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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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26124-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

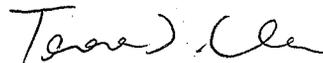
JOSE JUAN MONTANO,

Respondent.

DIRECT APPEAL
FROM THE SUPERIOR COURT OF GRANT COUNTY

APPELLANT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF APPELLANT

The State of Washington, represented by the Grant County Prosecutor, is the Appellant herein.

II. ASSIGNMENTS OF ERROR

The trial court erred in dismissing the charge of intimidating a public servant pursuant to State v. Knapstad. There are no written findings and conclusions upon which to assign error.

III. ISSUE

Did the court err in dismissing the charge of intimidating a public servant pursuant to State v. Knapstad, finding insufficient evidence for the element of “attempting to influence”, where the evidence is that the Defendant strenuously evaded and resisted arrest and that his threats followed immediately upon the officer taking him into custody and continued throughout the arrest and transport to jail?

Did the court err in requiring the “attempt to influence” be explicitly and verbally stated and in ignoring the context of the offense despite the great weight of case law to the contrary?

IV. STATEMENT OF THE CASE

On February 25, 2007, Quincy police officer Smith observed the Defendant Jose Juan Montano shove his brother, Salvador Montano. CP 18. Bleeding from his earlobe, Salvador Montano approached the officer and reported that his brother had hit him. CP 18. The officer arrested an apparently drunk and belligerent Defendant for assault in the fourth degree – domestic violence against his brother Salvador Montano, committed in the presence of the officer. CP 18-19.

The Defendant refused to provide Officer Smith with his name, broke free of the officer's grasp three times, repeatedly attempted to escape, and pulled on the officer's wrist. CP 18-19. When Sergeant Jones arrived on the scene, the Defendant refused to comply with orders and advanced on Sergeant Jones. CP 19. The sergeant had to use a Taser on the Defendant two times before he stopped struggling enough to be handcuffed. CP 19.

While being escorted to the patrol car, the Defendant made the following statements to police: "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 "Punk Ass." CP 19. Once in the patrol car and while being transported to the jail, the Defendant made the following statements to police:

“you need to retire, I see your grey hair” and “I know you are afraid, I can see it in you eyes.” CP 19. During the ride, the Defendant made eye contact with Officer Smith in the rear view mirror and glared. CP 19. He laughed in a menacing manner as if to frighten the officer. CP 19. When they arrived at the jail, the officer asked that several jailers be present in the event that the Defendant became violent again. CP 19.

The Defendant has a significant criminal history, which includes robbery, burglary, and firearm offenses. RP February 26, 2007 at 4.

In Grant County Superior Court No. 07-1-00116-9, the Defendant Jose Juan Montano was charged with intimidating a public servant, resisting arrest, and simple assault - DV. CP 1-2. The Honorable Evan Sperline failed to find probable cause for the first count. RP February 26, 2007 at 4, ln. 8-9.

The Defendant made a pretrial motion to dismiss under State v. Knapstad. CP 8-22. The State prepared a written response. CP 23-26.

Judge Sperline asked for evidence that the purpose of the threat was to influence a decision of the officer. RP April 17, 2007 at 5-6. And the prosecutor explained that the purpose of the threat was to gain release. RP February 26, 2007 at 4 (ln. 16-25) - 5 (ln. 1-4). The prosecutor explained that the only thing the Defendant could have been responding to was the arrest

and that this was amply evidenced by his resisting arrest. Id. While the Defendant did not specifically ask for release, the fact that this was his purpose was implicit in the threat. RP April 17, 2007 at 6 (ln. 8, 14).

Judge Sperline said that, while the offense was “reprehensible” and he did not “condone” the Defendant’s behavior, the charge was not legally justifiable. RP April 17, 2007 at 7. Judge Sperline found that there was no evidence that, while detained, the Defendant’s threats to harm the officer were intended to influence any decision. RP April 17, 2007 at 7-9. Relying upon State v. Burke, 132 Wn. App. 415, 132 P.3d 1095 (2006), Judge Sperline stated that unless a defendant specifically articulates the purpose of the threat, the elements of the crime are not met. RP April 17, 2007 at 8. Accordingly, the court dismissed the intimidating count. RP April 17, 2007 at 9.

The remaining counts were dismissed in order to prevent multiple trials while facilitating the appeal. CP 27-28. The State is appealing the dismissal of count one. CP 29-31.

V. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE CHARGE OF INTIMIDATING A PUBLIC SERVANT.

The trial court erred by stepping into the role of jury rather than applying the proper standard for a Knapstad motion.

A trial court has inherent authority to dismiss a prosecution when the undisputed facts are legally insufficient to support a finding of guilt. State v. Knapstad, 107 Wn.2d 346, 352, 729 P.2d 48 (1986). A defendant seeking dismissal accepts the truth of the police reports. Here, the Defendant attached the report to his motion and no new evidence was taken.

Standard of Review:

On appeal from a dismissal pursuant to Knapstad, the reviewing court is in the same position as the trial court, reviewing the same police report. Accordingly, the standard of review is *de novo*.

We review *de novo* the trial court's decision to dismiss under *Knapstad*, viewing the facts and all reasonable inferences in the light most favorable to the State. ... We will uphold a trial court's dismissal of an information under *Knapstad* if no rational factfinder could have found the essential elements of the crime beyond a reasonable doubt.

State v. Missieur, No. 58164-3-I, 2007 Wash. App. LEXIS 2472, slip op. at 3-4, (Aug. 20, 2007) (reversing dismissal after State appeal). See also CP 10 (conceding the standard).

The evidence establishes that the Defendant's threats were made for the purpose of gaining release.

The Defendant was charged with intimidating a public servant.

Intimidating a public servant.

- (1) A person is guilty 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.
- (2) For purposes of this section "public servant" shall not include jurors.
- (3) "Threat" as used in this section means
 - (a) to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
 - (b) threats as defined in RCW 9A.04.110(25).
- (4) Intimidating a public servant is a class B felony.

RCW 9A.76.180.

Judge Sperline found insufficient facts to support the element of attempting to influence a public servant's decision. The dismissal can only stand if no rational factfinder could have found the essential elements of the crime beyond a reasonable doubt.

The evidence is that the officer was not familiar with the Defendant. CP 18 (the officer asked for the names and identification of the Defendant and his brother). Their only acquaintance was through this arrest. The officer became involved after observing an assault and after Salvador Montano requested the officer's assistance.

In investigating the crime, the officer immediately met with resistance from the Defendant. The Defendant refused to give his name, refused to provide identification, and then tried to leave. Three times the Defendant wrested free and tried to walk away.

After repeated attempts to obtain from him his ID, Jose refused steadfastly and became increasingly agitated. I radioed to MACC to have Sergeant Jones respond to my location. Jose then began to walk away and toward his residence to the North at 103 B Street SW. I grabbed Jose by the back of his coat and tried to pull him back to stop him. Jose forcefully broke free. I grabbed him again on the coat and again he broke free and continued walking. We then walked onto the lawn of 103 B. Street SW. Others from inside the house walked out. I told Jose he was under arrest for assault 4th and grabbed hold of his wrist. Jose broke my grip and grabbed my wrist and attempt[ed] to pull me over. I freed myself from his grasp.

CP 18-19. Clearly the Defendant's desire was to leave, to prevent the investigation of the crime, and to prevent arrest. This is what the officer was attempting and this is what the Defendant was preventing.

Judge Sperline found probable cause for resisting arrest (RP February 26, 2007 at 4), and the Defendant did not contest this charge under Knapstad.

The *only* thing the officer was doing was investigating and arresting. By his actions, the only thing the Defendant was doing was attempting to leave and escape legal consequences. By leaving and later by threatening, the only thing the Defendant was doing was preventing was arrest. There is no evidence of any other intent.

So much did the Defendant want to leave that it took two Taser stuns before he stopped resisting. Once he had been physically restrained, placed in handcuffs and eventually placed in the patrol car, the Defendant could no longer walk away. But he continued preventing the arrest through his threats. His subsequent actions, the threats, should be understood *in the context of his desire to leave and escape arrest* as evidenced by his walking away and resisting only moments before. The Defendant threatened, "I know when you get off work and I will be waiting for you." "I'll kick your ass." His threats clearly were an attempt to get the officers to release him, that is, to prevent them from carrying out their duty, as evidenced by his strenuous resistance to arrest and attempts to escape.

Judge Sperline failed to apply the proper standard for a Knapstad Motion.

Judge Sperline stated that “an equal argument [may] be made that it’s anger ... [and not] an attempt to get the officer to let him go.” RP April 17, 2007 at 7. These are arguments for the Defendant to make *to a jury*. It is not the standard at a Knapstad motion. A Knapstad motion is not the judge’s opportunity to act as jury. The judge only determines if there is “legally” sufficient evidence, a “prima facie case.” The standard requires the judge to view the facts and all reasonable inferences in the light most favorable to the State.

The motion to dismiss should be granted only where the construction most favorable to the State would not establish a prima facie case of guilt. ... the trial court may neither try to determine factual issues, nor may it consider the weight of conflicting evidence or the credibility of witnesses in determining whether there exists a genuine issue of material fact.

State v. Knapstad, 107 Wn.2d at 356 (discussing a Florida case which “contain[s] the necessary and desired safeguards”). “[T]he court is not to rule on factual questions.” State v. Knapstad, 107 Wn.2d at 357.

In State v. Scherck, 9 Wn. App. 792, 514 P.2d 1393 (1973), the defendant made a motion to dismiss the charge of witness tampering. He

argued that while he asked the witness to drop the charges, this was not tantamount to an attempt to prevent the witness from testifying. State v. Scherck, 9 Wn. App. at 794. The court of appeals called this “an exercise in semantics.” Id. The court noted that the jurors are “required to consider the inferential meaning as well as the literal meaning.” Id.

Judge Sperline similarly engaged in a semantic exercise, ignoring the context of the statements and appropriate inferences, which the standard grants to the state in a Knapstad motion. In so doing, he usurped the jury’s role.

A California case demonstrates the error. In People v. Thomas, 83 Cal. App. 3d 511, 148 Cal. Rptr. 52 (1978), the superior court dismissed a charge of intimidating a witness in a preliminary hearing after finding insufficient evidence for the charge. The evidence was that the son of a shooting defendant approached the mother of the victim as she sat outside the courtroom. He yelled at her “that [the shooting victim] was going to kill my mother-fucking ass and he was going to fuck me up,” and “You put my mother in jail, you had my mother picked up.”

Like Judge Sperline, the superior court judge commented that he did not condone the defendant's actions, but had to dismiss to uphold the integrity of the system.

The state appealed, and the court of appeals *reversed*, holding that there was a reasonable inference that the words or actions were intended to prevent or dissuade a potential witness from testifying.

There is, of course, no talismanic requirement that a defendant must say "Don't testify" or words tantamount thereto, in order to commit the charged offenses. As long as his words or actions support the inference that he (1) sought to prevent or dissuade a potential witness from attending upon a trial (Pen. Code, § 136, subd. (b)) or (2) attempted by threat of force to induce a person to withhold testimony (Pen. Code, § 137, subd. (b)), a defendant is properly held to answer.

People v. Thomas, 83 Cal. App. 3d at 314.

The California court of appeals noted that the superior court judge's ruling was self-contradictory, because it "impliedly determined" that there was an intent to prevent the witness from testifying. Similarly, Judge Sperline's ruling is self-contradictory. He has already impliedly determined the Defendant's intent -- by finding probable cause for resisting arrest. It is not reasonable to find that only one of two actions had the purpose to evade arrest when the actions were separated in time by mere seconds and consistent in purpose.

There is legally sufficient evidence that the Defendant's threats, in the context of the entire incident and his multiple attempts at escape, were made with the purpose of securing release. Judge Sperline's dismissal must be reversed.

Judge Sperline misinterpreted *State v. Burke*.

The court relied upon *State v. Burke*, 132 Wn. App. 415, 132 P.3d 1095 (2006). In *State v. Burke*, an officer was pursuing what appeared to be underage drinkers. They ducked into a private party. The officer followed in hot pursuit. The tenant of the house yelled that the officer did not have permission to be in her house and needed a warrant. *State v. Burke*, 132 Wn. App. at 417.

The officer pursued the suspects through the house and out onto the back deck where he lost them among 50 party attendees. *Id.* The party goes became rowdy and the officer decided to abandon his pursuit. Having abandoned his pursuit, there was no further duty that he was conducting. He only attempted to leave. However, he attempted to leave by re-entering the home through the back deck. The crowd denied him entrance and the defendant Burke, a large man, belly bumped the officer to prevent him from

re-entering the home. While this could constitute harassment or assault, there was no intent to prevent him from pursuing the suspects. They were not inside the house, and the officer had already abandoned pursuit.

The State pointed out that the facts of this case are inapposite. Where in Burke, the officer was no longer attempting to arrest the underage drinkers, Officer Smith was still attempting to arrest, transport, and charge the Defendant when the threats were made. CP 26.

Judge Sperline argued that the officer in Burke was also prevented from an official action, to wit: his "official duty to return to his patrol car." RP April 17, 2007 at 8. This is not a reasonable reading of the case. The officer could return to his car by walking *around* the house. He had no cause to go *through* it. Nowhere in the record does it suggest that there was no other egress from the large deck. If such were the case, the state likely would have charged unlawful imprisonment (RCW 9A.40.040). The officer was no longer in hot pursuit and, therefore, had no cause to enter a private residence without a warrant. U.S. CONST. amend. IV (Security from Unwarrantable Search and Seizure).

Judge Sperline erred in requiring magic words:

In the Knapstad motion, the Defendant claimed that absent the words “if you don’t release me,” there is no evidence of intent to influence.

For example, Mr. Montano would need to make the following type of statement in order for Intimidating a Public Servant to be a valid charge, “If you don’t release me immediately, I’ll wait for you until you get off work;” or, “I’m going to hit you if you arrest me;” or, “I’m going to hurt your family, if you don’t release me.”

CP 14. Although there is **no authority for this proposition of magic words**, Judge Sperline adopted this requirement.

In the cases where there is evidence of that, the threat is either “you turn me loose or I’m gonna hunt you down, I know where you live, etc.,” but there’s nothing of the first type in this case. There’s only the threat.

RP April 17, 2007 at 8.

Such a requirement is unreasonable. The essence of intimidation is subtlety. Any thug worth his salt does not need to spell it out. One would be doing a poor job indeed of intimidating if the victim did not take the message. When a robber holds a gun on a cashier, neither the threat to shoot nor the demand for money require words. When a defendant looks at a witness or a juror and draws his finger across his throat, no words need communicate the meaning. The circumstances provide the plain inference.

The Defendant's actions and threats speak for themselves. He eloquently expressed his desire not to be arrested and charged by attempting to leave over and over again, by resisting, and then, when restrained, by threatening the officer for the entirety of the ride from Quincy to Ephrata.

Case law contradicts the judge's argument that evidence for the element of attempt to influence must be articulated in the threat. The jury is entitled to find that the intimidation was performed with the intent to influence a public servant even in the absence of an explicit statement to that effect.

The jurors [are] required to consider the inferential meaning as well as the literal meaning of [communications]. The literal meaning of words is not necessarily the intended communication. The true meaning of words may be lost if they are lifted out of context.

State v. Scherck, 9 Wn. App. at 794.

Most Washington case law regarding the charge of intimidating a public servant is unpublished. In one published case, the defendant was convicted of intimidating a public servant when she told an officer who was cuffing her that she would "call her gang boys to come up and shoot" him. State v. C.G., 114 Wn. App. 101, 104, 55 P.3d 1204 (2002), rev'd, 150 Wn.2d 604, 80 P.3d 594 (2003) (reversing on a different count). There were

no magic words “if you don’t release me.” The defendant had been kicking furniture at the police station and trying to get out of her arm restraints. When the officer tried to transport her from the police station to a detention facility, she kicked and dented his car. When he cuffed her legs to prevent further kicking, she threatened to have him killed. The inference from the situation was apparent and it satisfied the jury beyond a reasonable doubt. The defendant was threatening the officer to prevent him from cuffing her and transporting her to detention for charging.

In a recent Division Three case, on the way to the jail the defendant said to the sheriff’s deputy, “I bet your name and address are in the phonebook.” State v. King, 135 Wn. App. 662, 666, 145 P.2d 1224 (2006). When the deputy testified, the defendant mouthed the word, “liar.” Id. While being led from the courtroom, the defendant said to the deputy, “I hope you sleep well at night,” “I hope you feel good, Batman,” and “I’ll see you, but you won’t see me.” State v. King, 135 Wn. App. at 667. The defendant was convicted of intimidating a witness, which contains the element of attempting to influence testimony, etc.. RCW 9A.72.110(1). The defendant challenged the sufficiency of the evidence, and the court upheld the conviction, although the purpose of influencing testimony was never articulated in the threat.

In United States v. Balzano, 916 F.2d 1273 (7th Cir. 1990), the defendant was convicted of intimidating a grand jury witness. The federal statute contains the element of intent to influence and prevent the witness from testifying. 18 U.S.C. § 1512(b). The evidence established that, immediately before the witness testified before the grand jury, the defendant stood in the doorway of the room where the witness was sitting, “waved a newspaper over his own mouth two or three times, moved his thumb across his own throat in a slashing motion, and pointed his index finger with his thumb extended in a motion representing the firing of a gun.” Balzano, 916 F.2d at 1279. The court noted

Although it is difficult to find direct evidence in the record of the defendants’ intent to intimidate and retaliate against [the witness], direct evidence of intent is usually unavailable. In general, it is necessary to prove intent through circumstantial evidence, and a jury may thus rely on evidence of this nature to find that a defendant had the requisite intent to commit the crime charged. Circumstantial evidence, moreover, is no less probative than direct evidence.

Balzano, 916 F.2d at 1291, citing United States v. Johnson, 903 F.2d 1084, 1087 (7th Cir. 1990). The court found that the jury “properly inferred” intent to influence from the circumstances and found sufficient evidence for the conviction. Balzano, 916 F.2d at 1291-92.

In Reed v. State, 209 S.W.3d 449 (Ark. App. 2005), although the defendant plainly threatened harm, she never explicitly stated that the witness should not testify. Reed, 209 S.W.3d at 451. Holding the police report with the witness' statement, the defendant approached a witness and asked, "How the hell could [you] do that, because the whole time [you've] been sitting over [here] with [us]... [you've been] getting information, ...and going back and telling the police[?]" Id. On a second occasion, the defendant approached the witness and her mother saying, "How can you have this fat bitch sitting over there? She tried to send your grandson to jail." Id. And on a third occasion, the defendant threatened to kill the witness, burn down her house, and do something bad to her children. Id. Despite the absence of magic words (if you testify), the court found sufficient evidence. The court noted the context: the defendant knew the victim was called to be a witness at her son's trial. In the light most favorable to the state, the evidence was sufficient to find a purpose to influence testimony beyond a reasonable doubt.

In Commonwealth v. Burt, 663 N.E.2d 271 (Mass. App. 1996), in front of the courthouse the defendant approached a woman whom he knew to be a witness against him in a pending criminal case. He asked her if she was afraid of him. Burt, 663 N.E.2d at 277. Referring to her husband, he

asked, “how old is Michael? He’s going to be 36? Do you think he’ll make it to 36?” Id. “And you have a daughter Elizabeth? She has Elizabeth S. [Puleo] Insurance in Marblehead? I know what kind of car she drives. Are you afraid of me now?” Id. “Why don’t you ask your friends at City Hall to come now? I’m gonna put your son away.” Id. Although no magic words (don’t testify) exist in these facts, the court found sufficient evidence for the element of attempting to influence. Id.

And in State v. Mendoza, 59 Cal. App. 4th 1333, 1344, 69 Cal. Rptr. 2d 728 (1997), the court plainly rejected any “talismanic requirement” of magic words to satisfy the elements of dissuading a witness by threat. There the defendant told a witness that her testimony at a preliminary hearing “fucked up his brother’s testimony” and that he was “going to talk to some [gang members].” Mendoza, 59 Cal. App. 4th at 1343. The victim, a former gang member, understood the words to mean that the defendant was going to come back and shoot her. Id. Although the defendant argued there was no threat and, if there was a threat, it was only retaliatory (read: angry) and not an attempt to prevent future testimony, the court found the statement implied both the threat and the intent to dissuade further testimony. The context (that

the witness expected to testify at trial) provided the evidence of the attempt to influence. Mendoza, 59 Cal. App. 4th at 1344.

In the same way, the Defendant Montano may not have asked for release with those exact words. But the context, resisting and being arrested, provide the evidence of his intent. He did not want what was happening to continue. He wanted the officer to let him go. He knew the officer still had to drive him to jail, write out a report, and testify. His purpose to prevent these official duties is plain from the circumstances around his statement.

Judge Sperline acknowledges that the Defendant's behavior was "reprehensible" and "something that officers shouldn't have to put up with." RP April 17, 2007 at 7. Harassing a public servant in the course of his duty is far more significant than typical misdemeanor threats under RCW 9A.46.020. If public officials succumb to threats, entire public processes are at risk.

The plain language of RCW 9A.76.180 suggests several purposes. First, it protects public servants from threats of substantial harm based upon the discharge of their official duties. See State v. Hansen, 122 Wn.2d 712, 716-718, 862 P.2d 117 (1993) (legislative intent behind similar intimidating a judge statute, RCW 9A.72.160(1), is to "protect judges from retaliatory acts" because of past official actions). Second, it protects the public's interest in a fair and independent

decision-making process consistent with the public interest and the law. And third, by deterring the intimidation and threats that lead to corrupt decision making, it helps maintain public confidence in democratic institutions.

State v. Stephenson, 89 Wn. App. 794, 803-04, 950 P.2d 38 (1998). So serious does the legislature find the crime that it requires no element of “reasonable fear.” It is immaterial whether the public servant actually feels afraid.

So serious does the legislature consider the intimidation of judges, that the threat need not even be communicated. State v. Side, 105 Wn. App. 787, 21 P.3d 321 (2001).

Yet by ruling as he has, Judge Sperline has taken away the only meaningful legal deterrent to the behavior. Under his ruling, if defendants steer clear of the magic words “unless you release me,” instead expressing their meaning nonverbally, they can intimidate police with virtual impunity. Such an interpretation is error.

The trial court’s ruling dismissing count one (intimidating a public servant) must be reversed. On this record, this Court cannot find that no rational factfinder could have found the essential elements of the crime beyond a reasonable doubt.

VI. CONCLUSION AND RELIEF REQUESTED

Based upon the forgoing, the State respectfully requests this Court reverse the dismissal of count one and remand before a different judge.

DATED: Sept 19, 2007.

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