury found Budik guilty, and the judge sentenced Budik to 13 months in prison, the low end of the standard range. Budik appealed his conviction, raising an as-applied challenge to the constitutionality of his conviction, challenging the sufficiency of the State's evidence, and asserting ineffective assistance of trial counsel. The Court of Appeals denied all three challenges and affirmed Budik's conviction. *State v. Budik*, 156 Wn. App. 123, 130, 132, 230 P.3d 1094 (2010). Budik petitioned this court for review of the sufficiency challenge, and we granted review. *State v. Budik*, 170 Wn.2d 1008, 249 P.3d 624 (2010).

Issue

Does sufficient evidence support Budik's conviction?

Analysis

I. Standard of Review

In a challenge to the sufficiency of the evidence supporting a criminal

conviction, the question is whether, viewing the evidence in the light most favorable to the State, "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). To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by interpreting the underlying criminal statute. Statutory interpretation is a question of law, which we review de novo. *Id.*

When interpreting a statute, our objective is to determine and give effect to the legislature's intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). We first attempt to ascertain the plain meaning of the statute. *Id*. "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*. (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and we "look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

With these standards in mind, we turn to Budik's conviction of first degree rendering criminal assistance.

II. Rendering Criminal Assistance Requires an Affirmative Act or Statement

Budik was convicted of rendering criminal assistance in the first degree, a class C felony, under former RCW 9A.76.070 (2003).[2] A person violates this statute if (1) "he or she renders criminal assistance" (2) to another person "who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense." *Id*. The term "renders criminal assistance" is defined by RCW 9A.76.050. That statute provides that

> a person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he:
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> (1) Harbors or conceals such person; or
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> (2) Warns such person of impending discovery or apprehension; or
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> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
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> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
>
> (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or

[2] In 2010, the legislature elevated this crime to a class B felony. Laws of 2010, ch. 255, § 1.

(6) Provides such person with a weapon.

RCW 9A.76.050. In other words, a person renders criminal assistance if he or she (1) knows that another person (a) "has committed a crime or juvenile offense" or (b) "is being sought by law enforcement officials for the commission of a crime or juvenile offense" or (c) "has escaped from a detention facility" and (2) intends "to prevent, hinder, or delay the apprehension or prosecution" of that other person and (3) undertakes one of the six specified actions. *Id.* In this case we are solely concerned with the fourth action• "[p]revent[ing] or obstruct[ing], by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension" of a person sought by law enforcement officials. RCW 9A.76.050(4); *see* Clerk's Papers at 26 (jury instruction relying solely on this action).

In interpreting this portion of the statute, we look to the statutory scheme as a whole. Two similar crimes exist under chapter 9A.76 RCW. RCW 9A.76.020 makes the willful hindrance, delay, or obstruction of a "law enforcement officer in the discharge of his or her official powers or duties" a gross misdemeanor. Conviction under this statute requires "some conduct in addition to making false statements." *State v. Williams*, 171 Wn.2d 474, 486, 251 P.3d 877 (2011). RCW 9A.76.175 makes it a gross misdemeanor to make a false or misleading statement to a public servant if that statement is "reasonably likely to be relied upon by [the] public servant in the

discharge of his or her official powers or duties."

This statutory scheme evidences legislative intent to require an affirmative act or statement in order to constitute "deception" within the context of RCW 9A.76.050(4). First, the legislature expressly criminalized making false or misleading material statements to the police in RCW 9A.76.175. In doing so, it expressed the manner in which it intended to deal with such statements and provided that they are punishable as gross misdemeanors. Rendering criminal assistance, on the other hand, can be up to a class B felony. Second, under the canon of noscitur a sociis, we construe a term in light of those terms with which it is associated. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). The five other means of rendering criminal assistance require some affirmative act or statement, be it harboring or concealing the person sought, RCW 9A.76.050(1); warning the person sought of impending discovery, RCW 9A.76.050(2); providing a person sought money, a disguise, transportation, or other means of evading discovery, RCW 9A.76.050(3); concealing, altering, or destroying physical evidence that would aid in discovery, RCW 9A.76.050(5); or providing the person sought with a weapon, RCW 9A.76.050(6). From this, we infer that the legislature similarly intended to require an affirmative act or statement in order to violate RCW 9A.76.050(4).

The history of RCW 9A.76.050 reinforces our conclusion that it requires an

affirmative act or statement and sheds light on the nature of the affirmative act or statement required. RCW 9A.76.050 was enacted as part of the adoption of the current criminal code in 1975. Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.76.050. The crime of rendering criminal assistance replaced the then-existing concept of serving as an accessory after the fact. 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 1801, at 366 (2d ed. 1998); Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(4) (repealing RCW 9.01.040, which defined "accessory," former RCW 9.01.040 (Laws of 1909, ch. 249, § 9). RCW 9A.76.050 embodies many of the same principles as did its predecessor.

Other states have interpreted the crime of serving as an accessory after the fact in circumstances comparable to those present here. In *Tipton v. State*, 126 Tex. Crim. 439, 443-44, 72 S.W.2d 290 (1934), a witness before a grand jury falsely stated that she "knew nothing about" a homicide. The *Tipton* court held that the witness was not properly treated as an accomplice after the fact based upon this false statement. *Id*. at 444. In *State v. Clifford*, 263 Or. 436, 438, 441-42, 502 P.2d 1371 (1972), the Supreme Court of Oregon built on *Tipton* and held that a witness who responded to police questioning by falsely stating that he had not seen a murder suspect could not be convicted of being an accessory to the murder because the falsehood was not an "affirmative act" but was instead "a mere denial of knowledge."

In *Stephens v. State*, 734 P.2d 555 (Wyo. 1987), interpreting a statute very similar to RCW 9A.76.050, the Supreme Court of Wyoming held that "[a] mere denial of knowledge is to be differentiated from an '"[a]ffirmative statement of facts tending to raise any defense for (the principal), or a statement within itself indicating an effort to shield or protect (the principal)."'" *Id*. at 557 (alterations in original) (quoting *Clifford*, 263 Or. at 441 (quoting *Tipton*, 126 Tex. Crim. at 444)); *see People v. Plengsangtip*, 148 Cal. App. 4th 825, 838, 56 Cal. Rptr. 3d 165 (2007) ("[A] statement that one *knows nothing* about a crime, even if false, is equivalent to a passive nondisclosure or refusal to give information, which is insufficient to support an accessory charge.").

We find that the foregoing interpretations illuminate the meaning of RCW 9A.76.050. The deception contemplated by RCW 9A.76.050(4) requires an affirmative act or statement; it does not encompass mere false disavowals of knowledge. *Cf. Plengsangtip*, 148 Cal. App. 4th at 839 ("Affirmative statements of positive facts are distinguishable from . . . a denial of knowledge that a crime occurred."). While the term "deception" may be literally broad enough to include false disavowals, such an interpretation would ignore the statutory scheme and past interpretations of the principles underlying the crime. Moreover, such an interpretation would ignore our holdings in *Williams* and its predecessors that statutes

purporting to criminalize false statements made to law enforcement officers implicate constitutional guaranties of speech and privacy and will be narrowly construed.[3] *See* 171 Wn.2d at 483-84.

In sum, proving that an individual rendered criminal assistance by "[p]revent[ing] or obstruct[ing], by use of . . . deception, . . . an act that might aid in the discovery or apprehension" of another who has committed, or is sought for commission of, a crime or juvenile offense, RCW 9A.76.050(4), requires an affirmative act or statement that raises a defense for the other person, *see*, *e.g.*, *Plengsangtip*, 148 Cal. App. 4th at 838; *People v. Duty*, 269 Cal. App. 2d 97, 104, 74 Cal. Rptr. 606 (1969), or which, in itself, indicates an effort to shield or protect the other person. A mere false disavowal of knowledge is insufficient. Accordingly, Budik's mere false disavowal of knowledge is insufficient to support his conviction for rendering criminal assistance.[4]

[3] We decide this case on statutory, not constitutional, grounds. Narrowly construing statutes implicating constitutional guaranties is an aspect of statutory interpretation. In this case, we are not asked to declare, nor do we hold, that RCW 9A.76.050(4) is unconstitutional on its face or in application. Application of our holdings in *Williams* and its predecessors regarding when conduct is required in addition to speech is not before us in this case. Contrary to the dissent's assertion, this case does not require interpretation of the Washington Constitution.

[4] We are not presented with the question of whether Budik would have been properly charged with making a false or misleading statement to public officials under RCW 9A.76.175 and reserve that question for the appropriate case.

III. There is No Evidence of Prevention or Obstruction of Any Act Caused by Budik's False Statements

A second approach to this case yields the same result. Under RCW 9A.76.050, one essential element is demonstrating that the defendant "[p]revents or obstructs, by use of . . . deception, . . . anyone from performing an act that might aid in the discovery or apprehension" of an individual sought for commission of a crime. RCW 9A.76.050(4). That is, the State had to prove that Budik's deception• assuming his false disavowal of knowledge was indeed a "deception"• actually prevented or obstructed the performance of some act that might have aided in discovery or apprehension of one of the shooters. The State produced no such evidence.

First, it is not at all clear that prevention or obstruction of the State from filing charges against another is included in RCW 9A.76.050(4). RCW 9A.76.050 derives from section 205.50 of the New York Penal Law. Rev. Wash. Criminal Code at 319 (Legislative Council's Judiciary Comm. 1970). The provision in the New York Penal Law prohibits the prevention or obstruction of acts that "might aid in the discovery or apprehension of [another] person *or in the lodging of a criminal charge against him*." N.Y. Penal Law § 205.50(4) (McKinney 2010) (emphasis added). Our provision omits the italicized language, at least raising the inference that the legislature, in adopting it, intended to exclude from culpability for rendering criminal assistance those acts that

merely prevent or obstruct the lodging of criminal charges against another person. *See State v. Edwards*, 104 Wn.2d 63, 68, 701 P.2d 508 (1985) ("'[W]here a material change is made in the wording of a statute, a change in legislative purpose must be presumed.'" (quoting *Graffell v. Honeysuckle*, 30 Wn.2d 390, 399, 191 P.2d 858 (1948))).

Second, there is no evidence in the record that Budik's false statements, as opposed to his nondisclosure of information, prevented or obstructed any act. RCW 9A.76.050 includes within the definition of rendering criminal assistance "deception" that "[p]revents or obstructs" certain acts, RCW 9A.76.050(4); it does not include "nondisclosure" that "prevents or obstructs" certain acts. This is a critical distinction. If law enforcement officers are unable to act because an individual has not provided them with information, it is the nondisclosure of information that is preventing them from undertaking some act. This is not rendering criminal assistance. This is so whether or not the individual has also made a false statement to law enforcement officers. This is obviously to be distinguished from the situation in which the false statement itself prevents some act that might aid in the discovery or apprehension of another person. The relevant question therefore becomes whether some act would have been performed *but for* the false statement. If not, it cannot be said that the *deception* prevented or obstructed an act that might aid in the discovery or

apprehension of another person.

The evidence the State relies upon to show prevention or obstruction is testimony from Detective Hollenbeck that it would have been "helpful" and that the investigation would "have been able to take a different turn" if Budik had told him that Nave was responsible for the shooting. 1 VRP at 144; 2 VRP at 184. This is clearly evidence that any prevention or obstruction of the performance of any act that might have aided in the discovery or apprehension of the shooters was caused by Budik's *nondisclosure*, not his false statements. There is simply no evidence in the record that but for Budik's false disavowal of knowledge of the identity of the shooters (i.e., had he said nothing) anyone would have "perform[ed] an act that might aid in the discovery or apprehension" of one of the shooters. RCW 9A.76.050(4). As such, there is no evidence that Budik's deception• assuming his false disavowal of knowledge amounted to deception• caused the prevention or obstruction of any act.[5]

Even if Budik's false disavowal of knowledge of the shooter's identity amounted to deception under RCW 9A.76.050(4), there would be insufficient evidence to sustain his conviction.

Conclusion

[5] Similarly, though the State does not expressly rely upon any other false statement by Budik on appeal, we note that no evidence suggests that Budik's statement that he was leaning down at the time of the shooting, which we assume was false, prevented or obstructed any act.

We hold that in order to prove that a defendant has rendered criminal assistance "by use of . . . deception," RCW 9A.76.050(4), the State must show that the defendant has made some affirmative act or statement; mere false disavowal of knowledge is insufficient to sustain a conviction for rendering criminal assistance. There is no evidence that Budik did more than falsely deny knowledge of the identities of the assailants who had shot him and shot and killed his companion. Accordingly, insufficient evidence supported Budik's conviction. We reverse the Court of Appeals and vacate Budik's conviction.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Charles W. Johnson	Justice Debra L. Stephens
Justice Tom Chambers	Justice Charles K. Wiggins
	Gerry L. Alexander, Justice Pro Tem.
Justice Mary E. Fairhurst	