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DECEMBER 26, 2012
Court of Appeals
Division III
State of Washington

No. 30895-2-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

RODNEY WILLARD ANDREWS,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction of intimidating a public servant.

Issue Pertaining to Assignment of Error

Was Mr. Andrews' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of intimidating a public servant?

B. STATEMENT OF THE CASE

The defendant, Rodney Willard Andrews, was charged with intimidating a public servant, third degree assault and obstructing a law enforcement officer. CP 43–44. The charges arose from an encounter of approximately 15 minutes duration that took place at Mr. Andrews' residence. 4/25/12 RP 47; 4/26/12 RP 176; *passim*. In relevant part the State presented the following evidence.

On a November afternoon, Grant County Sheriff's Deputy Patrick Pitt and Reserve Officer Ryan Lavergne accompanied CPS worker Sandra North to a trailer park address where she hoped to locate and talk to Ms. Townsend, who was the mother of a child recently referred to the agency. Mr. Andrews resided with Ms. Townsend and her child at this address.

Such an “officer assist” was routine in a visit of this nature. 4/25/12 RP 45, 60–62, 64–65, 76–77, 193–94.

There was no response to several knocks at the front door. In a few minutes Mr. Andrews came out of the back door. Mr. Andrews appeared as if he’d just been awakened – he stumbled into the light, had no shirt or shoes on and his hair was messed up, and seemed agitated, tense and possible angry. Mr. Andrews asked what was going on and why they were there. Ms. North explained she needed to locate Ms. Townsend to talk to her about her child. When asked what it was about, Ms. North said it was confidential and she couldn’t talk to him about it even if he were the stepdad. When asked where the mother was, Mr. Andrews said she might be in Soap Lake with a friend. He wouldn’t give a name, address or phone number, but said he’d go inside and call Ms. Townsend. He went inside after asking the visitors to leave. They left and went off of his property. 4/25/12 RP 48–51, 68–70, 77–80, 121–23; 4/26/12 RP 150–51, 188, 194–95.

A few minutes later the officers went back to the trailer’s back door, having seen Mr. Andrews peeking out of it several times. Mr., Andrews yelled through the door two times, saying things like “go away”, “stop harassing me” or “I’m going to come out there and kick your ass”.

The officers returned to their car. 4/25/12 RP 86–90; 4/26/12 RP 196, 199–201.

Officer Pitt located a contact number in his database for Ms. Townsend and was able to reach her. He told her they were at the trailer and needed to speak with her. Ms. Townsend arrived about five minutes later. At about the same time as she arrived, Reserve Officer Lavergne saw Mr. Andrews come out and walk towards them, swinging what later turned out to be a big stick, back and forth in a threatening manner. The officer yelled, “He’s got a bat”. Deputy Pitt yelled at Mr. Andrews to drop the stick. 4/25/12 RP 86–98; 4/26/12 RP 201–02.

The officers drew their weapons, Mr. Andrews dropped the stick and went back inside, backup units were called and police subsequently arrested and handcuffed Mr. Andrews after a brief tussle in the trailer. 4/25/12 RP 98–102, 4/26/12 RP 177–81, 185–86, 203–04.

At trial, Mr. Andrews brought a halftime motion after the State rested its case to dismiss each of the three charges. The Court granted the motion as to obstructing a law enforcement officer. 4/26/12 RP 252.

The jury convicted Mr. Andrews of intimidating a public servant and third degree assault of a police officer. 4/26/12 RP 325. This appeal followed. CP 142–43.

C. ARGUMENT

Mr. Andrews' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of intimidating a public servant.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “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)).

In determining the sufficiency of the evidence, the test 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. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "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." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

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. Baeza, 100 Wn.2d at 491, 670 P.2d 646.

Where the essential facts are undisputed, the question becomes whether those facts support the elements of intimidating a public servant. That is a question of law and will be reviewed de novo. State v. Moncada, ___ Wn. App. ___, ___ P.3d ___, 2012 WL 6132777 ¶ 9 (Dec. 11, 2012) (citing State v. O'Meara, 143 Wn. App. 638, 641–42, 180 P.3d 196 (2008)).

The evidence is insufficient to establish the requisite nexus between Mr. Andrews' threat and an attempt to influence. A person commits the crime 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." RCW 9A.76.180. In order to establish a prima facie case, the State must provide some evidence both that the defendant made a threat and that the threat was made with the purpose of influencing a public servant's official action. State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). It is undisputed in the present case that Mr. Andrews' statements to the officers constituted a threat. The issue is whether sufficient evidence existed that Mr. Andrews intended his threat to influence an official action by the officers.

In Montano, the defendant “struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in a stun gun’s being used on him twice, Montano grew increasingly enraged and violent. After being subdued physically, he [lashed] out verbally, hurling threats and insults at the officers.” Montano, 169 Wn.2d at 879. Despite Montano’s behavior, which was clearly more violent than that of Mr. Andrews in the present case, the Supreme Court found there was simply no evidence to suggest that Montano engaged in this behavior, or made his threats, for the purpose of influencing the police officers' actions. Id.

Similarly, in State v. Burke, Mr. Burke was intoxicated when he charged at and “belly-bumped” an officer. 132 Wn. App. 415, 417, 132 P.3d 1095 (2006). He did not listen to the officer’s commands to get back, yelled some fighting threats, and took a “fighting stance.” Id. at 417–18. The court there concluded that “[t]here is no direct evidence that Burke intended to influence [the officer] other than that he used profanities and ‘fighting threats.’ ... And the manner of Burke’s physical attack does not demonstrate his attempt to communicate, however subtly, a suggestion that Billings take, or not take, a course of action.” Id. at 421.

In a recent decision, this Court considered to what extent threatening words and conduct are sufficiently “purposeful” to suggest that a public servant take or not take a course of action for purposes of the crime of intimidating a public servant. In State v. Moncada, while driving west on the freeway, a Washington State Trooper observed Mr. Moncada walking in the opposite direction with his arm outstretched as if hitchhiking or “making obscene gestures.” The trooper parked his car and got out. Moncada quickly walked toward the trooper, clenching his fists and looking tense. When the trooper told him to stop, Moncada continued to walk towards him. Moncada yelled, “What the f* *k do you want?” When the trooper asked why he was on the freeway, Moncada said: “F* *k you. What the f* *k are you going to do? Shoot me?” As the trooper retrieved his stun gun, Moncada said “F* *king shoot me” and “Tase me or I will f* *king kill you.” Moncada, 2012 WL 6132777 ¶ 3.

This Court concluded, after reviewing the few cases that address intimidating a public servant, that a defendant’s generalized display of anger, through words and conduct, is not enough to show an attempt to influence official action. “The facts here are similar to those in Burke and Montano. Like in Montano and Burke, Mr. Moncada immediately confronted the trooper. He hurled threats and swear words. ‘Tase me’ is

more specific than what was hurled in Burke. But it is still essentially an expression of anger and an invitation to fight. In context, we conclude that Mr. Moncada's words and conduct here do not show an attempt to influence but rather a drunken tirade.” Moncada, 2012 WL 6132777 ¶ 12.

Mr. Andrews’ behavior was even less egregious toward the police officers than that of Montano, Burke and Moncada. Before his arrest, Montano struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in two tasings, Montano grew increasingly enraged and violent. Burke "belly bumped" the officer and swung his fists. Moncada advanced toward the trooper making threats and using obscenities. Here, Mr. Andrews was grudgingly cooperative when police first contacted him. And, either assuming or believing Mr. Andrews was going to try to contact Ms. Townsend, police retreated off of his property because Mr. Andrews had asked them to leave.

Yet only a few minutes later police returned to his door. Mr. Andrews had just been awakened from his sleep about a concern with a child who lived with him and whom he considered a step-son, and had been told CPS would not discuss the matter with him. He’d told them the child’s mother was not there, but that he would try to locate her and, now,

please leave. And the visitors left. At this second encounter a few minutes later, Mr. Andrews yelled—two times and through a closed door—“go away, stop harassing [me] or I’m going to come out there and kick your ass.” There was simply no evidence to suggest that Mr. Andrews engaged in this behavior, or made his threats, for the purpose of influencing the police officers' actions. His statement did not constitute an attempt to influence either officer's official action, any more than did Moncada’s (or Montano’s or Burke’s) other threats or insults.

The State argued in closing that Mr. Andrews’ words show that he was attempting to influence the officers to stop their goal of helping the CPS worker locate the mother she wished to talk to. 4/26/12 RP 285. But Mr. Andrews had already helped the officers by telling them Ms. Townsend was not there and that he’d try to reach her. He didn’t understand why they’d return to his door after leaving the first time and felt it was harassment. While telling them he’d “kick their ass” if they didn’t leave his property was not particularly polite, there is no evidence that after having already helped them Mr. Andrews was now trying to interfere with his visitors’ stated mission.

Moncada is instructive on this point. There, the State argued that Moncada’s words and behavior show that he was attempting to influence

the trooper to leave him alone, i.e. to *not* investigate why Moncada was walking on the freeway. It said that this was evidenced by the statement, “What the f* *k do you want?” and Moncada’s aggressive behavior at the beginning of the trooper’s contact with him. Moncada, 2012 WL 6132777 ¶¶ 4, 13. This Court cited to Burke for the proposition that an “attempt to influence” *requires a connection between the defendant’s threats and his purpose in making the threats*: “The court concluded that there was no evidence to ‘show that Burke’s anger had some specific purposes to make [the officer] do or not do something.’” This Court concluded that, like in Burke, the evidence showed only that Moncada was in a drunken rage and failed to establish that his overall belligerence demonstrated the requisite specific purpose of making the trooper do or not do something in his official capacity. Moncada, 2012 WL 6132777 ¶ 14.

Here, as in Moncada, the facts do not establish that Mr. Andrews’ angry threats—based on perceived harassment after having already assisted his visitors—had the specific purpose to make the officers stop their stated mission. He simply wanted them to get off his property.

Instead, the evidence showed a sleepy and disheveled man who was angry at being contacted a second time after having already given information and assurance he’d try to contact Ms. Townsend and who

expressed that anger toward the police officers. The State failed to make a prima facie showing that Mr. Andrews attempted to influence the officers' official action, and the evidence is insufficient to prove this essential element of the crime of intimidating a public servant beyond a reasonable doubt. Mr. Andrews' conviction must be reversed. Moncada, 2012 WL 6132777 ¶ 16.

D. CONCLUSION

For the reasons stated, the conviction for intimidating a public servant should be reversed and dismissed.

Respectfully submitted on December 26, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 26, 2012, 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 brief of appellant:

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