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No. 36128-4-III

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

STATE OF WASHINGTON,
Respondent,

v.

JOHN LAURICELLA,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
STEVENS COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00316-1

BRIEF OF RESPONDENT

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Revised Code of Washington

RCW 9A.76.1807

A. RESPONSE TO ASSIGNMENTS OF ERROR

1. There was sufficient evidence to convict the defendant of Intimidating a Public Servant.

B. STATEMENT OF THE CASE

On October 21, 2017, WDFW Officer Matthew Konkle was patrolling the Pend Oreille Wildlife Refuge on US Fish & Wildlife land when he made contact with John Lauricella due to suspicious driving activity. (VRP 65 – 67). Officer Konkle made contact with the driver, later identified as John Lauricella. During the contact, Officer Konkle observed a shotgun. Officer Konkle asked the passenger if the shotgun was loaded, and the passenger said no, and showed an empty chamber. When Officer Konkle asked to see the shotgun to see if there were shells in the tube, Lauricella became increasingly agitated. (VRP 67 – 69). Officer Konkle attempted to place Lauricella in handcuffs. (VRP 71). When Officer Konkle had one cuff on Lauricella, Lauricella told his passenger to “get the gun out and load up.” (Plaintiffs Exhibit 3). As Officer Konkle was alone, he decided to attempt to de-escalate the situation and decided to un-cuff Lauricella. (VRP 72). Over the course of approximately an hour, Officer Konkle attempted to talk with Lauricella. (VRP 73).

During the course of that hour Lauricella continued to be out of control. Lauricella indicated throughout the confrontation that he would use force if necessary against Officer Konkle. (Plaintiff’s Exhibit 3). He

specifically stated that “next time cuffs come out, f-ing guns out.” (Plaintiff’s Exhibit 3, Video 1 at 11:30). He indicated that it was unconstitutional to cuff people. At one point during the contact, Lauricella indicated that he might have another person hiding in the back seat of the truck with a gun. At another point, Lauricella indicated that his son was carrying a gun, and motioned to the passenger’s waistband; and also indicated that he was carrying a gun. (Plaintiff’s Exhibit 3). At one point, while Officer Konkle was at his truck, Lauricella calmly told his son “I got my 9 on me, I’m not letting him get close to me” (Plaintiff’s Exhibit 3, Video 1 at 12:50). Lauricella began to get even more agitated when he was told he was going to get an infraction. (Plaintiff’s Exhibit 3, Video 2). When Officer Konkle returned to his vehicle to write the infraction, Lauricella began threatening that he would shoot any officer that came near him. (Plaintiff’s Exhibit 3, Video 2 at 6:08). Lauricella then told his passenger to stand in front of him and repeatedly said “women and children in front”. He said that he could shoot it, “or be nice like you should and not write a ticket.” (Plaintiff’s Exhibit 3, Video 2 at 6:47). Lauricella continued to repeat “women and children in front;” and when Officer Konkle asked what that meant, Lauricella said “It’s a threat, for protection.” (Plaintiff’s Exhibit 3, Video 2 at 9:50).

While discussing whether Officer Konkle was going to write a ticket or not, Lauricella commented “you want to escalate shit tough guy? Write a ticket.” (Plaintiff’s Exhibit 3, Video 2 at 7:32). He continued on to say that if

Officer Konkle wrote him a ticket he would “wipe my ass with it right on your f-ing face.” (Plaintiff’s Exhibit 3, Video 2 at 9:20). He continued on, stating “write a ticket . . . if you want to escalate . . . if you want a shoot out.” (Plaintiff’s Exhibit 3, Video 2 at 17:42). Lauricella made it clear that he was armed and would use force when he stated “we’re all packing. We’re getting out of here.” (Plaintiff’s Exhibit 3, Video 2 at 7:52).

Lauricella continued throughout the conversations to indicate that he was a free trapper and that nobody had the right to stop him; and that Officer Konkle needed to let him go, without a ticket. He indicated that it was unconstitutional to cuff somebody, and that he shouldn’t even be stopped. (Plaintiffs Exhibit 3). When asked if he wanted a criminal ticket or a citation, he replied “why can’t we just be men, shake hands and go . . . you’re wasting my time . . . I’ll wipe my ass with it right in front of you.” (Plaintiff’s Exhibit 3, Video 2 at 2:04). He continued his threats that if he did leave, and any other cop tried to stop him that he would use violence: “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 going to rock, stop, and drop.” (Plaintiff’s Exhibit 3, Video 2 at 22:00).

Once back up finally arrived, Lauricella was taken into custody. During a search incident into arrest, a loaded 9 mm handgun was located in the front pocket of his sweatshirt. (VRP 75). After the arrest of Lauricella, it was discovered that the passenger had been recording the incident on his cell

phone. (VRP 85). The cell phone was seized. Once a warrant to search the phone was obtained, the video was located. (VRP 89).

The case proceeded to jury trial. (VRP 51-327). Officer Konkle of the Department of Fish and Wildlife testified. (VRP 63 – 226). Officer King of the Department of Fish and Wildlife testified. (VRP 226 – 247). The video footage from the cellphone recordings were played. (VRP 93 – 154). It should be noted that the second video was stopped at 23 minutes, as the remainder of the recording was only that of the passenger sitting in the back of a patrol vehicle. The defendant testified. (VRP 247 – 271). The defendant admitted that he meant that he would draw his gun if the officer tried to place him in handcuffs again. (VRP 270). The defendant admitted that he didn't want to be cited. (VRP 271).

During closing, the State argued that the defendant was threatening Officer Konkle specifically to influence a decision or other official action by use of threat. The State specifically referenced the initial threat in which Lauricella told his son to "load up" when Officer Konkle attempted to physically detain him. (VRP 289). The State also referenced the specific threat that if Officer Konkle tried to place him in cuffs again, he would bring out his weapon. The state pointed to the statement by the defendant regarding the fact that if any other Officer approached him, he would use force. (VRP 290). The State went on to reference that the defendant attempted to influence the decision of Officer Konkle to write a ticket;

pointing to the threats that were made by the defendant in response to this possibility. (VRP 291). The defense offered in closing that the defendant was not attempting to influence any decisions by Officer Konkle. (VRP 298).

The defendant was convicted of Intimidating a Public Servant as charged in Count 1, and returned a yes to the firearm enhancement. The defendant was convicted of Obstructing a Law Enforcement Officer as charged in Count 2. The defendant was found not guilty of the crime of Unlawful Hunting of Wild Animals in the Second Degree as charged in Count 3. (VRP 319-320).

Sentencing was held on June 5, 2018. (VRP 328). The Court sentenced the defendant to 39 months of confinement for Count 1, a 90 day standard range sentence plus 36 months for the firearm enhancement. The court imposed 12 months of community custody. (VRP 345 – 346).

The defendant timely filed this appeal.

C. ARGUMENT

a. Sufficiency of the evidence.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the jury’s verdict, any rational jury could find the essential elements of a crime beyond a reasonable doubt.” *State v. McCreven*, 284 P.3d 793, 809, 170 Wn.App.444 (2012) (emphasis added) (citing *State v. Johnson*, 159 Wn.App. 766, 744, 247 P.3d 11(2011) (internal citations omitted).

A sufficiency review is a limited inquiry which addresses whether “the government’s case was so lacking that it should not have even been submitted to the jury.” *Burks v. United States*, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed 2d 1(1978). A narrow sufficiency review does not override the jury’s role concerning how the jury weighs the evidence or what inferences they draw from evidence. *Musacchio v. United States*, 577 U.S. _____, 136 S. Ct. 709, 193 L.Ed.2d 639 (2016). The Supreme Court outlines that a reviewing court on a sufficiency of the evidence review has a narrow role, where they make a “*limited* inquiry tailored to ensure that a defendant receives the minimum that due process requires: a ‘meaningful opportunity to defend’ against the charge against him and a jury finding of guilt ‘beyond a reasonable doubt; and that a “sufficiency challenge is for the court to make a ‘legal’ determination whether the evidence was strong enough to reach a jury at all” *Id.* (emphasis added) (quoting *Jackson v. Virginia*, 443 U.S. 307, 314-319, 99 S.Ct.2781, 61 L.Ed. 2d 560 (1979)).

Washington case law follows suit. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980) explains that the job of the court when conducting a sufficiency review is not to “reweigh the evidence and substitute judgment” but rather “because [the jury] observed the witnesses testify first hand, we defer to the jury’s resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given to the evidence.”

All reasonable inferences that could be made from the evidence “must be drawn in favor of the verdict and interpreted strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The “jury is the sole and exclusive judge of the evidence.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

When conducting a sufficiency of the evidence review, the only question should be if there was enough evidence to send to the jury; it is not the job of the reviewing court to make determinations on the evidence. See *State v. McCreven*, 170 Wn.App.444, 284 P.3d 793(2012); *State v. Johnson*, 159 Wn.App. 766, 247 P.3d 11(2011); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Walton*, 64 Wn.App.410, 824 P.2d 533 (1992); *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979).

b. The State presented sufficient evidence to prove that the defendant made threats in an attempt to influence the peace officer in his official duties.

A person commits the crime of intimidating a public servant if, “by use of a threat, he attempts to influence a public servant’s vote, opinion, decision, or other official action as a public servant.” RCW 9A.76.180. To convict a person of intimidating a public servant, there must be evidence that shows an attempt to influence, not simply generalized anger at the

circumstances. *State v. Montano*, 169 Wash. 2d 872, 877, 239 P. 3d 360 (2010). The defendant's anger and threats must have "some specific purpose." *State v. Burke*, 132 Wash.App 415, 422, 132 P. 3d 1095 (2006).

The appellant points to a line of cases that stand for the premise that generalized threats and anger at the situation do not rise to the level of attempting to influence an official action in *Burke* and *Montano*.

Montano is correctly characterized as a man who makes generalized threats towards the officer – threatening to meet up with him and fight. *Burke* is similar in which an officer comes to break up a party and the defendant hurls angry insults. *State v. Moncada* is a similar case in which the defendant shouts threats and expletives – but is still essentially an expression of anger and an invitation to fight. 172 Wash.App. 364, 289 P. 3d 752 (2012). None of those cases had anything to show that the defendant was attempting to influence any decision or action.

The case at hand is distinguishable from all three of those cases. Here, as *Burke* requires, there is a connection between the defendant's threats and the purpose of his threats. Rather than the circumstances in *Burke* and *Moncada*, this is not a drunken rage. This is not simply shouting angry threats at an officers. The *Moncada* court indicates that there needs to be "evidence to suggest that th[e] rage was purposeful." *Moncada* at 754. In Mr. Lauricella's case, there was much purpose to his rage. His purpose was to keep Officer Konkle from physically detaining him. This is why he

tells his son to “load up.” His second purpose is to keep Officer Konkle, or any other officer, from arresting him in the future. That is why he shouts “next time cuffs come out, f-ing guns come out,” and talks about how he will shoot any other officer who contacts him or pulls him over he will use his firearm. His third purpose was to keep Officer Konkle from writing him any sort of citation, referencing that he would “wipe his ass” with any citation, or that there would be a shootout if Officer Konkle wrote a citation. He stated “write a ticket . . . if you want a shootout.”

Even though this case is distinguishable from *Montano*, the appellant overlooks a small, but relevant, holding in *Montano*. The *Montano* court specifically references an example regarding if a person calls a police station and threatens to kill any officers who attempt to arrest them. The *Montano* court indicates that is a relevant application of the Intimidating a Public Servant statute. *Montano* at 878. *Montano* references *State v. Russell*, 124 Wash. App. 1088 (2004), in which that exact type of intimidation of a public servant was upheld. In that case, the defendant knew he had an active warrant for his arrest, and threatened to kill any police officer who tried to arrest him, and further referenced that he had a 9 mm pistol. This is completely analogous to what Mr. Lauricella did. He told Officer Konkle that he would use force against any officer who pulled him over again. Lauricella also referenced that he was carrying a loaded gun, multiple times.

Other than the small fact that *Montano* references that scenario

being acceptable under the Intimidation of a Public Servant statute, *Mr. Lauricella's* case is nothing like that cases of *Burke, Montano, and Moncada*.

This court has previously addressed the attempt to influence element in *State v. Andrews*, 176 Wash.App. 1002 (2013). In that case, a CPS investigator and two sheriff's deputies attempted to make contact with an individual regarding a CPS intake. That individual was not home, but the defendant was at her home. The defendant in that case told them to leave, and that no one needed to talk to the mother because the child was fine. He walked towards them with a stick and told them he was going to kick their asses. Division III distinguished this case from that of *Burke, Montano, and Moncada*. Specifically, the defendant became irate because the CPS investigator was choosing to investigate. The court concluded that a jury could find that his threats were specifically to make the officers abandon the effort to talk with the mother. The court rejected the argument that the threats were generalized anger. Mr. Lauricella's case is analgous to *Andrews*. Mr. Lauricella repeatedly threatened Officer Konkle to specifically get Officer Konkle to abandon any investigation or continued detention of Mr. Lauricella. He also threatened Officer Konkle in an attempt to make sure that he wouldn't receive a citation.

Division II also addressed this specific element in *State v. Kalachik*, 186 Wash.App. 1030 (2015). This case is even more closely on point. In

that case, Officers made a traffic stop and issued a citation to the defendant. He ripped up the citations and stated “you have no idea what you are doing right now, I will guarantee you will regret this.” The *Kalachik* court held that a jury could find that the defendant “made his threats with the purpose of influencing law enforcement officers to withdraw the citations and take no further action against him.” *Kalachik* at 2. Division II distinguished *Kalachik* from *Montano* and *Burke*.

D. CONCLUSION

Because the only question that should be answered when conducting a sufficiency of the evidence review is whether or not there was enough evidence to send to the jury, convictions for Intimidating a Public Servant should be upheld on a sufficiency of the evidence basis.

There was enough evidence presented at trial to show that the threats that Mr. Lauricella was making were made with the intent to influence the decisions of Officer Konkle. The display of Mr. Lauricella was not generalized, rather it had the purpose to intimidate Konkle in foregoing any further detention or investigation, to not write any citations, and for no other officer to attempt to stop him.

It is not the job of the reviewing court to substitute their judgment for that of the jury. The argument that the defendant was not attempting to influence the actions of Officer Konkle was submitted to the jury. The jury dismissed that argument and returned a verdict of guilty.

Mr. Lauricella's case is clearly distinguishable from that of *Montano, Moncado, and Burke*. Rather, it is analogous to *Andrews, Russell, and Kalachik*.

Respectfully submitted this 1st day of March, 2019.

STEVENS COUNTY
PROSECUTING ATTORNEY



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Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Lise Ellner, Attorney for Appellant on March 1, 2019.



Michele Lembcke, Legal Assistant
for Erika George

STEVENS COUNTY PROSECUTOR'S OFFICE

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