

No. 28408-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
APR 28 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JASON OLIVER NUNN,

Defendant/Appellant.

APPEAL FROM THE KLINKITAT COUNTY SUPERIOR COURT
HONORABLE E. THOMPSON REYNOLDS

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The state failed to prove every essential element of the crime of intimidating a public servant.

Issue pertaining to assignment of error.

Did the state fail to prove every essential element of the crime of intimidating a public servant where there is no evidence other than the “threat” itself to establish the requisite element of an attempt to influence a public servant’s vote, opinion, decision, or other official action as a public servant?

B. STATEMENT OF THE CASE

Late in the afternoon of June 30, 2009, the defendant, Jason Nunn, was driving on a private road in Klickitat County when two patrol cars approached and signaled him to stop with overhead lights. RP 49–53. Recognizing him, Klickitat County Deputy Sheriff Michael Kallio ordered Mr. Nunn out of the car and arrested him on an unrelated matter. RP 53, 55, 125, 127. Mr. Nunn was smoking a cigarette while Deputy Kallio handcuffed his right hand and eventually, after Klickitat County Deputy Sheriff Jason Ritoch threatened to use a taser gun, his left hand. RP 55, 57–58, 126.

Mr. Nunn, who was upset at being arrested, wanted to know what was going on and police said they would explain later. RP 128,166. Mr. Nunn called Deputy Kallio “swine”, and called Deputy Ritoch a “fucking pig” and said “you think you’re a big fuckin’ deputy,” “think you’re tough.” RP 58, 130.

Deputy Kallio held onto Mr. Nunn as police walked him toward the patrol cars. RP 132. Although the precise facts were disputed, the lit cigarette left Mr. Nunn’s mouth and fell towards Deputy Kallio, causing him to move his arm away in concern for being burned. RP 59–61, 130–134, 162–164. Mr. Nunn was placed in the backseat of Deputy Ritoch’s patrol car, where he continued saying such things as “you think you’re big, you’re so tough now” and cussing from time to time. RP 61–63, 66. Deputy Ritoch described Mr. Nunn as being upset with him and upset at being arrested. RP 62.

Deputy Ritoch transported Mr. Nunn and called ahead to have someone meet them upon arrival at the jail. RP 65. Based on his prior experiences as a corrections officer, the deputy described Mr. Nunn’s verbal taunts as “escalating” and trying to dehumanize him and to get him mad, and said he’d had it happen in the past that “they will try to start to assault” him. RP 66.

City of Klickitat Corrections Sergeant Doug Gilliam accompanied Deputy Ritoch and Mr. Nunn in the elevator up to the jail booking area. RP 69–70, 105–108. The sergeant described Mr. Nunn as upset, looking very agitated and staring at Deputy Ritoch. RP 108–114. Mr. Nunn angrily told the deputy, “I’ll be out of here in fifteen days. I can’t wait to meet you on the street.” RP 68, 88–89. While Deputy Ritoch had never met him before and thought Mr. Nunn was going to try to harm the deputy, he acknowledged that Mr. Nunn made no specific threats. RP 68–69, 94–95. When Deputy Ritoch asked if he was threatening him, Mr. Nunn said “Don’t put words in my mouth.” RP 69. After booking procedures had begun, the deputy left. RP 71.

The incident from arrival at the scene to booking at the jail took 30 to 45 minutes. RP 72. Deputy Ritoch said Mr. Nunn was agitated and upset during the entire time, that he never calmed down and seemed to be getting more and more mad. RP 72.

Mr. Nunn was convicted after jury trial of third-degree assault and intimidating a public servant as charged. CP 67–68; RP 220. The court imposed concurrent standard range sentences of 50 months and a range of community custody from 9 to 12 months. CP 74.

This appeal followed. CP 81.

C. ARGUMENT

Mr. Nunn's conviction violates his right to due process of law under the Fourteenth Amendment and Wash. Const. article I, § 3 because there is no evidence his "threat" was made in an attempt to influence Deputy Ritoch's vote, opinion, decision, or other official action as a public servant.

Constitutional due process requires that in any criminal prosecution every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); Wash, Const. Art. 1, § 3; U. S. Const., Fourteenth Amendment.

The proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487,

491, 670 P.2d 646 (1983). “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973), *quoting* State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42–43, 38 P.3d 817 (2001); State v. Bridge, 91 Wn. App. 98, 100, 955 P.2d 418(1998).

Under RCW 9A.76.180(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. The elements of this offense are (1) use of a threat (2) to influence a public servant’s official behavior. State v. Montano, 147 Wn. App. 543, 546, 196 P.3d 732 (2008), *rev. granted*, 166 Wn.2d 1019, 217 P.3d 783 (2009). Mere “threats are not enough; the defendant must attempt to influence the public servant’s behavior with these threats.” State v. Burke, 132 Wn. App. 415, 420–421, 132 P.3d 109 (2006), *citing* State v. Stephenson, 89 Wn. App. 794, 807, 950 P.2d 38, *rev. denied*, 136 Wn.2d 1018, 966 P.2d 1277 (1998). Here, the appellant concedes that a threat was made. However, there was no evidence that Mr. Nunn made

the threat with the intention of “influencing” Deputy Ritoch to do or not do something in his official actions.

In Stephenson, the defendant threatened to file a monetary lien against certain judges’ properties if they did not meet his demand to cause his convictions to be dismissed. Stephenson later followed through with the threat by recording the liens. Mr. Stephenson’s subsequent convictions for intimidating a public servant were upheld on appeal, because he had filed the liens “for the purpose of influencing the judges to alter rulings or decisions they made in official proceedings in the course of their duties as public servants.” State v. Stephenson, 89 Wn. App. at 798–99. “A critical element of the statute [] is the requirement that the defendant ‘attempt to influence’ the targeted public servant's behavior. Threatening words or behavior by themselves do not violate the statute.” Stephenson, 89 Wn. App. at 807.

In Burke, a police officer was investigating an apparent underage drinking party. The court applied the *Stephenson* principle and found that mere evidence that the defendant made verbal threats and a fighting stance with raised fists toward the officer followed by an unsuccessful punch to his face while drunk and angry was insufficient to convict the defendant of intimidating a public official, in the absence of any evidence that

defendant had a specific purpose to make the officer do or not do something. State v. Burke, 132 Wn. App. at 421–422.

In Montano, Division III reversed the *Knapstad* dismissal of a charge of intimidating a public servant. The court held that whether the defendant's threats to a police officer, after the officer had arrested the defendant and while the officer was taking him to jail, were designed to get the officer to change his course of action, was an issue for the jury. Montano, 147 Wn. App. 549. In part, the court reasoned that “Because of the temporal proximity of the threats and the arrest, it would be permissible for the trier-of-fact to draw the conclusion that the threats were an attempt to influence the action the officer was then undertaking.” Id. at 548. This statement is *dicta*. Moreover, the reasoning is questionable because the statute requires more than mere temporal proximity of the threats and the public servant’s particular “official action.”¹ The state must show that by his threats a defendant *has attempted to influence* the public servant’s behavior. Burke, 132 Wn. App. at 422, *citing* Stephenson, 89 Wn. App. at 807.

Here, Mr. Nunn was angry at the fact of his arrest and uttered profanities to both officers at the time of his arrest and during the walk to

¹ Mr. Montano appealed Division III’s decision, and oral argument is scheduled in Case No. 82855-5 on June 8, 2010.

the patrol car. H continued cussing at Deputy Ritoch in the car, and finally angrily told the deputy in the elevator that “I’ll be out of here in fifteen days. I can’t wait to meet you on the street.” There is no doubt that Mr. Nunn was agitated and angry during the entire encounter from arrest to booking: he admitted so to the jury (RP 164, 166), Sergeant Gilliam observed anger in the elevator (RP 108–114), and Deputy Ritoch concluded that Mr. Nunn never calmed down and only seemed to be getting madder. RP 62, 66, 72. However, evidence of anger alone is insufficient to establish an intent to influence a public servant’s behavior. Burke, 132 Wn. App. at 422.

In Burke, the State further argued that the circumstances surrounding the incident supported the inference that Burke attempted to prevent the officer from ending the party or from pursuing the underage drinkers - Burke admitted that he did not want the party to end and admitted to overhearing the officer talk to the home's tenant about the underage drinkers. The court rejected this argument, because there was “no evidence linking these circumstances and Burke's actions. Nothing Burke said or did that night to make this connection evidences his intent to prevent the party's closure or to prevent [the officer] from chasing the underage drinkers. ... The evidence must show a connection, however

weak, between Burke's anger and intent to influence [the officer].” Burke, 132 Wn. App. at 422.

Here, as in Burke, there was no evidence that Mr. Nunn intended by his threat to make Officer Ritoch “do or not do something.” Mr. Nunn had already been arrested by Officer Kallio. He did not attempt to resist the arrest physically or verbally, and made no attempt to get away from custody. Further, Mr. Nunn’s statement that he would “be out of here in fifteen days. I can’t wait to meet you on the street” acknowledges that he was under arrest, and does not logically support an inference that he was instead trying to influence the deputy to “un-arrest” him or help him be released without a bail requirement or achieve any other speculative possible official action.

While Mr. Nunn’s angry and belligerent remarks under other facts might be sufficient to support a gross misdemeanor charge of harassment,² the state here must show that his anger had a specific purpose to make

² RCW 9A.46.020 provides in pertinent part:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; ...
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. ...
- (2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor. ...

Deputy Ritoch to do or not do something in order to sustain the conviction for intimidating a public servant. The state did not prove this essential element of the crime charged, and the conviction must be reversed and dismissed. Burke, 132 Wn. App. at 423.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing to reverse and dismiss the conviction for intimidation of a public servant..

Respectfully submitted April 8, 2010.



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