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Court of Appeals
Division III
State of Washington

No. 29474-9-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LINDA KAY TOSCANO,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
HONORABLE EVAN E.SPERLINE

REPLY BRIEF OF APPELLANT

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A. ADDITIONAL ARGUMENT.

Ms. Toscano incorporates by reference all arguments made in her Brief of Appellant. The State's brief of respondent fails to specifically address the following points.

1. Insufficient evidence of actual fear from first encounter. There is no evidence that at the time of the first encounter Deputy Voss was actually apprehensive and fearful that he would be hit. Deputy Voss said he "wasn't sure exactly if she was trying to hit me or was just a startled citizen driver that didn't know what to do" (RP 57, 82) and that "at the time I didn't feel that she was trying to hit me or not maliciously." RP 142. He further testified that "at first I didn't realize she was trying to hit me. I felt that she was trying to hit me later[]" RP 58. Apprehension or fear *in hindsight* does not satisfy the requisite element of second degree assault – that an act "in fact creates in another a reasonable apprehension and fear of bodily injury". Jury Instruction No. 10 at CP 32. The apprehension must be of future harm, not a recognition of past danger.

In State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), the defendant shot at an individual in a car. The bullet entered the window of a nearby home, shattering glass on the occupant sleeping in his living room. The occupant "was shocked and startled after the shot was fired,

realizing how close he had come to being hit." Id. at 349. The jury was instructed on three alternative means of committing assault, including the same common law assault instruction given in Ms. Toscano's case. Bland, at 349-52. The Court held that the conviction could not be upheld under the common law assault theory because the sleeping victim did not experience actual fear from the gunshot and there was no evidence that the victim "feared future injury after the bullet came through his window." Bland, at 355. In the absence of actual fear during the event, the Court concluded that common law assault requires that the victim have a "fear about the future; a presentiment of danger." Id., at 356.

Here, there was no evidence that Deputy Voss experienced actual fear at the time of the first encounter. As in Bland, the deputy was apparently upset because he *later* felt he could have been harmed in this first encounter. But the facts that a car had backed out of a driveway and was stopped in the roadway, and then moved forward at a minimal speed of 10 to 15 miles per hour to get out of the way of the pursuit do not provide a reasonable factual basis to support a claim of apprehension and future of future harm from the event. Nor was there evidence that due to the first encounter the deputy feared for the future. There simply is no evidence that at the time of the encounter Deputy Voss was actually

apprehensive and fearful that he would be hit. For the reasons set forth herein and in Brief of Appellant, the conviction on Count 4[1] must be reversed and dismissed.

2. Failure to give a Petrich[2] instruction requires dismissal. Herein, the jury was instructed in part that a conviction of intimidating a public servant required the use of a threat. Jury Instruction No. 5 at CP 27; RCW 9A.76.180(1). The State presented evidence of two separate alleged assaults based on the use of Ms. Toscano's car as the "threat". In closing argument, the State did not tell the jury which alleged assault to rely on in its deliberation as to the charge of intimidating a public servant. RP 263, 283.

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[1] The record doesn't disclose which encounter the jury relied upon in convicting on Counts 4 and 5. The State charged Ms. Toscano with two counts of assault in the second degree for "intentionally assault[ing] another person, [] Deputy Voss, with a deadly weapon." CP 20 (Counts 4 and 5). The "to convict" instructions asked the jury to find as an element, "That on or about March 30, 2009, the defendant assaulted Tyson Voss with a deadly weapon" (Instruction No. 11 at CP 33) and "That on or about March 30, 2009, the defendant, by conduct other than any act found by you to have established an element of Count 4, assaulted Tyson Voss with a deadly weapon." Instruction No. 12 at CP 34. Appellant contends one or the other conviction should be vacated.

[2] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

Instead, the State told the jury to consider both acts as the basis for the charge:

> … Ladies and gentlemen, it's the State's position that the defendant, Linda Toscano … attempted twice to assault Deputy Voss with a deadly weapon, that is her vehicle, and that she did so with the intent to intimidate him, to affect his behavior, to affect his decision making … and the State is asking you to find the defendant guilty of intimidating a public servant … .

RP 263, 284.

Jury unanimity as to the means used to commit the crime is not required if there is substantial evidence to support each of the alternative means charged. State v. Linehan, 147 Wn.2d 638, 645, 56 P.3d 542 (2002). As set forth in the preceding argument, there was not substantial evidence that the first encounter between Ms. Toscano and Deputy Voss was an assault as charged and instructed. If the deputy had any fear or apprehension from the incident, it was only in hindsight and therefore not reasonable. Thus, even if there was substantial evidence of an assault based on the second encounter—which Ms. Toscano does not concede at all—the court's failure to give a Petrich instruction was not harmless. Since there was no Petrich instruction, there is no way of knowing whether all the members of the jury were relying on the same encounter when considering the necessary threat required for a conviction of intimidating a public servant. Therefore, the conviction must be reversed and dismissed.

D. CONCLUSION

For the reasons stated here and in the initial brief of appellant, the convictions for intimidation of a public servant and the two counts of second degree assault must be reversed and dismissed.

Respectfully submitted on September 6, 2011

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 6, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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