FILED
MAR 30, 2012
Court of Appeals
Division III
State of Washington

NO. 29913-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

TEODORO MONCADA,

APPELLANT.

BRIEF OF RESPONDENT

D. ANGUS LEE
PROSECUTING ATTORNEY

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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decisions of the Superior Court and uphold the conviction of the Appellant.

C. STATEMENT OF FACTS

Appellant's Statement of the Case describing the facts (Br. of Appellant, at 4–7) is sufficient for the purpose of Respondent's response, and will be accepted as it is, unless otherwise noted below.

D. RESPONSE TO APPELLANT'S ISSUES PRESENTED

1. Appellant's Due Process rights were not violated, as the evidence at trial was sufficient to sustain the charge of Intimidating a Public Servant.

Appellant challenges his conviction for Intimidating a Public Servant, arguing the evidence was insufficient to prove beyond a reasonable doubt that

he committed the crime. Br. of Appellant, 7. From this incorrect assertion, Appellant leaps to the erroneous conclusion that his Due Process rights were violated by the jury's finding of guilty.

As stated in Instruction #4, in order to convict the Appellant of that crime, the State had to prove beyond a reasonable doubt that on or about July 14, 2010, Appellant attempted to influence a public servant's decision or official action as a public servant by use of a threat, and of course that the acts occurred in the State of Washington. CP, at 73; RCW 9A.76.180.

In order to determine whether there was sufficient evidence to support Appellant's conviction, this Court will "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. Mitchell*, 169 Wn.2d 437, 443-44, 237 P.3d 282 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). A claim of insufficiency of the evidence not only requires that the Appellant admit the truth of the State's evidence, but also grants the State the benefit of all inferences that can reasonably be drawn from it. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980)). Additionally, appellate courts defer to the finder of fact (in this case, the

jury) on issues of witness credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

This Court should do the same. Considering all evidence, including all reasonable inferences drawn from it, is reviewed in the light most favorable to the State, there is more than sufficient evidence to support a conviction for Intimidating a Public Servant. Troopers Bassen and Raymond testified as summarized above, and were subjected to vigorous cross examination. RP Trial 3/30/11, 40–77; RP Trial 3/31/11 4–18.

Trooper Bassen's testimony established essentially what is described in Appellant's Statement of the Case, along with the following: that he was on duty in Grant County Washington as a Washington State Patrol Trooper, a commissioned law enforcement officer of the State Patrol, in uniform and driving a marked police car with a complete set of emergency lights and a siren. RP Trial 3/30/11, 40–41, 45.

The jury was properly instructed as to its obligations in considering the evidence. The jury was to consider what had been proven based on the testimony and admitted exhibits, and to consider all evidence without regard to which party introduced it. CP, 69–70. It was also instructed as to witnesses and their testimony, including direct and circumstantial evidence, and the

jury's role in considering the veracity and accuracy of any witness. CP, 71. While the jury received testimony from Appellant that differed from that of the Troopers, it was the role of the jury to determine what had been proven and to consider the credibility, biases, and opportunity to observe of all of the witnesses. Appellant's dissatisfaction with the conclusion to which the jury came does not have any legal meaning. What Appellant is essentially attempting to do is attack the jury's decision by focusing on irrelevant tangents. This is not proper. The standard for determining whether a conviction rests on insufficient evidence is "whether, 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." *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. A challenge to the sufficiency of the evidence admits the truth of the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Further, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*, at 201. This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. *State v. Walton*, 64 Wn. App. 410, 415-416, 824 P.2d 533

(1992). Applying the law to the facts of this case, the jury could have, and did, believe the Troopers' testimony. That testimony, and the inferences from it, supports the jury's verdict.

Appellant makes a similar but tangential attack, relying on *State v. Montano*, 169 Wn.2d 872, 239 P.3d 360 (2010). There are two elements (other than jurisdiction) to the crime of Intimidating a Public Servant. The accused must be shown beyond a reasonable doubt to have 1) attempted to influence a public servant's vote, opinion, decision, or other official action as a public servant, 2) by use of a threat. RCW 9A.76.180; CP, 73. Appellant does not dispute that the statements made to the Troopers, specifically to Trooper Bassen, were threats. Br. of Appellant, 10. The only question, then, is whether Appellant was attempting to influence a public servant's vote, opinion, decision, or other official action as a public servant. Under the facts as proven beyond a reasonable doubt to the jury during the trial, it is clear that he was not only attempting to do so. He did in fact influence Trooper Bassen's official acts. Although the trial court narrowed the facts to be considered too far, the "decision or official action" of Trooper Bassen using his Taser was certainly sufficient to sustain the conviction. CP, 74.

Assuming for the sake of argument that *Montano* was correctly decided, it and the cases upon which it relies are readily distinguishable. For

example, in *State v. Burke*, 132 Wn. App. 415, 132 P.3d 1095 (2006), the court held that there must be a connection between the threats and any attempt to influence behavior, and that there was not in that case.

> "Nothing Burke said or did that night to make this connection evidences his intent to prevent the party's closure or to prevent Billings from chasing the underage drinkers. And Billings had discontinued his pursuit of underage drinkers at the time Burke assaulted him. The evidence must show a connection, however weak, between Burke's anger and intent to influence Billings."

Id, at 422. This also assumes that Officer Billings could take any official action under the circumstances, since the lawfulness of his presence on the porch at the back of the house after walking through the house without consent or a warrant is open to question.

To the contrary, in this case, Trooper Bassen was clearly engaged in his official duties, checking on a pedestrian on Interstate 90. Appellant's threats were directly related to attempting to change the course of Trooper Bassen's decisions and actions. As correctly noted but incorrectly applied by Appellant, "... 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, 877, 239 P.3d 360 (2010); Br. of Appellant at 11. In *Montano*, the Court held that there was no evidence to show an attempt to influence the officers' official actions.

State v. Montano, 169 Wn.2d 872, 879, 239 P.3d 360 (2010). That is not the case here.

The threats made by Appellant on the side of the Interstate were not merely the venting of an intoxicated and angry man. While Appellant was from all indications both intoxicated and angry, there were direct consequences both implicit and explicit associated with those threats. As acknowledged in Appellant's brief, as soon as Trooper Bassen stopped and got out of his squad car, Appellant began approaching, displaying tense body language and clenched fists. Trooper Bassen repeatedly directed him to stay where he was, which Appellant did not do. Appellant then yelled at Trooper Bassen "What the fuck do you want?" RP Trial 3/30/11, 45; Br. of Appellant at 5. In ordinary interaction, such an inquiry would be interpreted as an expression of desire to be left alone. Words do in fact have meaning. Here, with a person whose presence on the Interstate is apparently not lawful, this phrase alone would be sufficient to convey to Trooper Bassen that the Appellant wanted the Trooper to go away, a change in the course of his official actions. Combined with the body language displayed, the message is even stronger.

Appellant continued on this path. As a result, Trooper Bassen drew and prepared to deploy his Taser, and continued to give verbal commands to

Appellant to put his hands above his head. Appellant did not comply with those commands, instead telling Trooper Bassen "Tase me or I will fucking kill you". Clearly this is part of a continuing effort to get Trooper Bassen to go away and leave Appellant alone, a change in the course of his decision or official action as a public servant. Trooper Bassen had to choose between risking Appellant's will and ability to carry out the threat to kill him, or applying the Taser. Predictably, the threats had the effect of causing Trooper Bassen to deploy the Taser against Appellant, which is an official decision or action, not an act of sport or personal gratification. The trial court gave an unnecessarily narrow instruction, limiting the jury to considering only deployment of the Taser. CP, 74. Under that restrictive instruction, the jury was convinced beyond a reasonable doubt that the Tasing resulted from Appellant's threats. This completely satisfies the legal standard of *Montano*.

The same legal theory was advanced before and during the trial. A hearing pursuant to CrR 8.3(c) was held on November 30, 2010.[1] Appellant's motion did not comply with the applicable rule, but a full hearing was conducted. CP, 9–24; RP VH 10–28.[2] The State asserted then what it asserts now as to the charges against Appellant. Trooper Bassen was engaged in an

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1 Judge Antosz heard this hearing; Judge Sperline the trial. The attorney who represented Appellant at that time left that office and was replaced on this case by trial counsel.
2 There are multiple volumes of transcripts. The transcript of this hearing is contained in a volume entitled "Various Hearings" at those pages. The use of "VH" is an attempt to clearly refer to the

uncertain and evolving blend of community caretaking and investigative functions, and theoretically could have withdrawn, thus satisfying Appellant's apparent goal. Of course, that withdrawal would not have been appropriate. CP, 25–33. In its oral ruling, the Court determined that the application of the Taser was the official action resulting from the threats and denied the motion. RP VH, 16–18. The State's position was not that narrow, but as noted above, the conviction was entered based upon the narrow instruction from the trial court.

Essentially the same motion was made at the close of the State's case. The State's response was also essentially the same as it had been during the CrR 8.3(c) hearing. RP Trial 3/31/11, 19–24. The Court denied the motion.

> The easiest way for me to understand – and perhaps it will help others to understand the crime of intimidating a public servant – is instead of a police officer let's make it a legislature (sic) and the bill is pending and someone says "vote for that bill or I'll do in your child." That's the two aspects of this crime which come together and that are the threat and the threat given for the purpose of changing the – or affecting the official's decision or action.
> The first thing we can say is that it's not necessary that the action be changed or the decision be affected, only that it's done by the defendant with the intent or as an attempt to accomplish some change in the behavior of the public servant.
> . . .
> So the question is: Is the evidence in this case one in which the both of those prongs, if you will, come together.

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volume intended.

> In my view there's a sufficient – there's sufficient evidence here to allow the jury to consider the intimidating charge. But the only place where those two elements come together is the statement "Taze me or I will fucking kill you." There is both the threat and the threat being offered for the purpose of changing/affecting the public officer's decision or action.
>
> . . .
>
> So it is clearly a change in the official behavior or conduct, and the evidence would support an argument that that is the purpose for the threat.

RP Trial 3/31/11 24–26.

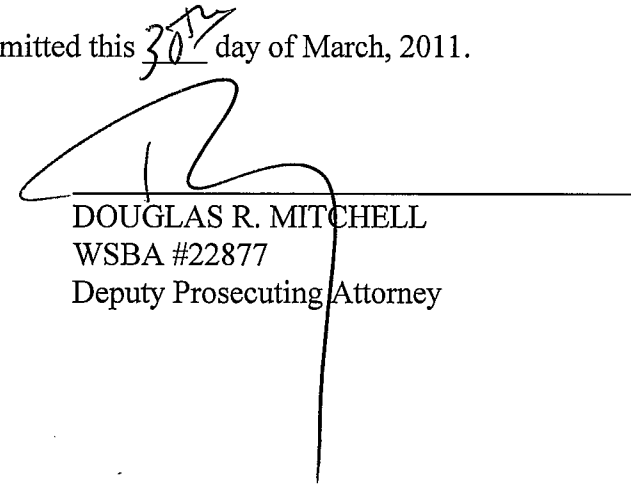
The judge who made this oral ruling is the same judge who initially dismissed the charge in the *Montano* case as a result of the CrR 8.3(c) motion. He is certainly aware of the factual differences. In the *Montano* case, Officer Smith's discretionary investigative actions were completed. The defendant was in custody, and in the squad car pending transport to jail. This is largely a ministerial action. The threats, no matter how improper and serious, could not have affected Officer Smith's decision. Such is not the case here. At the time of the threats from Appellant, Trooper Bassen was still engaged in investigation and decision making. He did not have a complete or even sufficient understanding of the facts upon which to base his actions, and the Appellant created a situation in which the path of the events could have and did change. This is not at all similar to the *Montano* facts, and the outcome must likewise be different.

E. CONCLUSION

The Appellant has not raised any supportable claims of error. The evidence was sufficient to convict the Appellant.

Accordingly, this Court should uphold the decisions of the trial court and the conviction of the Appellant. The trial may not have been perfect, as there are no perfect trials. It was, however, fair, and that is what the Appellant was entitled to receive – a fair trial.

Respectfully submitted this 30th day of March, 2011.



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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. TEODORO MONCADA, Appellant.	))))))))))	No. 29913-9-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

David N. Gasch
Gasch Law Office
gaschlaw@msn.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Teodoro Moncada
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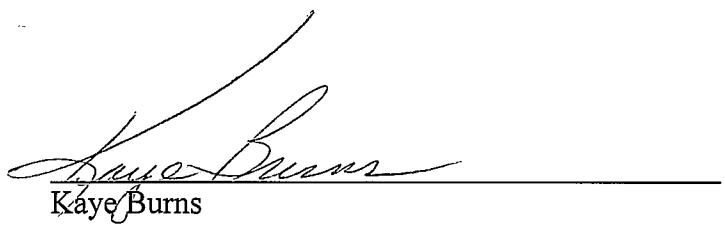
Dated: March 30, 2012.



Kaye Burns