

FILED

MAR 10 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28408-5-III

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

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STATE OF WASHINGTON,

Respondent

v.

JASON OLIVER NUNN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
KLICKITAT COUNTY, STATE OF WASHINGTON  
Superior Court No. 09-1-00101-6

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....i  
COUNTERSTATEMENT OF THE ISSUE.....1  
STATEMENT OF THE CASE.....1  
ARGUMENTS.....1  
CONCLUSION.....5

**TABLE OF AUTHORITIES**

**Cases**

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970);  
*see also* Seattle v. Gellein, 112 Wn.2d 58, 768 P.2d 470 (1989) ..... 1  
Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781  
(1979)..... 2  
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) ..... 2  
State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988) ..... 1  
State v. Montano, 147 Wn. App. 543, 196 P.3d 732, 733 (2008)  
*rev'd*, 169 Wn.2d 872, 239 P.3d 360 (2010) ..... 4  
State v. Montano, 169 Wn.2d 872, 239 P.3d 360 (2010) ..... 1, 2, 3, 4

**Rules**

RAP 10.3(b)..... 1

**Statutes**

RCWA §9A.76.180(1)..... 2

**Constitutional Provisions**

Wash. Const. Article 1 § 3 ..... 1  
U.S. Const. amend. 14..... 1

## I. COUNTERSTATEMENT OF THE ISSUE

1. Whether, in light of the Supreme Court's ruling in State v. Montano, 169 Wn.2d 872, 239 P.3d 360 (2010), the defendant's conviction for intimidating a public servant must be reversed.

## II. STATEMENT OF THE CASE

The State accepts the facts set forth in the brief of appellant pursuant to RAP 10.3(b). As needed the State shall refer to specific areas of the record.

## III. ARGUMENT

1. **NUNN'S CONVICTION VIOLATES HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT AND WASH.CONST. ARTICLE 1 § 3 BECAUSE THERE IS INSUFFICIENT EVIDENCE THAT HIS THREAT WAS MADE IN AN ATTEMPT TO INFLUENCE DEPUTY RITTOCH'S VOTE, OPINION, DECISION OR OTHER OFFICIAL ACTION AS A PUBLIC SERVANT.**

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also* Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The question presented is

whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980).

*Standard of Review*

An appellate court reviews a sufficiency challenge by determining whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980).

To convict a person of intimidation of a public servant the State must prove that the defendant, by use of a threat, attempted to influence a public servant's vote, opinion, decision, or other official action as a public servant. RCWA §9A.76.180(1). The Supreme Court recently clarified the requirements for conviction under this statute. They held that, “to 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.” State v. Montano, 169 Wn.2d 872, 239 P.3d 360 (2010).

Because the facts in this case are nearly indistinguishable from those in

Montano, the State is forced to concede that the ruling in that case is controlling here. Because there was no evidence presented that showed an attempt to influence other than the defendant's threat and anger at the circumstances, Nunn's conviction for intimidating a public servant must be reversed.

In State v. Montano, an officer attempted to arrest Montano after witnessing him assault his brother. State v. Montano, 169 Wn.2d at 874. The defendant did not have identification, refused to tell the Officer his name, and walked away "agitated" when the Officer attempted to ascertain further information from him. *Id.* After attempting unsuccessfully to detain Montano, the officer grabbed his wrist and informed him he was under arrest. *Id.* Montano broke free and attempted to pull the officer to the ground. *Id.* At this point, a second Officer arrived on scene and, at the request of the first Officer, tased Montano twice before he was able to subdue him and place him in handcuffs. State v. Montano, 169 Wn.2d at 875. At this point, Montano became angry and pulled away from the first officer, stating "I know when you get off work and I will be waiting for you." *Id.*

During the walk to his patrol car Montano continued to harass the officer, making comments such as "I'll kick your ass," "I know you are afraid I can see it in your eyes," and calling the officer "punk ass." *Id.* In the patrol car

on the ride to the jail, Montano told the officer “you need to retire. I see your gray hair,” the defendant also repeated that he could see in the officer’s eyes that he was scared. *Id.* Montano was charged with Intimidating a Public Servant, a charge which was dismissed by the trial court after a Knapstad<sup>1</sup> Motion on the basis that the State had not produced sufficient evidence to allow a reasonable trier of fact to find that Montano had attempted to influence the vote, opinion or action of the officer. State v. Montano, 147 Wn. App. 543, 546, 196 P.3d 732, 733 (2008) *rev'd*, 169 Wn.2d 872, 239 P.3d 360 (2010). The State appealed to this Court, which reversed the trial court decision and remanded the case for trial. *Id.* at 549. Overruling this Court, the Supreme Court agreed with the trial court that the State did not produce sufficient evidence of attempt to influence outside of the threats themselves and Montano’s generalized anger at the circumstances. State v. Montano, 169 Wn.2d at 880.

A review of the statement of facts in this case presents a strong likeness to the facts of Montano. This was not only noted by the Court during defendant’s “halftime” motion at trial RP 146-147 (“--case pretty

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<sup>1</sup> State v. Knapstad, 41 Wn. App. 781, 706 P.2d 238 (1985), *review granted, affirmed* 107 Wash.2d 346, 729 P.2d 48 (1986).

much on point. It's a fairly recent case, a 2008 case, the -- title of it is State of Washington v. Jose Juan Montano. The facts are very close to this particular case."); but also relied on by previous counsel for the State in his Motion on the Merits ("The facts of Montano are very similar to those presented here." Respondent's Motion on the Merits at 9). It would seem disingenuous for this writer to argue that the two cases are distinguishable at this point.

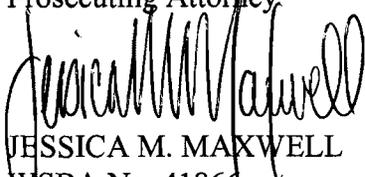
#### IV. CONCLUSION

For the foregoing reasons, Nunn's conviction for intimidating a public servant must be reversed and he should be remanded for resentencing on the sole charge of assault in the third degree.

DATED March 9, 2011

Respectfully submitted,

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