



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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

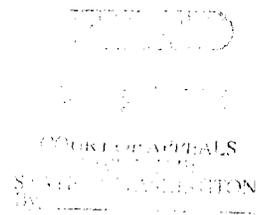
LINDA KAY TOSCANO,

Defendant/Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the conviction of Count 4, second degree assault.

2. There was insufficient evidence to support the conviction of Count 5, second degree assault.

3. The trial court erred in failing to give a Petrich instruction regarding Count 1, intimidating a public servant.

4. There was insufficient evidence to support the conviction of Count 1.

Issues pertaining to assignments of error.

1. Was Ms. Toscano's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, violated where the state failed to prove all of the elements of the crime of second degree assault?¹

2. Was a Petrich instruction required where the evidence disclosed two alleged assaults, only one of which could arguably form the basis of a finding of guilt as to the charge of intimidating a public servant beyond a reasonable doubt?²

¹ Assignment of Error 1 and 2.

² Assignment of Error 3.

3. Did Ms. Toscano's conviction for intimidating a public servant violate her right to due process of law under the Fourteenth Amendment and Wash. Const. article I, § 3 because there was no evidence a "threat" was made or, if made, that it was an attempt to influence Deputy Voss' vote, opinion, decision, or other official action as a public servant?³

B. STATEMENT OF THE CASE

Grant County Sheriff's Deputy Tyson Voss was on patrol duty in Warden, Washington during pre-daylight hours on March 30, 2009 when he saw a blue Honda fail to signal within 100 feet of making a turn. RP 44, 46. The blue car was travelling pretty slowly, and the deputy caught up with it and turned his emergency lights on intending to make a traffic stop. RP 46-47, 87. Using his spotlight, Deputy Voss saw a male driver talking on a cell phone and a female passenger. RP 49-50, 87, 137.

Despite his flashing lights and siren, the blue car continued to move through the streets of Warden, and Deputy Voss followed in pursuit. RP 48-49. Although the city street speed limit was 25 miles per hour, at times the two cars reached top speeds of between 40 and 50 miles per hour. RP 50, 134. The two cars' speeds and the distances between the cars varied. RP 86. Due to gravel roads in the town of Warden, Deputy

³ Assignment of Error 4.

Voss and the blue car were typically driving down the center of roads in this pursuit. RP 94–95. The entire pursuit lasted 20 to 25 minutes. RP 83–84.

As Deputy Voss drove southbound in the 900 block of Adams Street, he saw a tan Honda that was stopped diagonally in the middle of the street, facing towards the deputy somewhere between north and northeast. The driver of the tan car was later identified as the defendant, Linda Kay Toscano. It seemed to the deputy that Ms. Toscano had just backed out of the driveway at 912 South Adams. RP 53–56, 91, 94–95. According to Deputy Voss, there was enough room to pass by Ms. Toscano’s car. RP 90–91. He testified the blue car went around her car. RP 91.

Deputy Voss first noticed the stopped car when he was five or six car lengths away. RP 91. His patrol car was a few car lengths away when Ms. Toscano began moving her car forward to her left, going 10 to 15 miles per hour. RP 56–57, 90. The deputy was going 25 to 30 miles per hour, driving in the center of the gravel roadway. RP 90, 105–06. He felt Ms. Toscano was steering directly toward him. RP 95, 104. When there was 9 to 10 feet between the cars, Deputy Voss turned his car to his right to go around her. RP 57, 89, 95. The deputy thought she was going to hit

him so he took evasive action. RP 141. This incident took place in a matter of seconds. RP 57, 104.

Deputy Voss did not call in the incident to Dispatch because “at first I didn’t realize she was trying to hit me. I felt that she was trying to hit me later.” RP 58. The deputy said he was a little bit apprehensive and “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.

Deputy Voss continued to follow the blue car, as it drove through streets, yards and alleys in what appeared to be a general circular radius around the 900 block of South Adams. A few minutes after the first encounter with Ms. Toscano, the deputy was driving eastbound on 10th street when the blue car he was following turned north onto Adams. RP 59–60. RP 58–60, 84, 117. The intersection was about a hundred feet from Ms. Toscano’s residence on Adams. RP 140.

Deputy Voss, while two to three car lengths from the intersection, saw Ms. Toscano (headed southbound on Adams) drive out and stop in the middle of the intersection with her headlights on high beam. RP 59-60, 106-07. While Ms. Toscano was moving, the blue car was making the left turn onto Adam Street, coming no closer than 10 feet to Ms. Toscano’s car. RP 107-08, 134. There was room in the intersection to go around the

parked car. RP 108-09. Deputy Voss drove around Ms. Toscano's car to avoid colliding with her, and continued to follow the blue car. RP 60-61, 109. The deputy did not know how fast he and Ms. Toscano were going. RP 107. This encounter itself lasted mere seconds, and in moments the pursuit ended when the blue car pulled into Ms. Toscano's driveway. RP 108-09, 184.

Grant County Sheriff's Corporal Gary Mansford had been called to assist Deputy Voss, and was following two to three car lengths behind Voss just prior to the second encounter with Ms. Toscano. RP 167-68, 172-73, 181. He did not recall how fast he, the deputy and the blue car were going. RP 181. Corporal Mansford did not see Ms. Toscano approach the intersection. RP 181. He saw Ms. Toscano pull out and stop in the middle of the road. RP 181. Ms. Toscano remained stopped. RP 181-82. The corporal saw Deputy Voss drive around Ms. Toscano's car. RP 173. Corporal Mansford did not have to swerve around her, and simply drove in front of Ms. Toscano while turning to follow the other cars. RP 181-82. The corporal did not think much of the near encounter at the time, stating that he figured it was just a citizen getting caught in the middle of something. RP 184.

Ms. Toscano's residence was two doors down from the intersection of 10th and Adams. RP 136. The blue car pulled into her driveway and the male driver began running away. RP 61. Deputy Voss stopped his car nearby and chased the man. RP 61–62. Within a minute or so, Ms. Toscano pulled into the driveway behind the blue car. RP 64. The driver of the blue car, later identified as Ms. Toscano's nephew, Mike Castoreno, was eventually arrested. RP 63, 138, 188. Deputy Voss also arrested Ms. Toscano for "interfering with the pursuit." RP 65, 118.

The jury was instructed in part as follows:

COUNT I: INTIMIDATING A PUBLIC SERVANT

To convict the Defendant of intimidating a public servant as charged in Count I, the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about March 30, 2009, the defendant attempted to influence a public servant's decision or official action as a public servant;
2. By use of a threat; and
3. That the act occurred in the State of Washington.

...

Jury Instruction No. 5 at CP 27.

DEFINITIONS RELATING TO COUNT I

...

"Threat" means to communicate, directly or indirectly, the intent:

1. To immediately use force against any person who is present; or
2. To cause bodily injury in the future to the person threatened or to any other person; or
3. To cause physical damage to the property of any person other than the person making the threat; or

4. To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker or actor, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

Jury Instruction No. 6 at CP 28.

A jury convicted Ms. Toscano of intimidating a public servant, attempting to elude a pursuing police vehicle (based on accomplice liability) and two counts of second degree assault. CP 46, 48, 49 and 51.⁴

This appeal followed. CP 75--76.

C. ARGUMENT

1. Ms. Toscano's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, was violated where the state failed to prove all of the elements of the crime(s) of second degree assault.

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.,

⁴ The jury found Ms. Toscano not guilty of Count 2, second degree malicious mischief. CP 19, 55.

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. Bacza, 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).

Here, 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); *see also* RCW 9A.36.021(c). Because no statute defines the term assault, the common law definition is applied to the crime. State v. Aumick, 126 Wn.2d 422, 426 n. 12, 894 P.2d 1325 (1995). Washington recognizes three definitions of assault, one of which is to put “another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.” Aumick, 126 Wn.2d at 426 n. 12, 894 P.2d 1325 (quoting State v. Walden, 67 Wn. App. 891, 894, 841 P.2d 81 (1992)). Here, the trial court instructed the jury on this definition of assault, defining it as

[A]n act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Jury Instruction No. 10 at CP 32.

This form of assault “require[s] specific intent that the defendant intended to ... cause reasonable apprehension of bodily harm.” State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). A person acts “intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a).

a. In the first encounter, there was no evidence of specific intent to cause apprehension or fear of bodily harm and no evidence that Deputy Voss had an apprehension and fear of future bodily injury.

Here, there was no evidence that Ms. Toscano had a specific intent to cause any apprehension or fear of bodily harm. Deputy Voss was following the blue car, in the center of the roadway and going 25 to 30 miles per hour, when he first saw Ms. Toscano's car stopped diagonally in the middle of the road. The deputy was five to six car lengths away. He thought Ms. Toscano had just backed out of her driveway. RP 53-56, 90-91, 94-95, 105-06. Within seconds, the deputy was a few car lengths away when Ms. Toscano began moving forward at a speed of 10 to 15 miles per hour. RP 56-57, 90. Obviously she would appear to steer toward the deputy as Ms. Toscano hurriedly tried to move out of her diagonal position in the roadway and get out of his way. RP 95, 104. There was no evidence she "gunned" her car toward the deputy. And according to Deputy Voss, there was enough room to pass by Ms. Toscano's car, he saw the blue car go around it, and he himself went around the car at a distance of 9 to 10 feet. RP 57, 89, 90-91, 95. There is no evidence that Ms. Toscano intended to cause fear; she was simply

doing her best to get out of the way of the cars driving in the center of the roadway.

There was also no evidence that Deputy Voss had an apprehension and fear of bodily harm that was reasonable under the circumstances. At trial, Deputy Voss did say he thought Ms. Toscano was going to hit him so he took evasive action. RP 141. The factual circumstances do not reasonably support his belief. The entire incident took place in a matter of seconds, at slow speeds, and clearly Ms. Toscano had only moments to get out of the way of the other cars. RP 56–57, 90, 104.

Further, the deputy candidly admitted 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. At trial, Deputy Voss also testified that “at first I didn’t realize she was trying to hit me. I felt that she was trying to hit me later[]”; “at the time I’ didn’t feel that she was trying to hit me or not maliciously.” RP 58, 142. But 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. There must be an apprehension 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 this assault theory because there was no evidence that the victim "feared future injury after the bullet came through his window." Bland, at 355. The Court concluded that common law assault requires that the victim have a "fear about the future; a presentiment of danger." Id., at 356.

Thus Bland holds that there must be a reasonable factual basis to support the victim's fear of future harm. At best, the victim in Bland was upset because he realized he could have been harmed; there was no reason for him to believe that he would be harmed in the future. Here, as in Bland, Deputy Voss was apparently upset because he later felt he could have been harmed in this first encounter. 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.

Ms. Toscano's car was obviously "in the way" as Deputy Voss travelled at or near the 25 mile per hour residential speed limit while following the blue car. But there is no evidence to show that by simply moving her car to get out of the way Ms. Toscano intended to cause apprehension and fear. Nor is there evidence that at the time of the encounter Deputy Voss was apprehensive and fearful that he would be hit. The conviction on Count 4 must be reversed and dismissed.

b. In the second encounter, there was no evidence of specific intent to cause apprehension or fear of bodily harm and no evidence that Deputy Voss had an apprehension and fear of bodily harm that was reasonable under the circumstances.

In this second encounter there was also no evidence that Ms. Toscano had a specific intent to cause apprehension and fear of bodily harm. She simply drove into an intersection and stopped. This brief encounter happened a few minutes after the first one, at an intersection about a hundred feet away from Ms. Toscano's driveway. RP 59-60. RP 58-60, 84, 117, 140. Deputy Voss was still pursuing the blue car. He was two to three car lengths from the intersection when he saw Ms. Toscano

drive from her street into the middle of the intersection and stop. RP 59-60, 106-07. Ms. Toscano remained stopped. RP 181-82.

Nor was there evidence that Deputy Voss actually suffered a reasonable apprehension and fear of bodily injury due to Ms. Toscano's act. Apparently Ms. Toscano came into the intersection at the same time as the blue car made the turn onto Adam Street, coming no closer than 10 feet to Ms. Toscano's car. RP 107-08, 134. The deputy testified there was room in the intersection to go around the parked car and he *did* drive around the car as he turned and followed the blue car. The encounter lasted mere seconds. RP 60-61, 108-09, 184.

Deputy Voss said Ms. Toscano "came darting out into the intersection and stopped", and that "It happened so fast, she came into the intersection, stopped, and I had to take that evasive maneuver to get around her car to keep from colliding with her." RP 60, 109. There was no evidence as to how fast Ms. Toscano, Deputy Voss, Corporal Mansford and the blue car were actually driving at the time, so one cannot conclude that a high speed chase was going on at this moment. RP 107, 181. When the deputy saw Ms. Toscano's car stopped in the road, he was two to three car lengths away and was aware that the blue car had turned left onto Adams, so presumably he was slowing to some degree to make the turn

himself. Corporal Mansford, following close behind the deputy, said that he did not have to swerve around Ms. Toscano's car, and could simply drive in front of the stopped car. RP 167-68, 172-73, 181-82. The corporal did not think much of the near encounter, stating that he figured it was just a citizen getting caught in the middle of something. RP 184. Under all the circumstances, the fact that Deputy Voss had to drive around a car stopped in the road does not reasonably support a claim that the deputy was apprehensive and fearful of bodily injury at the time he encountered the stopped car.

The question here is whether Ms. Toscano's act placed Deputy Voss in actual fear of bodily injury. Deputy Voss is a seasoned police officer. He has nine years experience in law enforcement, including specialized training in learning evasive maneuvers and high speed patterns, and is qualified to teach others those emergency driving techniques. RP 44-45. He testified the very nature of his employment produces general stimulation, i.e., "[t]here's many times that my job - I mean, I feel fear and stuff but I don't put it in my report because it comes with the job, whether it's driving fast, tense situations. somebody with a gun, whatever. With the job itself, you know, you experience a lot of emotions, fear being one of them." RP 133, 139-40. But general

stimulation that “comes with the job” does not provide proof beyond a reasonable doubt that Deputy Voss was placed in actual fear by Ms Toscano’s acts. Deputy Voss’ testimony shows that he did not have actual fear at the time of the second encounter, but rather only a present recognition *at the time of trial* of past danger, i.e. what could have happened. *See Bland*, 71 Wn. App at 355-56. Further, the deputy admitted his general stimulation from *both* encounters lasted just a moment, and he did not mention it in his report or to his supervisor. RP 114-15, 159. Nor did Deputy Voss recommend that Ms. Toscano be charged with the crimes of assault. RP 116.

Instead, Deputy Voss’ conduct at the scene reveals how he really interpreted Ms. Toscano’s behavior--he arrested her for interfering with the pursuit. RP 65, 118. The deputy felt that by placing her car in front of his patrol car, Ms. Toscano intended to keep him from pursuing her nephew. RP 133. There is no doubt that Ms. Toscano’s car was “in the way” a second time as Deputy Voss continued to follow the blue car. But there is no evidence to show that Ms. Toscano intended to cause apprehension and fear. Nor is there evidence that Deputy Voss was actually and reasonably fearful of future bodily injury. The conviction on Count 5 must be reversed and dismissed.

c. Ms. Toscano is guilty only of the crime of obstructing a law enforcement officer.

The jury convicted also Ms. Toscano of attempting to elude a police vehicle, as an accomplice to her nephew, Mr. Castoreno. The only evidence presented in support of accomplice liability were the facts that her nephew was seen talking on a cell phone, Deputy Voss thereafter encountered Ms. Toscano's car twice while pursuing the nephew, and the car pursuit ended by the nephew driving into Ms. Toscano's driveway. If viewed in a light most favorable to the state, Ms. Toscano's acts could be interpreted to be willful. The two acts of hindering, delaying or obstructing Deputy Voss during the discharge of his official duties in pursuing the blue car after a traffic infraction might therefore be sufficient to support a gross misdemeanor charge of obstructing a law enforcement officer. RCW 9A.76.020(1). But Ms. Toscano's actions fall far short of second degree assault with a deadly weapon, and the convictions must be reversed and dismissed.

2. A Petrich instruction was required where the evidence disclosed two alleged assaults, only one of which could arguably form the basis of a finding of guilt as to the charge of intimidating a public servant beyond a reasonable doubt.

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). If the State presents evidence of more than one act that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (*citing Petrich*, 101 Wn.2d at 570). Failure to follow one of these options is constitutional error that is not harmless if a rational juror could have a reasonable doubt as to any one of the alleged acts. Id. at 409, 411, 756 P.2d 105. Because of its constitutional implications, this issue may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

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. 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.

3. Ms. Toscano’s conviction for intimidating a public servant violates her right to due process of law under the Fourteenth Amendment and Wash. Const. article I, § 3 because there is no evidence a “threat” was made or, if made, that it was an attempt to influence Deputy Voss’ vote, opinion, decision, or other official action as a public servant.

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), *reversed on other grounds*, State v. Montano, 169 Wn.2d 872, 239 P.3d 360 (2010).

a. Ms. Toscano did not make a threat to Deputy Voss.

The word “threat” was defined for the jury as follows:

“Threat” means to communicate, directly or indirectly, the intent:

1. To immediately use force against any person who is present; or
2. To cause bodily injury in the future to the person threatened or to any other person; or
3. To cause physical damage to the property of any person other than the person making the threat; or
4. To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker or actor, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

Jury Instruction No. 6 at CP 28.

In order to find beyond a reasonable doubt that Ms. Toscano made one of these types of threats, the threat had to be a true threat. State v. Stephenson, 89 Wn. App. 794, 801, 950 P.2d 38, as amended (citations omitted), *rev. denied* 136 Wn.2d 1018, 966 P.2d 1277 (1998). A true threat is a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual]". Id. (internal quotations omitted).

Here, it is undisputed that Ms. Toscano made no verbal statements of threat to Deputy Voss. RP 116–17, 161, 183. Nor was there any

evidence her physical actions alone were a “threat”, i.e. intended to cause bodily injury to the deputy or physical damage to his property. The two alleged assaults were instructed and argued as the intentional creation of *apprehension and fear of* bodily injury in another. As set forth above, there was insufficient evidence of such intent. Ms. Toscano planted her car in the roadway (first encounter) or drove into the roadway and stopped (second encounter) in a misguided and wrongful effort to hinder, delay or obstruct Deputy Voss in his pursuit of the blue car. As best, Ms. Toscano was guilty only of obstructing.

Moreover, the trial court reflected upon the evidence presented by the state and refused to define the “assault” here as an attempted battery,⁵ as requested by the State during the jury instruction conference. RP 223.

THE COURT: The concern for the court at this juncture is always a sincere desire ... to balance two competing interests. One is to make certain that any instruction that is justified by the evidence is presented so that each party can argue their theory of the case. And the other it to avoid resolving any issue by means of the instructions when it’s an issue for the jury.

That’s what was in my mind in considering how much to include in the definition of ‘assault’. And, frankly, I determined that *there simply is no evidence from which the jury could by any process other than speculation conclude that the Defendant intended to injury Deputy Voss. ...*

⁵ WPIC 35.50 Assault—Definition, provides in pertinent part: [An assault is ... an act], with unlawful force,] done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. [It is not necessary that bodily injury be inflicted.]] 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed).

I think it best that ... I not include that in order to avoid that speculation.

RP 224--25 (emphasis added).

Here, there simply was no evidence of intent to inflict bodily injury or property damage, and consequently no evidence that Ms. Toscano made a “threat” to Deputy Voss.

b. There was no evidence Ms. Toscano attempted to influence a public servant’s vote, opinion, decision, or other official action as a public servant.

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* Stephenson, 89 Wn. App. at 807.

The verb “to influence” is not defined by RCW 9A.76.180. However, the intimidating a public servant statute protects public servants from threats of substantial harm based upon the discharge of their official duties, protects the public's interest in a fair and independent decision-making process consistent with the public interest and the law, and, by deterring the intimidation and threats that lead to corrupt decision making, it helps maintain public confidence in democratic institutions.

Stephenson, 89 Wn. App. at 803-04. “To influence” is “to exercise

influence on; affect; sway” and “to move or impel a person to some action”. Webster’s Encyclopedic Unabridged Dictionary of the English Language, “Influence”, 980 (Deluxe Ed., Thunder Bay Press 2001). Thus, at the very least, an attempt to influence appears to require the affirmative urging that a public servant take a specific course of action that somehow conflicts with his or her official duty.

Thus, 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.” 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.

Here, unlike in Stephenson, Ms. Toscano did not threaten Deputy Voss. And while the stopped vehicle had the capacity to hinder or delay

Deputy Voss' pursuit of the blue car, the evidence doesn't reveal why Ms. Toscano stopped her car. This act is not the affirmative urging of a specific official action by Deputy Voss, and therefore does not rise to the level of being an attempt to influence.

Similarly, 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 took 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 shown by evidence *independent* of the threatening conduct itself to make the officer do something affirmative in his official capacity. Burke, 132 Wn. App. at 421–422.

In State v. Montano, 169 Wn.2d 872, 239 P.3d 360 (2010), the Washington Supreme Court Division reversed the Court of Appeals and affirmed the trial court's *Knapstad* dismissal of a charge of intimidating a public servant. In Montano, the defendant initially refused to provide identification, before his arrest struggled violently with police officers, thrashed about resulting in two tasings, and after being subdued hurled

verbal threats and insults at the officers. Montano was charged with intimidating a public servant, fourth degree assault, and resisting arrest. The Court agreed with the rule adopted in Burke and Stephenson, that to convict a person of intimidating a public servant, there must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances. Montano, 169 Wn.2d at 877. "Some evidence must independently support the 'attempt to influence' element of the crime." Id. at 878. The Court held that under the facts alleged by the State no evidence existed that Montano intended to influence a public servant, and upheld the trial court's dismissal of the charge. Id. at 879-80.

Here, as in Montano, Burke and Stephenson, there was no evidence independent of the allegedly threatening act of stopping her car linking Ms. Toscano's behavior to an official action that she wished to influence. There is no evidence independent of her act that reveals the affirmative urging of a specific course of official action by Deputy Voss, and therefore the element of being an attempt to influence is unsupported.

The evidence arguably shows that Ms. Toscano could have been charged with the gross misdemeanor crime of obstructing a law enforcement officer. A person is guilty of that crime if the person

“willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties”. RCW 9A.76.020(1).

But Ms. Toscano does not concede that her actions amounted to a “threat” for purposes of the intimidation statute. Even if it did, “the State cannot bring an intimidation charge any time a defendant insults or threatens a public servant. Though such behavior is certainly reprehensible, it does not rise to the level of intimidation.” Montano, 169 Wn.2d at 879.

Here, the state failed to prove the essential elements of the intimidation statute. There was no evidence that Ms. Toscano’s behavior comprised a threat. More importantly, there was no evidence independent of the stopped car that shows her purpose in driving the car in such a manner. Since there was use of a threat and no showing of an attempt to influence, the conviction for intimidating a public servant must be reversed and dismissed. Burke, 132 Wn. App. at 423.

D. CONCLUSION

For the reasons states, the convictions for intimidation of a public servant and the two counts of second degree assault must be reversed and dismissed.

Respectfully submitted May 31, 2011.


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