

**NO. 45477-7-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**NIKOLAY I. KALACHIK,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan Clark, Judge

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**BRIEF OF APPELLANT**

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A. ASSIGNMENT OF ERROR

The evidence failed to prove that Mr. Kalachik's threats to Officer Botvinnik was used in an attempt too influence a decision or official action of Officer Botvinnik.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Did the evidence fail to prove that Mr. Kalachik's threat to Officer Botvinnik was used in an attempt too influence a decision or official action of Officer Botvinnik?

C. STATEMENT OF THE CASE

Procedural overview

The State charged Nikolay Kalachik with two crimes: Intimidating a Public Servant<sup>1</sup> and Felony Harassment Involving Threat to Criminal Justice System Participant.<sup>2</sup> CP 1-2. A jury found Mr. Kalachik guilty of both crimes. CP 3, 4.

For sentencing purposes, the State asked the court to vacate the Felony Harassment conviction and merge it with the Intimidating a Public Servant conviction. RP 1B 317. The trial court did so, noting that if the Intimidating a Public Servant conviction was reversed on appeal, the Felony Harassment charge could be reinstated. RP 1B 317; CP 20. The court imposed a 90 day sentence. CP 7.

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<sup>1</sup> RCW 9A.76.180(1)

<sup>2</sup> RCW 9A.46.020(2)(b)(iii)

Mr. Kalachik appeals all portions of his judgment and sentence.

CP 17-29.

Trial testimony

Nikolay Kalachik was driving in Vancouver with his wife Svetlana as a passenger. RP 1B 200, 236. They drove past Vancouver Police Officer Ilya Botvinnik. RP 1A 127. Officer Botvinnik thought Mr. Kalachik was not wearing a seatbelt so he initiated a traffic stop on the car. Mr. Kalachik pulled over without incident. RP 1A 125-27. It was July 25 at about 5: 30 p.m. RP 125.

Officer Botvinnik had Clark County Sheriff's Deputy Paul Uminski in the car with him. Deputy Uminski was new to the sheriff's office and Officer Botvinnik was his training officer that day. RP 1A 72-74. Officer Botvinnik was born in Russia. RP 1A 126. He lived there until he moved to the United States as teen. Deputy Uminski was born in Belarus. RP 1A 91. He went to university and served in the military in Russian. RP 1A 73, 91. Both officers spoke Russian fluently. RP 1A 73, 126.

Officer Botvinnik walked up to Kalachik's car and asked Mr. Kalachik for his driver's license, registration, and proof of insurance. RP 1A 130. Officer Botvinnik addressed Mr. Kalachik mostly in English. RP 1A 142. Officer Botvinnik told Mr. Kalachik he stopped him because of

the seatbelt violation. RP 1A 130. Mr. Kalachik, seeing Officer Botvinnik's Russian name on his nametag, addressed Officer Botvinnik in Russian. RP 1B 203. Mr. Kalachik was Russian-born and immigrated to the United States as a teen. RP 1B 199. Mr. Kalachik spoke to Officer Botvinnik in Russian because he felt it would be easier to communicate. RP 1B 203. Mr. Kalachik told Officer Botvinnik that he was mistaken and that he had been wearing his seatbelt. RP 1A 133; RP 1B 203. Mr. Kalachik was argumentative. RP 1A 81-82.

Mr. Kalachik provided Officer Botvinnik with an identification card. RP 1A 130. Officer Botvinnik and Officer Uminski returned to the police car. RP 1A 82, 133. Officer Botvinnik ran a check on Mr. Kalachik's driving status and learned that his license was suspended in the third degree. RP 1A 133. Using his patrol car's computer and printer, Officer Botvinnik issued Mr. Kalachik citations for the following three things: driving with a license suspended in the third degree, failing to have insurance, and failing to wear a seatbelt. RP 82, 134.

Officer Botvinnik and Deputy Uminski returned to Mr. Kalachik's car. Mr. Kalachik refused to accept the citations. RP 1A 136. He repeatedly told Officer Botvinnik he had been wearing a seatbelt. RP 1B at 202. Mr. Kalachik asked Officer Botvinnik to confirm with his wife

Svetlana that he had been wearing his seatbelt. But Officer Botvinnik did not do so. RP 1B 203-04.

The back seat driver side window was slightly open. Officer Botvinnik slipped the citations through the window and they fell on the backseat. RP 1A 136. Officer Botvinnik told Mr. Kalachik he was free to leave. RP 1A 138. Mr. Kalachik argued loudly with Officer Botvinnik about giving him the citations. RP 1A 86. He was animated and Officer Uminski thought Mr. Kalachik's behavior was escalating "drastically." RP 1A 86..

Officer Botvinnik and Deputy Uminski turned and started back toward their patrol car. RP 1A 87, 138. Both officers turned when they heard Mr. Kalachik's car door open. RP 1A 86, 138-39. Mr. Kalachik got out of the car and walked toward Officer Botvinnik. RP 1A 138. Mr. Kalachik had the citations in his hand. RP 1A 87. Mr. Kalachik argued that Officer Botvinnik had no legal authority to issue the citations. RP 1A 93. Mr. Kalachik tore up the citations. RP 1A 90. Mr. Kalachik said, "Do you know who you are messing with?". RP 1A 140. Officer Botvinnik repeatedly told Mr. Kalachik to stop and that he was free to leave and get back into his car and leave. RP 1A 87, 139. From Deputy Uminski's perspective, every time Officer Botvinnik would take two steps back, Mr.

Kalachik would move two steps forward and close the distance. RP 1A 88.

At 6'4" and over 200 pounds, Kalachik had a large presence. RP 1A 142. Both of the officers were about 5'9 or 5'10" and weighed closer to 175 pounds. RP 1A 93, 141.

Per Officer Botvinnik and Deputy Uminski, Mr. Kalachik pulled out what appeared to be a cell phone and start to dial it. RP 1A 91, 141. Officer Botvinnik said that while Mr. Kalachik was doing this, he said that "I'm going to call my brigade and they're going to come right here, right now after you." RP 1A 91. "Brigade" is a word that both Deputy Uminski and Officer Botvinnik associate with Eastern European criminal gangs. RP 1A 91-92, 143-45. Officer Botvinnik had never met Mr. Kalachik before but he was aware of his name and his reputation among local law enforcement and the local Russian community. RP 1A 131, 145-46, 188. Mr. Kalachik was known to be affiliated with an Eastern European criminal gang. RP 1A 190.

At this point, Officer Botvinnik decided to arrest Mr. Kalachik. RP 1A 147. Deputy Uminski drew his gun to "low ready" and Officer Botvinnik upholstered his taser. RP 1A 96, 149. Mr. Kalachik was taken into custody without resistance. RP 1A 97.

While transporting Mr. Kalachik to jail, he said that Officer Botvinnik did not know who he was dealing with and would regret what he was doing. RP 1A 99. He also mentioned Maxim Ukimetz and asked Officer Botvinnik if he knew who that was. RP 1A 158. Officer Botvinnik knew that to be the name of a young Russian man from Vancouver who was killed in Florida a few years earlier. RP 1A 158. Officer Botvinnik had helped a Florida detective with part of the investigation that extended back to Vancouver. RP 1A 158. Officer Botvinnik interpreted Mr. Kalachik raising the subject as a suggestion that maybe the same thing could happen to him. RP 1A 100.

Deputy Uminski testified he could see that Officer Botvinnik effected by the encounter with Mr. Kalachik; he appeared sad after the contact. RP 1A 122. Officer Botvinnik testified that in his many years as a police officer first in Los Angeles and later in Vancouver, that there had only been two other persons who troubled him as much as his contact with Mr. Kalachik. RP 1A 125, 160. Officer Botvinnik called his wife that evening and told her to take immediate precautions in the near future just in case. RP 1A 160.

In his testimony, Mr. Kalachik denied saying anything about a brigade. RP 1B 209. He acknowledged bringing up Maxim but only because he had heard Officer Botvinnik had done a poor job on the

investigation and it was being talked about in the local Russian community. RP 231-33.

D. ARGUMENT

THE STATE FAILED TO PROVE THAT MR. KALACHIK, BY USING A THREAT, ATTEMPTED TO INFLUENCE OFFICER BOTVINNIK'S DECISION OR OTHER OFFICIAL ACTION AS IS REQUIRED TO PROVE INTIMIDATING A PUBLIC SERVANT.

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

In criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. Amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980) The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable

inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To prove Intimidating a Public Servant as charged in this case, the State was required to prove beyond a reasonable doubt that Mr. Kalachik (1) threatened Officer Botvinnik and (2) by use of the threat, attempt[ed] to influence Officer Botvinnik's decision or other official action as a public servant. CP 1; RCW 9A.76.180(1); RP 1B 266-67 (Jury Instruction 12).

Mr. Kalachik submits the State proffered insufficient evidence to prove that by use of a threat, Mr. Kalachik attempted to influence Officer Botvinnik's decision, or other official action, as a public servant.

2. The State failed to prove the essential element that by use of a threat, Mr. Kalachik attempted to influence Officer Botvinnik's decision or other official action as a public servant.

Although the evidence was sufficient that Mr. Kalachik threatened Officer Botvinnik, the evidence does not prove he threatened Officer Botvinnik in an attempt to influence his decision, or other official action, as a public servant.

As instructed, threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened, or to any other person, or to communicate directly or indirectly the intent

immediately to use force against any person who is present at the time. RP 1B 266 (Jury, Instruction 9). Mr. Kalachik does not challenge that statements he made in anger and frustration toward Officer Botvinnik were other than threats. The threats included statements such as he was going to get his brigade and come after Officer Botvinnik and that Officer Botvinnik did not appreciate who he was dealing with and he would regret what he was doing. However, making threats alone does not satisfy the elements of Intimidating a Public Servant. Threats are not enough; the defendant must attempt to influence the public servant's behavior with these threats. *State v. Stephenson*, 89 Wn. App. 794, 807, 950 P.2d 38, *review denied*, 136 Wn.2d 1018 (1998).

In *State v. Burke*, 132 Wn. App. 415, 132 P.3d 1095 (2006), a police officer found himself alone and at the center of attention of a large group of persons drinking at a house party. One of the attendees, Mr. Burke, rushed through the crowd and “belly bumped” the officer, nearly knocking the officer off his feet. *Id.* at 417. Burke then yelled profanities and “fighting threats” at the officer and got into a “fighting stance.” *Id.* at 417-18. On review, the court reversed Burke’s conviction for intimidating a public servant due to lack of sufficient evidence. Although Burke threatened the officer, nothing in the record proved Burke’s threats had

some specific purpose to make the officer do or not do something. *Id.* at 422.

In *State v. Montano*, 169 Wn.2d 872, 239 P.3d 360 (2010), police officers contacted Montano after they saw him shove another man. Montano was not cooperative in providing identification to the police, attempted to walk away, and became resistive. *Id.* at 874-75. Montano's resistance increased when an officer pulled him back. Officers used their tasers on Montano to gain compliance. *Id.* at 874-75. Angry, Montano told an officer he would wait for him when he got off work, that he would kick his ass, and knew the officer was afraid because he could see it in his eyes. While being transported to jail, Montano told the officer he needed to retire, he could see the officer's gray hair, and he could still see the fear in the officer's eyes. *Id.* at 75.

On review, the supreme court found there was insufficient evidence of intimidating a public servant and affirmed the trial court's dismissal of the charge on a *Knapstad*<sup>3</sup> motion. "[T]o convict a person of intimidating a public servant, there must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances. *Montano*, 169 Wn.2d at 877.

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<sup>3</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986)

Like the defendants in *Burke* and *Montano*, Mr. Kalachik was angry at the actions of the police. He did not feel it was just to cite him for failing to wear a seatbelt when he had been wearing a seatbelt. Mr. Kalachik held onto and expressed his anger and frustration at Officer Botvinnik throughout the traffic stop and while he was being transported to jail. Nothing in the record established that Mr. Kalachik was trying to influence Officer Botvinnik's decision or any other action.

Like *Burke* and *Montano*, Mr. Kalachik's intimidating a public servant conviction should be dismissed for insufficient evidence.

3. This Court must reverse and remand with instructions to dismiss the conviction.

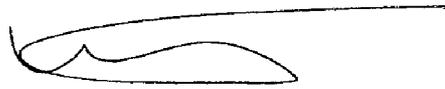
Since there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate Double Jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding"), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

Mr. Kalachik's conviction for Intimidating a Public Servant should be reversed and dismissed with prejudice for insufficient evidence.

Dated this 30<sup>th</sup> day of May 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

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LISA E. TABBUT, WSBA #21344  
Attorney for Adam Phillip Thomas

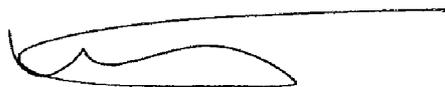
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Nikolay I. Kalachik/DOC #372632, Larch Corrections Center, 15314 NE Dole Valley Road, Yacolt, WA 98675-9531.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 30, 2014, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Nikolay I. Kalachik

## COWLITZ COUNTY ASSIGNED COUNSEL

**May 30, 2014 - 3:41 PM**

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