

**FILED**

**AUG 03 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 29474-9-III**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**LINDA KAY TOSCANO**

**APPELLANT.**

---

**RESPONDENT'S BRIEF**

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PROSECUTING ATTORNEY  
Carole L. Highland, WSBA #20504  
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### I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney's Office, is the Respondent herein.

### II. RELIEF REQUESTED

Reversal is not warranted and Appellant's convictions must be affirmed.

### III. ISSUES

1. Whether the State proved each and every element of the two counts of Assault in the Second Degree beyond a reasonable doubt.
2. Whether there was sufficient evidence to establish Appellant's intent to cause apprehension or fear of bodily injury on the part of Deputy Voss during both encounters.
3. Whether Ms. Toscano communicated through her behavior, her intent to physically prevent Deputy Voss from apprehending her nephew, and thus attempted to influence the Deputy's official action.

#### IV. STATEMENT OF THE CASE

Grant County Sheriff's Office Deputy Tyson Voss was on duty on March 30, 2009, in Warden, Washington, at approximately 4:30 a.m. RP 46. Deputy Voss observed an older blue Honda, later determined to having been driven by the appellant's nephew, Michael Castoreno, commit a traffic infraction. RP 46, 188. Based on his observation, Deputy Voss turned on his emergency lights and siren and began to initiate a traffic stop. RP 46, 47. It initially appeared that Mr. Castoreno was going to stop in an apartment complex parking lot near 5<sup>th</sup> and Alder and the deputy turned off his siren. RP 47-49. However, Mr. Castoreno continued through the parking lot and a pursuit, which lasted approximately 22-25 minutes, ensued. RP 84. Deputy Voss could see Mr. Castoreno and a female passenger, and toward the beginning of the pursuit was able to observe Mr. Castoreno on a cell phone. RP 50. When Mr. Castoreno failed to stop, Deputy Voss turned his siren back on. RP 49. Throughout the pursuit, Deputy Voss had all of his emergency vehicle equipment activated, to include his high intensity red and blue flashing lights, corner strobes, wig-wags, and siren. RP 47, 49, 56, 84, 169, 170. When asked about lighting conditions, Deputy Voss testified that it was dark. RP 49.

The pursuit reached speeds of 40-50 miles an hour on 25 mile per hour gravel roads. RP 50, 134. Deputy Voss was southbound on Adams Street from 9<sup>th</sup> to 10<sup>th</sup>, in pursuit of Mr. Castoreno, when a tan Honda, later determined to be driven by Linda Toscano, backed out of the driveway at 912 S. Adams. RP 55, 56. Deputy Voss testified that Mr. Castoreno drove around Ms. Toscano's vehicle, which was positioned in the road facing toward the deputy's vehicle. RP 55. Rather than driving to the right to get away from the deputy's patrol car after Mr. Castoreno had safely passed her, Ms. Toscano steered towards Deputy Voss while accelerating. RP 91, 92. Deputy Voss, who was driving at 25-30 miles an hour at this point, estimated Ms. Toscano's speed at approximately 10-15 miles an hour as she accelerated from her stopped position. RP 90. It was the deputy's testimony that Ms. Toscano would have hit him head on with a left headlight to left headlight impact had he not taken evasive measures. RP 56, 57. Deputy Voss – who had been specially trained and certified as an Emergency Vehicle Operations Course (EVOC) instructor – testified that he had only a matter of seconds to react, and that the two vehicles had come within approximately ten feet of each other. RP 45, 57. Deputy

Voss believed that Ms. Toscano's position was a "direct shot" towards him and that he was going to be hit. RP 104, 141.

The pursuit of Mr. Castoreno's vehicle continued, eventually becoming essentially a circular route around 9<sup>th</sup> Street, 10<sup>th</sup> Street, Washington, Adams, and Grant Streets, passing 912 S. Adams numerous times, with occasional diversions down the alley behind Ms. Toscano's home. RP 58, 59, 84, 79. Deputy Voss's lights and siren remained on throughout the entire pursuit. RP 58, 59, 149.

Near the very end of the pursuit of Mr. Castoreno, Deputy Voss was traveling eastbound on 10<sup>th</sup> approaching Adams being followed by Deputy Mansford who also had his emergency lights on. RP 59, 170, 172, 185. Mr. Castoreno made what would be his final turn onto Adams. RP 60, 106, 107. Ms. Toscano was in her vehicle with her high beams on, stopped southbound on Adams. RP 60, 110, 173. Both Deputy Voss and Deputy Mansford testified that nothing would have blocked Ms. Toscano's view of the intersection. RP 61, 185. Once Mr. Castoreno made his turn, Ms. Toscano entered the intersection. RP 106, 107, 173. Deputy Voss testified that after Mr. Castoreno turned, Ms. Toscano came "barreling" into the intersection. RP 106, 107. Deputy Voss stated "(r)ight after the

blue Honda had made the turn onto Adams from 10<sup>th</sup>, the tan Honda came darting out into the intersection and stopped in the middle of the intersection.” RP 60. According to Deputy Voss, it happened so fast, that he had to make a quick evasive maneuver to avoid a collision which he believed would have occurred had he not done so. RP 60, 109, 64. Deputy Voss estimated the distance as less than ten feet between the two vehicles as his patrol car swerved around her. RP 108. Deputy Mansford testified that it was close, and that it looked as if Ms. Toscano was going to hit Deputy Voss. RP 173, 182.

It was immediately after this that the blue Honda driven by Mr. Castoreno pulled into the front of 912 S. Adams, which was the residence of his aunt, Linda Toscano, and Mr. Castoreno ran between the houses on the north side of Ms. Toscano’s residence. RP 61, 149, 188. Deputy Voss ran around the back of the residence without success in finding Mr. Castoreno. RP 61, 62, 64, 63, 156, 178. Approximately 60 to 90 seconds later, Ms. Toscano arrived home at 912 S. Adams. RP 64, 110, 117, 172, 174, 186. According to Deputy Mansford, Mr. Castoreno’s vehicle came to rest against the residence when Ms. Toscano pulled into the driveway and hit the rear end of Mr. Castoreno’s vehicle. RP 177, 178.

Ms. Toscano was arrested almost immediately and placed in the back of Deputy Voss's patrol car. RP 65. Mr. Castoreno was arrested in Ms. Toscano's residence and also placed in the back of Deputy Voss's patrol car. RP 156, 178, 66. During their transport to jail, Deputy Voss saw a movement suggestive of an exchange between Mr. Castoreno and Ms. Toscano. RP 66. Although he grabbed his flashlight to shine it in the back seat, Deputy Voss could see nothing. RP 66. Upon arrival at the jail, Ms. Toscano had a corner piece of a black baggie in her hand. Additionally, there was a white powdery substance and feces on both the baggie and her hands. RP 67. Deputy Voss did not obtain a sample for testing as he was "too grossed out" by what he observed. RP 68. The smearing of her feces in the rear of the patrol car by Ms. Toscano was the basis for count two, Malicious Mischief 2<sup>nd</sup>, for which the defendant was found not guilty. CP 1, RP 4 (083010).

During the course of the entire early morning pursuit, the only three non-law enforcement vehicles observed by Deputy Voss were Mr. Castoreno's blue Honda, a silver Cadillac, which appeared briefly at the beginning of the pursuit, and Ms. Toscano's tan Honda. RP 51, 52, 73. Deputy Voss did not observe any people out on the streets. 73.

Sandra Castoreno, Ms. Toscano's daughter, testified that her sister's dog "Papi" had run out of the house when one of the children opened the door to find out what was going on. RP 205, 206. According to Sandra Castoreno, "Papi" came back to the home just as Deputy Voss was arresting her mother. RP 209. Deputy Voss testified that he had never observed a dog in the streets. RP 65. Deputy Mansford never observed a dog in the streets. RP 179. Deputy Mansford had never heard any of the children at 912 S. Adams refer to a lost dog. RP 86. He never heard Ms. Toscano refer to looking for a lost dog. RP 179. Sergeant Biallas, who had not been involved in the pursuit, but had been at 912 S. Adams, had never seen a dog in the streets. RP 158. Nor did Ms. Toscano ever state in his presence that she had been out looking for a dog. *Id.* Deputy Voss testified that he never heard anyone at the house calling for a dog. RP 132. He also testified that when he had first contacted Ms. Toscano at 912 S. Adams, she did not tell him that she had been out looking for a dog, did not mention a dog, and did not show any concern for a lost pet. RP 64. It was only after she had been placed under arrest that Ms. Toscano told Deputy Voss that her dog had gotten out and that she had been looking for him. RP 118, 119. Deputy Voss did not see a dog

return to 912 S. Adams when he was arresting Ms. Toscano, and presented with a picture of the dog during trial, testified that he had never seen “Papi”. RP 211, 220. All three officers testified that Ms. Toscano had been hostile, uncooperative, argumentative, and belligerent during their contact with her. RP 132, 158, 180.

Deputy Voss testified that he felt apprehension both times that Ms. Toscano had almost struck his vehicle, although more so the second time. RP 82. The first time he did not know if she had been trying to hit him, or was just a “startled citizen driver that (sic) didn’t know what to do”. *Id.* In any case, he was concerned and in a little bit of fear. RP 57. Deputy Voss felt that she was “driving into him” and that her actions were a “direct shot”. RP 95, 104. Regarding the second incident, when he was asked if he felt that Ms. Toscano was trying to ram his car, Deputy Voss responded, “I did”. RP 133. In response to defense counsel’s questioning, Deputy Voss testified he had experienced fear and apprehension for both encounters, but that he really had not had much time to think about it as he had to react, adapt, and continue on with the job at hand. RP 114. Sergeant Biallas testified that Deputy Voss had been “upset” when he had told the sergeant about Ms. Toscano trying to interfere with his pursuit, ram his car, and block him from Mr. Castoreno’s car. RP 162, 163.

Ms. Toscano was found guilty of Intimidating a Public Servant, Attempting to Elude a Pursuing Police Vehicle (as an accomplice), and two counts of Assault in the 2<sup>nd</sup>. RP 3, 7, 10, 12 (083010), CP 1. As stated above, she was found not guilty of the charge of Malicious Mischief in the 2<sup>nd</sup> degree.

#### V. ARGUMENT

1. The State proved each and every element of the two counts of Assault in the Second Degree beyond a reasonable doubt.

Ms. Toscano was charged with two counts of Assault 2<sup>nd</sup> for her conduct involving Deputy Voss (counts 4 and 5). The first count of assault stemmed from Ms. Toscano pulling the tan Honda out onto S. Adams, and then after her nephew had driven around her, accelerating directly toward Deputy Voss's patrol car. The second count of assault stemmed from the incident in which her nephew made his last turn onto Adams before Ms. Toscano "barreled" out onto 10<sup>th</sup> and stopped in the middle of the road where Deputy Voss again had to take evasive action to avoid striking her vehicle. Contrary to appellant's assertion, the record is devoid of any evidence that Ms. Toscano was "simply doing her best to get

out of the way of the cars driving down the center of the roadway”.

Appellant’s Brief at 10, 11.

To convict Ms. Toscano of Assault in the 2<sup>nd</sup> degree, the jury was instructed that they had to find “(t)hat on or about March 30, 2009, the defendant assaulted Tyson Voss with a deadly weapon”. RP 248. They were also instructed that the second count of Assault in the 2<sup>nd</sup> degree had to be premised “by conduct other than any act found by you to have established an element of Count 4”. *Id.* The jury was instructed that a “deadly weapon means any device or instrument, including a vehicle, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RP 249. The jury was also instructed as to a lesser included of assault in the 4<sup>th</sup> degree for each of the two counts. RP 249, 250.

Assault was defined for the jury as “an 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.” RP 247.

“In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the

State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). However, there must be substantial evidence that supports the elements of the crime charged. *State v. Cleman*, 18 Wn.App. 495, 498, 568 P.2d 832 (1977). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A defendant claiming insufficiency of the evidence ‘admits the truth of the State’s evidence and all inferences that can reasonably be drawn therefrom.’” *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).

“In determining the sufficiency of the evidence, criminal intent may be inferred from conduct, and circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *Myers*, 133 Wn.2d at 38. “A fact finder is permitted to draw inferences from circumstantial evidence so long as those inferences are rationally related to the proven fact.” *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). “The reviewing court defers to the trier of fact on issues of credibility, conflicting

evidence, and persuasiveness of the evidence.” *State v. E.J.Y.*, 113 Wn.App. 940, 952, 55 P.3d 673 (2002), *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004). “A challenge to the sufficiency of the evidence is reviewed to see if there was evidence from which the trier-of-fact could find each element of the offense proved beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979).

Deputy Voss testified that he did not know Ms. Toscano’s intention during their first interaction. But he was able to observe that, once her nephew’s car had driven around her, Ms. Toscano accelerated directly toward his patrol vehicle from a dead stop, and that it appeared to Deputy Voss that it was going to be a “direct shot”. Deputy Voss, a certified EVOIC instructor, had just seconds to react, and estimated that the vehicles had come within ten feet of each other.

Deputy Voss testified that during the second encounter with Ms. Toscano at 10<sup>th</sup> and Adams, Ms. Toscano again waited until her nephew had cleared her vehicle. It was then, according to the deputy, that Ms. Toscano came “barreling” into the intersection with her high beams on, and came to a direct stop in his path. Again, Deputy Voss had to take evasive action, and estimated that the vehicles came within ten feet of each

other. Deputy Mansford testified that it was close and that he thought that Ms. Toscano was going to hit Deputy Voss.

Deputy Voss testified that he had felt apprehension during both encounters with Ms. Toscano. The first time he was not certain if she was trying to strike him, or was just confused. However, she accelerated toward him and would have struck his patrol car left headlight to left headlight with Ms. Toscano driving at an estimated speed of 10-15 miles an hour, and Deputy Voss driving at an estimated speed of 20-25 miles an hour. The deputy believed that Ms. Toscano was driving right at him, and that her actions were “a direct shot”. During the second encounter, Deputy Voss testified that he thought that Ms. Toscano was trying to ram him. Deputy Voss testified that he had felt fear and apprehension during both of these encounters, but had to focus on the pursuit of Mr. Castoreno. Sergeant Biallas testified that Deputy Voss was upset as he told him of Ms. Toscano’s offensive driving behaviors.

2. There was sufficient evidence to establish Ms. Toscano’s intent to cause apprehension or fear of bodily harm on the part of Deputy Voss during both encounters.

Appellant argues that there is no showing of an intent on the part of Ms. Toscano to create an apprehension and fear of bodily injury in the

mind of Deputy Voss during either encounter. This argument must factually fail. Deputy Voss was involved in a police pursuit of the appellant's nephew at approximately 4:30 a.m. He had his full patrol vehicle equipment operating, to include red and blue flashing lights, strobes, wig-wags, and siren. Ms. Toscano pulled out of her driveway, allowed her nephew to pass her vehicle, and then drove directly toward the deputy's patrol car, accelerating as she did so. During the second encounter, her nephew had repeatedly "lapped" the area around her home traveling from 9<sup>th</sup> to 10<sup>th</sup> to Adams, Grant and Washington Streets, and through the alley directly behind Ms. Toscano's home. Since the pursuit began at approximately 4:30 a.m. and lasted approximately 22 - 25 minutes, it could have been no later than approximately 5 a.m. at the time of the second encounter, and in March, probably still dark. Deputy Voss still had all of his emergency equipment on, and was being followed by Deputy Mansford, who had his lights on as the deputies continued their pursuit of Ms. Toscano's nephew southbound on 10<sup>th</sup>. Again Ms. Toscano waited until her nephew, Michael Castoreno, passed her vehicle, and then with her high beams on, "barreled" into the intersection and dead stopped necessitating that Deputy Voss again take evasive action to avoid striking her. Furthermore, once her nephew had arrived at her home at 912 S.

Adams and bailed out his vehicle, Ms. Toscano returned as well. "Papi" who was never seen by any of the officers involved, miraculously also returned home once the pursuit had ended.

Deputy Voss testified that but for the silver Cadillac toward the beginning of the pursuit of Mr. Castoreno, he never saw any other non-law enforcement vehicles on the streets other than those driven by Mr. Castoreno and his aunt.

Based on this evidence, a trier of fact could find that Ms. Toscano acted intentionally, and that her acts were done with the intent to create in Deputy Voss a reasonable apprehension and fear of bodily injury, and did in fact do so.

3. Ms. Toscano communicated her intent, through her behavior, to physically prevent Deputy Voss from apprehending her nephew.

Ms. Toscano attempted to influence Deputy Voss's official action(s) as a public servant by use of a threat using her vehicle as an indirect communication of her intention to immediately use force against Deputy Voss; or to cause physical injury to Deputy Voss; or to cause physical damage to the patrol car of Deputy Voss. As defined for the jury, a threat, either by statement or act, must occur in a context or under such

circumstances where a reasonable person, in the position of Ms. Toscano would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat. RP 243, 244.

The Washington Supreme Court clarified the requirements to establish the charge of Intimidating a Public Servant in *State v. Montano*, 169 Wn.2d 872, 239 P.3d 360 (2010), holding that, in circumstances where a person directs threats and anger toward a police officer a *prima facie* case requires that there be evidence that the defendant did so in an attempt to influence the officer's official action. The State must show that the defendant's anger had some specific purpose to make the public servant do or not do something.

In instructing the jury regarding circumstantial evidence, they were informed that circumstantial evidence is intended to prove not only the facts observed, but other facts which could be inferred from what was observed, using their common sense and experience. RP 240. They were also instructed that neither direct nor circumstantial evidence is necessarily more valuable or believable than the other. *Id.*

Ms. Toscano's nephew was engaged in an approximately 22 to 25 minute eluding pursuit involving Deputy Voss. It began at approximately 4:30 a.m. and occurred while the only civilian cars on the road were Mr.

Castoreno's, Ms. Toscano's, and briefly, the silver Cadillac. Deputy Voss had his full emergency equipment engaged, both visually and audibly announcing the presence of law enforcement during the pursuit. Ms. Toscano just coincidentally became engaged with Deputy Voss twice during the proceedings after her nephew had safely passed her. The first time she took direct and aggressive action toward the deputy, while the second, she took direct and passive aggressive action toward the deputy. Both of these encounters resulted in near collisions. Ms. Toscano's story of looking for a dog that no one observed, who coincidentally returned after her nephew had ditched his car at her residence, and she herself had immediately followed in returning, was for the jury to assess and weigh in the light of all of the evidence presented.

It was Deputy Voss's official duty to stop Ms. Toscano's nephew, initially for having committed an infraction, and subsequently for eluding. Ms. Toscano ran interference for Michael Castoreno in a dangerous blocking manner with her vehicle. The evidence of her involvement showed Ms. Toscano's continuing goal of preventing Deputy Voss from carrying out his duty in contacting and apprehending her nephew. There is substantial evidence to support an inference that either of Ms. Toscano's aggressive acts of driving towards Deputy Voss was done with the intent

of influencing his action involving her nephew, which she could foresee would be interpreted as a serious expression of her intention to strike the patrol car, injure him and/or cause an accident. As there is substantial evidence to support each of the alternative means charged, jury unanimity as to the means used to commit the crime was not required. *State v. Linehan*, 147 Wn.2d 638, 645, 56 P.3d 542 (2002).

#### VI. CONCLUSION

Having proven beyond a reasonable doubt each and every element of the crimes for which Ms. Toscano was convicted, including her intent to place Deputy Voss in apprehension and fear of bodily injury and which did in fact create in Deputy Voss an apprehension and fear of bodily injury, as well as Ms. Toscano's intent to influence Deputy Voss's official action in his attempt to apprehend Mr. Castoreno, the State would respectfully request that this Court deny Ms. Toscano's appeal and affirm her convictions.

DATED this 2<sup>nd</sup> day of August, 2011.

Respectfully submitted:  
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