

NO. 45477-7-II

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

STATE OF WASHINGTON, Respondent

v.

NIKOLAY IVANOVICH KALACHIK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01416-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENT OF ERROR..... 1
 I. The evidence was sufficient to convict the appellant of
 Intimidating a Public Servant..... 1
B. STATEMENT OF THE CASE..... 1
 I. Procedural History..... 1
 II. Summary of Facts..... 2
C. ARGUMENT 7
 I. This court should find the evidence was sufficient to convict
 the defendant of Intimidating a Public Servant. 7
D. CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	7
<i>State v. Brown</i> , 162 Wn.2d 422, 173 P.3d 245 (2007)	8
<i>State v. Burke</i> , 132 Wn.App. 415, 132 P.3d 1095 (2006).....	7, 9, 10
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	12
<i>State v. Gosby</i> , 85 Wn.2d 758, 539 P.2d 680 (1975).....	8
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	7
<i>State v. Montano</i> , 169 Wn.2d 878, 239 P.3d 360 (2010).....	7, 8, 9, 10
<i>State v. Stephenson</i> , 89 Wn.App. 794, 950 P.2d 38 (1998), rev. denied 136 Wn.2d 1018, 966 P.2d 1277 (1998)	8
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	8

Statutes

RCW 9A.76.180(1).....	8
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A. RESPONSE TO ASSIGNMENT OF ERROR

I. The evidence was sufficient to convict the appellant of Intimidating a Public Servant.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, “the defendant”) was charged by Information with Count One: Intimidating a Public Servant and Count Two: Felony Harassment Involving Threat to Criminal Justice System Participant. (CP 1).

Trial commenced on September 16, 2013. (RP 1). Following trial, the jury found the defendant guilty of both charges. (RP 311). The defendant was sentenced on September 27, 2013. (RP 316). Pursuant to the State’s request, the trial court vacated the defendant’s conviction on Count Two (Felony Harassment) under principles of double jeopardy. (RP 317).

The defendant’s standard range sentence for Count One (Intimidating a Public Servant) was 1-3 months confinement. (RP 318). Taking into account the defendant’s conduct on the day of the incident as well as his extensive history of misdemeanor convictions, the court sentenced the defendant to the maximum sentence under the standard

range: 90 days confinement, with 20 days credit for time served. (RP 330-32; CP 7, 15-16). This timely appeal followed. (CP 17).

II. Summary of Facts

Officer Ilia Botvinnik is a patrol officer with the Vancouver Police Department (“VPD”). (RP 125). He has been employed with VPD for eight years and had over four years of law enforcement experience prior to his employment with VPD. (RP 125).

Officer Botvinnik is originally from Russia and he speaks Russian fluently. (RP 126). Officer Botvinnik is the only active Russian police officer who works for VPD. (RP 146). He is known throughout the local Russian community in Clark County, Washington. (RP 146).

On July 23, 2013, at approximately 6:00 p.m., Officer Botvinnik was on patrol in Clark County, Washington. (RP 125-26). Officer Botvinnik was driving a fully-marked patrol vehicle and was wearing his department-issued uniform. (RP 129). Officer Botvinnik was accompanied by Clark County Sheriff’s Office Deputy Paul Uminski, who was an officer in training at the time. Officer Uminski is also from Russia and is fluent in Russian. (RP 73). As Officer Botvinnik made a right turn onto Thurston Way, towards SR 500, he observed the defendant’s vehicle pass his patrol vehicle. (RP 127). Officer Botvinnik observed that the driver of the vehicle (later identified as the defendant), was not wearing a seatbelt.

(RP 127). Officer Botvinnik initiated a traffic stop. (RP 127). Both vehicles started going up the on-ramp to SR 500 at the same time.

(RP 128). On the ramp, Officer Botvinnik observed for a second time that the defendant was not wearing his seatbelt; rather “the seatbelt was still clearly hanging by the door jamb there.” (RP 128).

Officer Botvinnik approached the defendant on the driver’s side of the defendant’s vehicle. Officer Uminski approached the passenger side. (RP 130). Officer Botvinnik noticed the defendant had now put his seatbelt on. (RP 130). Officer Botvinnik did not recognize the defendant when he stopped him. (RP 132). Officer Botvinnik asked the defendant for identification. (RP 130). The defendant provided him with an ID card. (RP 130). Upon reviewing his identification card, Officer Botvinnik learned the defendant’s name was Nicolay Kalachik. (RP 132). Officer Botvinnik became concerned because he is aware of the reputation of the Kalachik brothers amongst the local Russian community. (RP 132).

A records check revealed the defendant’s license to drive was suspended in the State of Washington. (RP 133). The defendant also did not have insurance. (RP 133).

Officer Botvinnik could have arrested the defendant for driving with a suspended license; however, he instead decided to issue the defendant a citation for driving with a suspended license and for driving

without a seatbelt. (RP 134). Officer Botvinnik confirmed that the defendant's passenger (his wife) had a valid driver's license and she could drive the defendant home. (RP 135). Officer Botvinnik advised the defendant that he and his passenger could simply switch drivers and drive away legally. (RP 135).

Officer Botvinnik briefly went to his patrol car to print the citations. (RP 135). The defendant remained seated in his vehicle. (RP 85, 135). Officer Botvinnik re-approached the defendant in his vehicle and advised him on the citations he would be receiving. (RP 135). The defendant immediately became argumentative. (RP 133, 135). Officer Botvinnik attempted to hand the defendant the citations, but the defendant refused to take them. (RP 84). The defendant cracked open his front door. (RP 84). This action was unusual because there was no need for the defendant to get out of his vehicle. (RP 85). Officer Botvinnik slipped the citations through an opening in the rear driver's-side window of the defendant's vehicle. (RP 85, 136). The citations landed inside the defendant's vehicle; after which, the defendant's behavior escalated, drastically. (RP 85-86).

Officer Botvinnik walked back towards his patrol car. (RP 87). When the officer was approximately 15-20 feet from his patrol car, he noticed the defendant had exited his vehicle and was approaching him.

(RP 87, 90). The defendant was animated and his motions were aggressive. (RP 87). The defendant shouted to the officers “I want to talk to you. Do you know who you are messing with?” (RP 140). The defendant was wielding the citations in one hand. (RP 87). Officer Botvinnik held out one of his palms. (RP 87). He told the defendant to “Stop right there. ...Now you’re free to go, go back inside your car, you’re free to go.” (RP 87). However, the defendant continued to approach the officer, as he tore-apart the citations. (RP 90-91). While ripping-up the citations, the defendant admonished Officer Botvinnik, “You have no authority over me so you have no power to issue me [] tickets.” (RP 93, 137). Officer Botvinnik attempted to step back towards his patrol car; however, for every step he took backwards, the defendant stepped forward. (RP 88). Officer Botvinnik told the defendant to stop and that he was free to leave, at least five times. (RP 88).

The defendant took out his cell phone. (RP 91). He looked directly at Officer Botvinnik as he gestured like he was dialing the phone.

(RP 140). The defendant said, in Russian, that he was going to call his “brigade” and they would be coming “right here, right now after [Officer Botvinnik]”. (RP 91, 140).

The defendant is approximately six foot four and weighs over 200 pounds. (RP 141-42). Officer Botvinnik is approximately “five-nine, five-

ten) and weighs “one seventy-five or so.” (RP 141). Officer Botvinnik was familiar with the term “brigade” as being a common Russian term for a group engaged in criminal activity. (RP 143). He compared it to someone telling you that he knows an active local gang member who is known and feared. (RP 144-45). The defendant’s statements made the officer concerned for his safety and his family’s safety. (RP 145).

After repeated failed-attempts to get the defendant to stop and leave, Officer Botvinnik decided to arrest the defendant for threatening or intimidating a public servant. (RP 94, 147). On the ride to jail, the defendant, unsolicited, asked Officer Botvinnik “if he knew what happened to Maxim Ukimetz?” (RP 158). Maxim Ukimetz was a Vancouver resident who was killed in Florida a few years prior. (RP 158). Officer Botvinnik was familiar with Ukimetz because, several years ago, he assisted a Florida homicide detective on doing some follow-up investigation in relation to Ukimetz’s murder. (RP 158). Officer Botvinnik interpreted the defendant’s question as a suggestion that he could end up like Mr. Ukimetz. (RP 159). The defendant further said to the officer, “You have no idea what you are doing right now. I will guarantee that you will regret this.” (RP 159).

After he dropped the defendant at the police station, Officer Botvinnik called his wife and warned her to be careful. Officer Botvinnik

said there were only two other times in the course of his career when he had called his family to warn them about their safety. (RP 160).

C. ARGUMENT

I. This court should find the evidence was sufficient to convict the defendant of Intimidating a Public Servant.

The defendant does not dispute that he threatened a police officer; however, the defendant claims his conviction for Intimidating a Public Servant should be dismissed because the evidence was insufficient that he threatened the officer in an attempt to influence the officer's actions. *See* Brief of Appellant (hereafter, "Brief"), at 8-12. The defendant cites to *State v. Burke* and *State v. Montano* as authority. *See* Brief, at 9-11, *citing State v. Burke*, 132 Wn.App. 415, 132 P.3d 1095 (2006), *State v. Montano*, 169 Wn.2d 878, 239 P.3d 360 (2010). The defendant's claim is without merit and his conviction should be affirmed.

A reviewing court must affirm a conviction if "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. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficient evidence admits the truth of the State's evidence as well as all reasonable

inferences that can be drawn from it. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 875-75, 83 P.3d 970 (2004). In determining the sufficiency of the evidence, circumstantial evidence is accorded the same reliability as direct evidence. *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

The purpose of the intimidating a public servant statute is to protect public servants from threats of substantial harm based upon discharge of their official duties; to protect the public's interest in a fair and independent decision-making process; and, to maintain public confidence in democratic institutions by deterring intimidation and threats that lead to corrupt decision making. *State v. Stephenson*, 89 Wn.App. 794, 803-04, 950 P.2d 38 (1998), *rev. denied* 136 Wn.2d 1018, 966 P.2d 1277 (1998).

To prove the crime of intimidating a public servant, the State must show (1) an attempt to influence a public servant's vote, opinion, decision, or other official action of a public servant (2) by use of a threat. RCW 9A.76.180(1). In *Montano*, the Supreme Court held the evidence was insufficient to sustain a charge of intimidating a public servant. *Montano*, 169 Wn.2d at 879. Montano became belligerent and combative with police

officers who had temporarily detained him. *Id.*, at 874-75. The officers eventually tased Montano, cuffed him, and escorted him to their patrol car. *Id.*, at 875. En route to the patrol car, Montano said to one of the officers “I know when you get off work, and I will be waiting for you.” *Id.* Once inside the officer’s patrol car, Montano said to the officer “you need to retire. I see your gray hair.” *Id.* The Supreme Court held this evidence was insufficient to support a charge of intimidating a public servant because Montano’s behavior merely showed a man who was angry at the situation - there was “simply no evidence to suggest that Montano engaged in this behavior or made these threats, for the purpose of influencing the police officers’ actions.” *Id.*, at 879.

In *Burke*, the reviewing court also found insufficient evidence to sustain a conviction for intimidating a public servant. The police officer in *Burke* went to check on a house party. *Burke* at 132 Wn.App. 415, 416-17, 132 P.3d 1095 (2006). *Burke* was one of the guests at the party. *Id.* *Burke* was intoxicated. *Id.* Without provocation, *Burke* decided to charge towards the officer and “belly-bumped” him. *Id.* *Burke* ignored the officer’s commands to get back; instead, he yelled “fighting threats” at the officer, he took a “fighting stance,” and he hit the officer.¹ *Id.* at 417-18.

The reviewing court held this evidence was insufficient to sustain a

¹ At *Burke*’s trial, no witnesses were able to testify as to what *Burke* actually said to the officer during his “fighting threats.” *Burke*, at 421.

conviction for intimidating a public servant because neither Burke's non-descript "fighting threats" nor his assault of the officer demonstrated an attempt to communicate, "however subtly," a suggestion that the officer take, or not take, a particular course of action. *Id.*, at 421. Rather, Burke's conduct merely demonstrated that he was drunk and angry for some non-disclosed reason. *Id.*, at 422.

The instant case is distinguishable from *Burke* because, here, the defendant was sober. Therefore, the defendant's words and conduct cannot be written-off as merely the unfocussed tirade of a drunk.

More importantly, in both *Montano* and *Burke* the defendants never said what official action they were attempting to influence and their accompanying conduct did nothing to demonstrate what, if any, official action they were attempting to influence. For example, in *Montano*, the defendant said to the officer "I know when you get off work, and I will be waiting for you." However, the defendant never said *why* he would be waiting for the officer and his accompanying conduct did nothing to shed light on *what* the officer could do to prevent the defendant from waiting for him at his home. Similarly, in *Burke*, the defendant never explained, as part of his "fighting threats," what official action was enraging him and the circumstances under which he assaulted the officer (when the officer was merely "checking on" a party) did not explain what official action

could have been causing the defendant's rage. Consequently, it is difficult to see how Montano or Burke's conduct could lead to corrupt decision making.

In contrast, here, the defendant made it clear by his words and conduct that his threats were not merely expressions of generalized anger at the situation. Rather, each of the defendant's actions was demonstrative of goal-oriented behavior that was designed to elicit a particular response from Officer Botvinnik. Specifically, the purpose of the defendant's threats, and the actions that accompanied his threats, was to influence Officer Botvinnik to make the citations go away.

The purposeful nature of the defendant's conduct was first made clear when the defendant re-initiated contact with Officer Botvinnik, after he was told he was free to leave. Immediately after Officer Botvinnik dropped the citations through the defendant's car window and told him he was free to leave, the defendant got out of his vehicle and approached the officer. The defendant continued to approach Officer Botvinnik, despite the officer repeatedly telling him to stop and reminding him he was free to leave. The defendant wielded the tickets in his hands, and then tore them apart in the officer's presence. The defendant told Officer Botvinnik he had no authority to issue the citations. The defendant continued to close-in on the officer.

Here, there was simply no reason for the defendant to exit his vehicle and to aggressively close-in on Officer Botvinnik, immediately after Officer Botvinnik issued the citations and told the defendant he was free to leave, *except* to intimidate Officer Botvinnik into reconsidering his decision to issue the citations in the first place. Similarly, there was no reason for the defendant to wave the citations at Officer Botvinnik and then to tear them apart, while he admonished the officer that he had no authority to issue the citations, *except* to intimidate Officer Botvinnik into reconsidering his decision to issue the citations. To be sure, the defendant did not utter the words “Officer Botvinnik, I am going to assault you unless you make these citations go away;” however, such an utterance was unnecessary because the defendant clearly conveyed this message through his words and his actions. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (stating a defendant’s intent “may be inferred from the conduct where it is plainly indicated as a matter of logical probability”).

When this conduct did not have the desired effect of altering Officer Botvinnik’s decision to issue the citations, the defendant upped the ante: he took out his cell phone, he gestured like he was making a call, he looked directly at Officer Botvinnik, he told the officer he was going to call his “brigade,” and he warned that they would be coming after Officer Botvinnik “right here, right now.” For Officer Botvinnik, who is a native

Russian and who is known amongst the local Russian community, a threat to bring in the defendant's "brigade" is synonymous with a threat to cause substantial harm to Officer Botvinnik and his family. The defendant made this threat immediately after he ripped-up the citations. As a matter of logical probability, the only reason for the defendant to make this threat, to this particular officer, in this context, was to continue to pressure Officer Botvinnik into retracting the citations.

Even after being arrested, the defendant's efforts to influence Officer Botvinnik's official actions did not stop. Once inside the officer's patrol car, the defendant asked Officer Botvinnik "if he knew what happened to Maxim Ukimetz?" The fact that the defendant was aware of Officer Botvinnik's involvement in the investigation of Maxim Ukimetz's unsolved murder is chilling. Under these circumstances, there was no reason for the defendant to bring-up Ukimetz to Officer Botvinnik, except, as an implicit threat to the officer that he could end up murdered, like Maxim Ukimetz. The defendant made it clear that he was making this threat as part of a continuing attempt to influence Officer Botvinnik's actions when he went on to say to the officer "[y]ou have no idea what you are doing right now. I will guarantee that you will regret this." As a matter of logical probability, that which the officer would "regret" was arresting the defendant. The only way to avoid a fate similar to that which

befell Maxim Ukimetz was to release the defendant and make his citations go away.

The defendant's attempts to influence Officer Botvinnik's actions were relentless. The threats the defendant made and the context in which he made the threats demonstrated a clear nexus between an intent to make a threat and an intent to influence an official action. This is the exact behavior that the intimidating a public servant statute was designed to criminalize. Because a reasonable trier of fact could find that the essential elements of intimidating a public servant were proven beyond a reasonable doubt, the evidence was sufficient to convict the defendant of this charge.

D. CONCLUSION

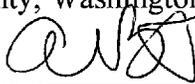
The defendant's conviction for Intimidating a Public Servant should be affirmed.

DATED this 23 day of July, 2014.

Respectfully submitted:

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