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Division III  
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NO. 36128-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN LAURICELLA,  
Appellant.

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

The Honorable Patrick Monasmith, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The state failed to prove the essential element of intimidating a peace officer by failing to present evidence that Lauricella made threats in an attempt to influence the peace officer in his official duties.

Issue Presented on Appeal

1. Did the state fail to prove the essential element of intimidating a peace officer where it only presented evidence of Lauricella's anger unrelated to attempting to influence the peace officer's official duties?

B. STATEMENT OF THE CASE

a. Procedural facts

John Lauricella was charged with illegal wild game hunting, obstructing a peace officer and intimidating a peace officer under RCW 9A.76.180(1)(a)(3). CP 14-15. Lauricella was acquitted on the illegal hunting charge and convicted on the other charges. CP 48-62.

Fish and Wildlife officer Konkle came upon John Lauricella on a mountain road during deer and modern firearm season. RP 64-65. Lauricella turned around and pulled over on his own without

direction from Konkle. RP 198. In response to Konkle's question about deer hunting, Lauricella explained that he did not have a license and that he was not hunting but "looking for coyotes". RP 67. Lauricella's teenage son Richard was also in Lauricella's truck. RP 68, 104.

Konkle asked Richard if the shotgun in the truck was loaded to which Richard stated "no" and showed Konkle the clear barrel. RP 68-69. When Konkle asked to see the chamber, Lauricella became irate according to Konkle and refused to permit Konkle to handle the shotgun. RP 68. Konkle decided to handcuff Konkle for safety to further investigate the hunting matter. RP 70.

Lauricella twisted around after Konkle put a single handcuff on one hand. RP 71-72. After Konkle put the handcuff on Lauricella which hurt, Lauricella told his son to "load up". Id. Konkle, wanting to deescalate, removed the one handcuff after asking Lauricella to calm down. RP 71-72 ,96, 268-69. Konkle testified that he thought Lauricella said load up to use force against Konkle to prevent use of handcuffs. RP 96, 220-21. Konkle testified that he was afraid he would have to use up to deadly force against Lauricella. RP 72.

When Konkle perceived Larucella's son walking towards him, Konkle decided he needed to deescalate the situation. RP 199. Larucella was yelling while his son approached and told his son to start videoing the scene on his phone. RP 71, 200-01.

Konkle explained that he wanted to investigate a hunting violation but did not try to arrest Larucella but rather called for backup after releasing Konkle from his handcuff. RP 197, 204. Konkle admitted that he could not arrest someone for the misdemeanor suspected coyote hunting but could have issued a citation. RP 205-06, 218, 224.

Konkle decided not to issue a citation because he wanted to arrest Larucella for obstructing and intimidating a peace officer. RP 205, 214-15. During his career, Konkle never cited anyone for hunting coyote. Konkle never told Larucella he was under arrest and never attempted to arrest Larucella until King arrived. RP 215.

Konkle detained Larucella and his son for 75 minutes during which Larucella was not in handcuffs and Konkle investigated the suspected hunting violation and talked at length about Catholicism. RP 114-125, 140-45, 151, 201, 209, 216, 259 (Exhibit 3 video). Larucella explained that he was scoping out the coyotes to come

back in December when coyote pelts were at prime quality. RP 250-52. During the 75 minute detention, all parties moved to and from their trucks without incident. RP 114-125, 140-45, 151, 201, 209 259 (Exhibit 3 video). Konkle explained that he did not arrest Lauricella during the wait but just detained him for safety. RP 204.

Lauricella told Konkle that he had a gun when asked but never threatened to use the gun and never pointed the gun or displayed it in any manner; he did however curse a lot. RP 208-09, 204. After Konkle told Lauricella he could have shot Lauricella, Lauricella, said “women and children in front”, a self-protective reference to an incident involving ex-Sheriff Mack from Arizona who said the same in an effort to protect himself from police fire. RP 74, 138, 266.

The state played a video of the 75 minute wait taken from Lauricella’s son showing Lauricella referring to “women and children in front” , and Lauricella stating “when cuffs come off out f-ing guns come”. Exhibit 3, CP 16; RP 74, 138, 270.

During the 75 minute wait Lauricilla told Konkle during the wait: “I can put them in front and pull out all my pistols and rock and roll, or I want to be nice like you should, no ticket.” “Women and

children in front. Grab the guns.” RP 266. Lauricella also said “Next time a cop comes around me I know what I’m going to do. You or the next person who pulls me over, we’re gonna rock, stop and drop.” RP 168.

Konkle explained that Lauricella becoming irate did not prevent him from writing a citation for hunting because he planned to arrest Lauricella to take him to jail for other charges. RP 224. During the detention Konkle kept asking questions about coyote hunting which Lauricella explained he was not hunting. RP 99-103, 128, 132, 150-51.

Konkle explained that he was afraid that Lauricella might hurt other officers if some other officers stopped Lauricella. RP 221. Even though Lauricella did not threaten to use a gun, Konkle was afraid he would have to use up to deadly force, something he wished to avoid. RP 210. Konkle was also generally afraid because he was alone in the mountains with someone who had possession of a gun, but Konkle told Lauricella he was not afraid. RP 69, 73-74, 208, 210, 223.

Officer Douglas King responded to Konkle’s call for backup. RP 230-31. On arrival, Konkle arrested Lauricella without incident

and King detained Lauricella's son without incident. RP 230-31. Just before the arrest Lauricella said "God bless you, brother" and we weren't even hunting." RP 151, 153.

During the 3.5 hearing Konkle explained that Lauricella made a threat to assault the next officer who confronted him. RP 37. Konkle testified that he perceived Lauricella answering his question about having a gun as a threat and informing Konkle that he had a gun in the truck as a threat as well. RP 73-74.

Lauricella told Konkle that he appreciated law and order and feared he might have a heart attack again and that he could not breathe due to the stress on his heart condition during the detention. RP 99, 124. Lauricella also explained that the handcuff restricted his blood flow and he needed to go to the hospital. RP 94. The police took Lauricella to the hospital after his arrest. RP 243.

Konkle explained that his standard procedure for stopping a person suspected of hunting lasted 15-20 minutes. RP 217. Konkle did not discuss how long it takes to arrest for obstructing and intimidating. Id.

When asked what Konkle was thinking during the wait he

responded that he was afraid he would have to use deadly force. “I was afraid I was going to have to use force at times up to and including deadly force, yes.” RP 201. Lauricella never told his son to assault Konkle, but Konkle was afraid of Lauricella’s son. RP 9

C. ARGUMENT

1. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF INTIMIDATING A PEACE OFFICER.

The state failed to prove beyond a reasonable doubt that Lauricella made threats against peace officer Konkle in an attempt to influence Konkle’s official actions.

In criminal cases, this Court reviews evidence for sufficiency of the evidence by asking, “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 15, 391 P.3d 409 (2017) (*quoting, State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*citing State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)) (plurality opinion))). The evidence is viewed in light most favorable to the state. *Id.*

As charged in this case under RCW 9A.76.180(1)(a)(3), to

prove the crime of intimidating a public servant, the state must establish beyond a reasonable doubt that the defendant “by use of a threat”, .... **attempts to influence a public servant's .... official action**”, the intent immediately to use force against any person who is present at the time. (Emphasis added) RCW 9A.76.180. This statute requires the state to prove both that Lauricella made a threat to use immediate force and the threat was intended to influence Konkle’s official actions. *Id.*

Our Supreme Court addressed the attempt to influence element of this crime in *State v. Montano*, 169 Wn.2d 872, 239 P.3d 360 (2010). In *Montano*, the defendant violently refused a command to stop and provide identification and kept walking away. The officer twice grabbed Montano’s jacket and Montano twice pulled away. *Montano*, 169 Wn.2d at 874. The police then grabbed Montano’s wrist and stated he was under arrest. Montano broke free grabbed the officer’s wrist and tried to pull him over. Another officer arrived and stunned Montano with a stun gun. *Id.*

After Montano was placed under arrest he made the following threat”: “I know when you get off work, and I will be waiting for you.” Montano then added, “I’ll kick your ass,” “I know

you are afraid, I can see it in your eyes,” and called the officer “punk ass”, “you need to retire. I see your gray hair.” Montano repeated that the officer was scared and that he could see it in Smith’s eyes. *Montano*, 169 Wn.2d at 875.

The Court clarified that to meet its burden of proof, the state is required to provide specific 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. *Accord State v. Toscano*, 166 Wn. App. 546, 555, ,271 P.3d 912 (2012), *review denied*, 174 Wn.2d 1013 (2012) (Toscano yelled at the officer and physically assaulted him with a car but she did not make threats to the officer- rather she wanted to interrupt the car chase – not sufficient to establish intimidating an officer).

The Supreme Court held that Montano’s “threats and taunts provided no evidence of any attempt to influence the police officers.” *Montano*, 169 Wn.2d at 880. The Court concluded that “because the State failed to provide any evidence—aside from Montano’s threats and angry behavior—of his intent to influence the police officers, the State did not make a prima facie showing that the elements of the offense were met.” *Montano*, 169 Wn.2d at 880.

The threats were also for future actions, not threats to immediately use force.

Similarly, in *State v. Burke*, 132 Wn. App. 415, 422, 132 P.3d 1095 (2006). the defendant was convicted of intimidating a public servant after he yelled profanities and “fighting threats” at a police officer during a house party, as well as “belly bump[ing]” the officer and swinging his fists. *Burke*, 132 Wn. App. at 417-18.

On appeal, the court reasoned that the evidence demonstrated only the defendant’s anger but did not support a jury’s inference that the defendant intended to influence the police officer’s official actions. “Evidence of anger alone is insufficient to establish intent to influence [a public servant’s] behavior.” *Burke*, 132 Wn. App. at 422.

The facts in Lauricella’s case are indistinguishable in all material respects to *Montano*. As in that case, Lauricella struggled to free himself from Konkle’s attempt to handcuff him. Lauricella verbally abused Konkle and made angry threats against Konkle but as in *Montano*, Lauricella’s threats were not in an attempt to influence Konkle. Rather Lauricella was angry, ranting and raving:

“load up”, RP 71-72, “when cuffs come off out f-ing guns come”. Exhibit 3, CP 16; RP 74, 138, 270, “I can

put them in front and pull out all my pistols and rock and roll, or I want to be nice like you should, no ticket.” “Women and children in front. Grab the guns,” RP 266, “Next time a cop comes around me I know what I’m going to do. You or the next person who pulls me over, we’re gonna rock, stop and drop.” RP 168.

These threats were of the same generic caliber of threats Montano used that were not considered threats to influence the officer: “I know when you get off work, and I will be waiting for you,” “I’ll kick your ass,” “I know you are afraid, I can see it in your eyes,” and called the officer “punk ass”, “you need to retire.” *Montano*, 169 Wn.2d at 875.”

Lauricella did not make any threats directed to alter Konkle’s behavior, rather Konkle was afraid because he was alone in the mountains and wanted back up to make the arrest. This was Konkle’s decision based on his perception of the situation, not based on any threats designed to change Konkle’s actions. As in *Montano*, the state did not present any evidence that Lauricella made threats with the purpose of making Konkle do or not do something in his official capacity.

The evidence demonstrated that Lauricella was angry, but evidence of anger and threatening remarks alone is insufficient to

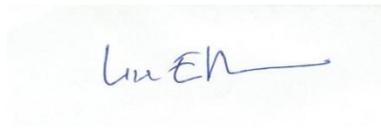
support a charge of intimidating a public servant. *Montano*, 169 Wn.2d at 878-79. Konkle was afraid of the situation because of its remoteness but being afraid is insufficient to meet the element of a threat intended to influence Konkle's decisions. Under *Montano* and *Burke*, the state's evidence was insufficient to prove beyond a reasonable doubt the crime of intimidating a public servant. Accordingly, this Court must vacate this conviction and remand for resentencing on the remaining conviction.

D. CONCLUSION

John Lauricella respectfully requests this Court reverse his conviction for insufficient evidence and remand for dismissal with prejudice and resentencing on the remaining crime.

DATED this 15<sup>th</sup> day of November 2018.

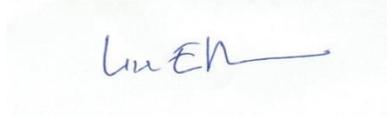
Respectfully submitted,

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I, Lise Ellner, a person over the age of 18 years of age, served the Stevens County Prosecutor's Office [trasmussen@stevenscountywa.gov](mailto:trasmussen@stevenscountywa.gov) and John Lauricella/DOC#408516, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on November 15, 2018. Service was made by electronically to the prosecutor and John Lauricella by depositing in the mails of the United States of America, properly stamped and addressed.

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Signature

**LAW OFFICES OF LISE ELLNER**

**November 15, 2018 - 12:09 PM**

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