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No.
COA III, No. 261247

ORIGINAL

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

JOSE MONTANO,
Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Evan Sperline

AMENDED PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jose Montano, the respondent below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Mr. Montano seeks review of Division Three's published decision in State v. Montano, --P.3d--, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008), docket no. 261247, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Under the intimidating a public servant statute, RCW 9A.76.180, can a "threat" by itself be an attempt to influence a public servant's vote, opinion, decision, or other official action as a public servant?
2. If a threat by itself is insufficient to be considered an attempt to influence a public servant's vote, opinion, decision, or other official action as a public servant, can a court dismiss the charge for insufficiency of evidence under Knapstad?

D. STATEMENT OF THE CASE

On February 25, 2007, Officer Darren Smith of the Quincy Police Department witnessed Jose Montano shove his brother, Salvador Montano, while at the intersection of B Street SW and First Street SW. CP 18. The accuser told Officer Smith that Mr. Montano had hit him. Officer Smith requested that the Mr. Montano identify himself, and he refused. CP 18. Mr. Montano became verbally abusive and walked away, despite being ordered to come back. CP 18. Officer Smith attempted to restrain Mr. Montano, but he shoved back. Officer Smith told Mr. Montano that he was under arrest for assault 4th – domestic violence. CP 18. Mr. Montano continued to struggle with Officer Smith. Sgt. Jones arrived on the scene, and told Mr. Montano twice to stop or he would be tased. CP 18. Mr. Montano was than tased. He continued to struggle, and was tased a second time. CP 18. It was then that Mr. Montano was handcuffed. CP 18. Mr. Montano said to Officer Smith on the way to the patrol car: “I know when you get off work, and I will be waiting for you;” “I’ll kick your ass;” “I know you are afraid, I can see it in your eyes;” “punk ass.” CP 18.

Once in the patrol car, Mr. Montano continued the taunts, such as: “You need to retire; I see your grey hair;” and that Officer Smith was

scared. CP 18. Officer Smith stated in his report that he could see Mr. Montano in his rear view mirror during the entire trip to the Grant County Jail, “with a glaring focus” and laughing in a menacing manner. CP 18.

In Grant County Superior Court No. 07-1-00116-9, Jose Montano was charged with intimidating a public servant, resisting arrest, and assault in the fourth degree – DV. CP 1-2. The Honorable Evan Sperline ruled that there was not probable cause for the intimidating a public servant charge. RP February 26, 2007 at 4, In. 8-9.

Mr. Montano made a pre-trial motion to dismiss under a Knapstad motion. CP 8-22. The State filed a written response. CP 23-26. Mr. Montano argued that for intimidating a public servant to be a valid charge, there must be a true threat, and that he had to try to influence an official action of the public servant. CP 18. Mr. Montano also argued that the case law supports the notion that the “threat” itself cannot be the only evidence that tries to influence the official action of the public servant. CP 18.

The trial court asked the State what evidence they had showing that the “purpose of the threat was to get the officer to turn the defendant loose or change his mind about arresting him...” RP at

5-6, April 17, 2007. The State responded that the purpose of the threat was to gain release. RP at 6, April 17, 2007. The State explained that the only thing that the defendant could have been responding to was the arrest and this was amply evidenced by his resisting arrest. RP at 6, April 17, 2007. The State said that the defendant never asked to be released; it was implied by his threat. RP at 6, April 17, 2007.

The trial court ruled that while Mr. Montano “was angry, belligerent, and resisting ...” the State was “unable to show that his threat was intended to persuade the officer to do or not do something.” RP at 9, LN 19-22, April 17, 2007. The trial court then quoted from State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006), and said, “Evidence of anger alone is insufficient to establish intent to influence the officer’s behavior.” RP at 9, LN 13-14, April 17, 2007.

The trial court then said that the evidence that was available in the present case is similar to the evidence available in Burke. RP at 9, LN 16-18, April 17, 2007. There were only threats of harm made by the defendant, but there was no evidence that the defendant tried to influence the official action of the police officer. The trial court

dismissed the charge of intimidating a public servant. RP at 9, April 17, 2007 .

The remaining counts were dismissed by the State in order to prevent multiple trials while facilitating the appeal. CP 27-28. The State is appealing the dismissal of the intimidating a public servant charge. CP 29-31.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Washington State Supreme Court should accept review of this case for the following reasons, under RAP 13.4(b) and 13.6:

I. The decision in State v. Montano, --P.3d--, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008), is in conflict with the decision the Court of Appeals Division II, State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006);

II. The petition involves an issue of substantial public interest that should be determined by the Supreme Court: The threshold of what constitutes intimidating a police officer should be higher than what the Montano Court allows.

There are two separate elements to commit the crime of Intimidating a Public Servant, RCW 9A.76.180: 1) making a threat; and, 2) the attempt to influence the official action, opinion, decision or vote

of a public servant. The petitioner concedes that a threat was made, but that Mr. Montano never attempted to influence the official action of a public servant.

I. MONTANO IS IN CONFLICT WITH BURKE.

1. STATE V. BURKE: THE FACTS.

In State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006), the defendant was convicted of assault in the third degree, and intimidating a public servant. Officer Billings was called to a house party in the early morning hours, where there appeared to be numerous underage drinkers outside the front of the residence. Id. at 416-417. Billings chased them into the house, where the lessee, Juliet Gaines got into a shouting match with Billings. Gaines was angry because she insisted that Officer Billings didn't have permission to be in the house and that he needed a warrant. Id. at 417.

Billings went outside, in the back of the house, onto the back deck. Id. Gaines continued screaming at Billings on the back deck. Id. Some of the young looking partiers ran off. Id. However, there were approximately 50 people with beer bottles on the deck, who became angry and started yelling profanities at Billings. Id. Billings did not attempt to chase the partiers that left. Id. Feeling outnumbered, Billings

tried to leave, but the crowd closed in around him preventing him from leaving. Id. Billings yelled at the crowd to back off, to protect himself. Id.

At trial, Burke testified that he was drunk, and that when he first noticed Billings, he thought, “Uh-oh, the party’s over.” State v. Burke, 132 Wn.App. 415, 418, 132 P.3d 1095 (2006). Burke then moved closer to hear what Billings and Gaines were talking about. Id. He heard Billings and Gaines talk about the underage drinkers. Id. Burke testified that he was disappointed that the party might be over, but not angry. Id.

At that point, Burke charged the officer, belly bumping him, and nearly knocking the officer off of his feet. State v. Burke, 132 Wn.App. at 417. The officer pushed Burke back. Id. Billings testified that the Burke’s demeanor was “enraged.” Id. Burke yelled profanities and fighting threats at Billings, although the Billings couldn’t remember the exact words used. Id. at 417-418. Burke then got into a fighting stance with closed fists, while standing a mere two feet away. Id. at 418. Burke then took a swing at Billings with a closed fist. Id. Billings parried the punch, and in the same motion turned Burke around, and pushed him through the crowd and off of the deck. Id. Billings struggled with Burke, and then finally handcuffed him. Id.

2. THE MONTANO COURT'S INTERPRETATION OF BOTH THE FACTS AND THE LAW IN BURKE WERE INCORRECT.

The Montano Court stated the following:

“However, we think there is a significant distinction between this case and Burke. Unlike the situation in Burke, here the officer was undertaking an official action at the time of the threats. He had arrested Mr. Montano and was taking him to jail when the threats began. The threats continued during transport. This is in stark contrast to Burke where the officer had abandoned his pursuit of the suspects and was simply trying to leave the scene.” State v. Montano, --P.3d--, 3, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008).

Mr. Montano respectfully disagrees with the Montano Court with regards to the officer in Burke abandoning “his pursuit of the suspects and was simply trying to leave the scene.” State v. Montano, at 3. Officer Billings was still performing his duties as a police officer when Burke confronted him. Officer Billings was still investigating underage drinking at the house party, when he found himself in the middle of a dangerous situation: 50 drunken people armed with beer bottles. State v. Burke, 132 Wn.App. 415, 417, 132 P.3d 1095 (2006). Being in that dangerous situation qualifies Officer Billings as still acting within his official capacity as a police officer. Throughout the entire encounter with Burke, Billings was taking official action as a police officer. There

was never any testimony from Billings that he was abandoning his investigation, i.e. his official action.

The Burke Court never stated or implied that their decision in reversing the intimidating a public servant charge had anything to do with Officer Billings abandoning his pursuit of suspects and trying to leave, because that was not the reason for the reversal in Burke. The Burke Court stated that the reason for the reversal was that there was no connection as to the threats made by Burke, with regard to Burke trying to influence Billings in his official action as a police officer. State v. Burke, 132 Wn.App. 415, 421, 132 P.3d 1095 (2006).

In order to charge intimidating a public servant, the public servant has to be on duty. If Officer Billings was off duty and at home, and his neighbor started making threats directed at him, the State would be hard pressed to charge the neighbor with intimidating a public servant, because he was not attempting to influence the official action of a police officer. The flip side is when Officer Billings is on duty, he is always doing something “in an official capacity.” This is the conflict between the Montano Court and the Burke Court: If a public servant is on duty and a threat is made to that public servant, then the Montano Court’s assumption is that probable cause can always be found, because

the person making the threat could be trying to influence the official action of the public servant. State v. Montano, --P.3d--, 3, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008).

The Burke Court's perspective is opposite that of the Montano Court: When a public servant is on duty, and a threat is directed at that public servant, the threat itself is not enough to show that an attempt was made to influence an official action of that public servant. State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006).

There needs to be some type of connection between the threat, and the official action of a public servant. The public servant being on duty coupled with a naked threat isn't enough to get you probable cause for intimidating a public servant in the Burke Court, although it satisfies the Montano Court. Thus, in both Burke and Montano, both officers were performing their official duties when the threats occurred: The officer in Burke was investigating an underage drinking party; the officer in Montano was completing an arrest. However, the Burke Court's holding does not allow a finding of probable cause when a person only makes a naked threat to a public servant.

3. NAKED THREATS DIRECTED AT A POLICE OFFICER ARE NOT ENOUGH TO VIOLATE THE INTIMIDATING A PUBLIC SERVANT STATUTE.

Are naked threats directed towards a police officer enough to violate the intimidating a public servant statute? The Burke court stated the following, “But 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, 422, 132 P.3d 1095 (2006) (citing State v. Stephenson, 89 Wn.App. 794, 807, 950 P.2d 38 *review denied*, 136 Wash.2d 1018, 966 P.2d 1277 (1998)).

The Burke court reversed Burke’s intimidating a public servant conviction. State v. Burke, 132 Wn.App. at 423. The Burke court stated that while the initial contact with Burke and the fighting stance was substantial evidence that a threat existed, there was no direct evidence that Burke tried to influence Billings. Id. at 421. The Burke court stated that the physical attack and threats were not an attempt to communicate that the officer take a certain course of action, and that simple anger does not imply an attempt to influence. Id. at 422 “Evidence of anger alone is insufficient to establish intent to influence Billings’s behavior. The state must show that Burke’s anger had some **specific purpose** to

make Billings do or not do something.” State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006)(emphasis added).

In the present case, statements like, “I’ll be waiting until you get off of work” and “I’ll kick your ass” can be viewed as a threat. CP 18. However, according to Stephenson and Burke, that would not be enough to satisfy all of the elements of the intimidating a public servant statute. Threatening words by themselves do not violate the statute: There must be an attempt by the respondent to influence the official action of the police officer. State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006) (citing State v. Stephenson, 89 Wn.App. 794, 807, 950 P.2d 38 *review denied*, 136 Wash.2d 1018, 966 P.2d 1277 (1998)).

4. MONTANO AND BURKE CONFLICT IN INTERPRETING THE INTIMIDATING A PUBLIC SERVANT STATUTE.

Mr. Montano never attempted to influence Officer Smith from doing his job. Mr. Montano was angry, but similar to Burke, there was no evidence that he was trying to influence Officer Smith from doing or not doing his official duty.

However, the Montano Court stated the following:

“We believe a rational trier-of-fact could infer that Mr. Montano's threats were designed to get the officer to change his course of action even if there was no explicit "I will attack you unless you release me"

statement. The threats began when the officer took Mr. Montano into custody and continued throughout the transportation process until the officer turned him into the jail. 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.” State v. Montano, --P.3d--, 3, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008).

This is in direct conflict with the Burke Court, which stated:

“...evidence of anger alone is insufficient to establish intent to influence Billings’ behavior. The State must show that Burke’s anger had some **specific purpose** to make Billings do or not do something.” State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006)(emphasis added); and “But threats are not enough; the defendant must attempt to influence the public servant’s behavior with these threats.” Id. (citing State v. Stephenson, 89 Wn.App. 794, 807, 950 P.2d 38 *review denied*, 136 Wash.2d 1018, 966 P.2d 1277 (1998)).

The jury found Burke guilty of intimidating a public servant.

However, the Burke Court reversed that decision. State v. Burke, 132 Wn.App. at 422. The Burke Court required that the State show how Burke’s anger had some **specific purpose** in making Billings do or not do something, and that threats alone were not enough. Id.

The Grant County Superior Court dismissed the intimidating a public servant charge against Mr. Montano in a knapstad motion (CP 28) for the same reason that the Burke Court reversed Burke’s conviction: The State did not show any **specific purpose** that the threats Mr. Montano made had influenced an official action of the police officer.

RP at 9, LN 18-22, 4/17/07. However, the Montano Court does not require that any **specific purpose** be shown. State v. Montano, --P.3d--, 3, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008).

Unlike the Burke Court, the Montano Court has ruled that if you make a threat, that alone can be all that is necessary for a jury to determine that a defendant was trying to influence the official action of a police officer. State v. Montano, at 3. The Montano Court stated the following:

“It is, of course, also possible that the trier-of-fact will determine that Mr. Montano was simply angry and vented that anger during the arrest process without attempting to influence the officer's official actions. Indeed, the repeated threats and statements without an express request for the officer to release him tend to suggest simple anger was all that was involved. That decision, however, is one left to the trier-of-fact. Viewed in a light most favorable to the prosecution, there is evidence, "however weak,"² from which a trier-of-fact could find Mr. Montano intended to influence Officer Smith's official actions. Under Knapstad, the trial court erred in deciding what inference was to be drawn from the evidence.” State v. Montano, at 3.

Mr. Montano respectfully disagrees with the Montano Court's ruling that “Under Knapstad, the trial court erred in deciding what inference was to be drawn from the evidence. State v. Montano, --P.3d-, 3, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008).

The jury decided that Burke was guilty of intimidating a public servant, given the threats he made and the anger that he showed toward

the officer. The jury connected the dots: Threats + anger = attempt to persuade. Yet, the Burke Court reversed the trier of facts decision. This was because the Burke Court decided that in situations where there was only anger and threats of harm, but no direct evidence that an attempt was made by the defendant to persuade a public servant in his official duty, it wasn't enough to prove the element of persuasion, and that there wasn't enough evidence to sustain a conviction for intimidating a public servant. State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006).

The Grant County Superior Court applied the holding of Burke when dismissing the intimidating a public servant charge. The holding in Burke sets the standard for sufficiency arguments in intimidating public servant cases. From that holding, you can conclude that a dismissal from a knapstad motion is permissible.

II. THE MONTANO COURT'S THRESHOLD OF WHAT CONSTITUTES INTIMIDATING A POLICE OFFICER SHOULD BE HIGHER, AS A POINT OF PUBLIC POLICY.

Mr. Montano was arrested for a gross misdemeanor and a misdemeanor, relatively minor offenses in the world of criminal offenses. CP 18-19. The misdemeanors were the underlying cause of the arrest. CP 18-19. The intimidating a public servant charge came after

Mr. Montano was arrested. CP 18-19. The Montano Court's interpretation of intimidating a public servant would lower the threshold for defendants getting charged with a class B felony, when the underlying charge was a misdemeanor. Defendants that are arrested for misdemeanor charges could now be facing significant jail/prison time and a felony charge, for making a threat as they are being arrested.

Police officers are trained to diffuse stressful situations. The expectation of a police officer is that part of the job is dealing with verbal abuse. Police officers have made an implied compact that they will be tolerant of a certain amount of verbal abuse. They deal with an array of difficult people on a daily basis: People that are high/intoxicated; mentally ill; frightened or embarrassed because they were arrested.

In effect, the Montano Court ruling allows there to be a zero tolerance policy for any threatening words when people are being arrested, even though when someone is arrested, they are typically in a stressful, vulnerable position, and are not necessarily thinking clearly.

When taking into consideration an intimidating a public servant charge, there should be some latitude for defendants at the point of arrest and while they are being taken to the county jail. Not every word that

comes out of a defendant's mouth at the point of arrest should be automatically considered an attempt influence a decision by a police officer. Most people arrested are not going to be charged with a felony. They are going to be charged with misdemeanors or infractions. By having a zero tolerance policy, there will be a greater chance that police contact of minor consequence will now turn into a class B felony. Threats made at the point of arrest and when a defendant is being taken to jail are more of an emotional type of response, and should not be treated as a class B felony.

F. CONCLUSION

There is a conflict between Division II and Division III, between Burke and Montano. The holding in Burke, "Evidence of anger alone is insufficient to establish intent to influence the officer's behavior," sets the standard for sufficiency of evidence in cases going forward, given that Burke is essentially the only published case in Washington State that deals with this issue. State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006). The Grant County Superior Court followed the standards set by the Burke Court when it dismissed Mr. Montano's case on a Knapstad motion.

The Montano Court's decision reversed the Superior Court, not allowing the court to dismiss based on a Knapstad motion for insufficient evidence. The Montano Court's belief that the case should go to a trier of fact takes away an insufficient evidence argument in an intimidating a public servant case. Given the same facts as Burke, the Montano Court would not reverse the superior court's decision, because the finder of fact, the jury, made it's ruling that Burke was trying to influence the Officer's behavior. The Montano Court would ignore the holding in Burke.

Mr. Montano believes that the Burke Court and Montano Court are in conflict, and that these questions of law should be reviewed by the Supreme Court.

For the reasons set forth above, this Court should grant review.
RAP 13.4(b), 13.6.

DATED this March 4th, 2009.

Respectfully Submitted,



Jeff Goldstein, WSBA No. 33989
Attorney for Petitioner

APPENDIX A

State v. Montano, --P.3d--, 2008 WL 4981060 (Wn.App. Div. 3, Nov. 25, 2008).

Westlaw

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 (Cite as: 2008 WL 4981060 (Wash.App. Div. 3))

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
 Division 3.
 STATE of Washington, Appellant,
 v.
 Jose Juan MONTANO, Respondent.
 No. 26124-7-III.

Nov. 25, 2008.

Background: In a prosecution for fourth-degree assault (domestic violence) and intimidating a public servant, the Superior Court, Grant County, Ken L. Jorgensen, J., granted defendant's motion to dismiss the intimidation charge. State appealed.

Holding: The Court of Appeals, Kevin M. Korsmo, J., held that whether defendant's threats to police officer, after officer had arrested defendant and while officer was taking defendant to jail, were designed to get the officer to change his course of action, was an issue for the jury.
 Reversed and remanded.

West Headnotes

[1] Criminal Law 0

110k0 k.

A trial judge can dismiss a criminal charge without prejudice prior to trial when the undisputed facts fail to establish that the defendant is guilty of the charged offense, but if there is a dispute about the facts, the motion to dismiss must be denied.

[2] Criminal Law 0

110k0 k.

Because there are no disputed facts when the trial court grants a pretrial motion to dismiss the criminal charges, the trial court does not make factual findings in support of its ruling granting the motion to dismiss.

[3] Criminal Law 0

110k0 k.

When reviewing a trial court ruling granting a pretrial motion to dismiss the criminal charges, the appellate court must view the evidence in a light most favorable to the prosecution.

[4] Obstructing Justice 0

282k0 k.

The elements of the offense of intimidating a public servant are: (1) use of a threat; (2) to influence a public servant's official behavior. West's RCWA 9A.76.180.

[5] Obstructing Justice 0

282k0 k.

Whether defendant's threats to police officer, after officer had arrested defendant and while officer was taking defendant to jail, were designed to get the officer to change his course of action, was an issue for the jury, in prosecution for intimidating a public servant. West's RCWA 9A.76.180.

Appeal from Grant Superior Court; Honorable Ken L. Jorgensen, J.

Edward Asa Owens, Teresa Jeanne Chen, Grant County Prosecutor's Office, Ephrata, WA, for Appellant.

Jeffrey Goldstein, Attorney at Law, Seattle, WA, for Respondent.

PUBLISHED OPINION

KORSMO, J.

*1 ¶ 1 The trial court dismissed a charge of intimidating a public servant filed against Jose Montano after he was arrested for assaulting his brother on a public street. The court reasoned that the threats made against the officer did not necessarily show intent to influence a public servant's actions. Believing that a jury could infer the motivation from the threats, we reverse the order of dismissal and remand for trial.

FACTS

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¶ 2 While on patrol, Officer Darren Smith saw respondent Jose Montano shove his brother, Salvador Montano. The officer stopped to investigate. Salvador Montano told the officer that Jose Montano had hit him. The officer observed blood on one of Salvador's ear lobes. Officer Smith asked Jose Montano for identification. He had none with him. When asked for his name, Jose Montano became agitated, refused to provide his name, and began to walk away. The officer grabbed the back of Mr. Montano's coat, but he broke free. The officer grabbed the coat again; once again Mr. Montano broke free. The officer then grabbed Mr. Montano's wrist and told him he was under arrest. Mr. Montano in turn grabbed the officer's wrist and tried to pull him down.

¶ 3 Another officer, who had arrived during the investigation, applied a TASER. Mr. Montano stopped struggling and was handcuffed. Officer Smith walked Mr. Montano to the patrol car. Mr. Montano became angry and pulled away. He told Officer Smith: "I know when you get off work, and I will be waiting for you." He also told the officer: "I'll kick your ass." He also called the officer a "punk ass" and stated: "I know you are afraid, I can see it in your eyes."

¶ 4 Once in the car, Mr. Montano made several more unsolicited comments, including the statement: "You need to retire. I see your gray hair." He repeated his belief that the officer was scared and that he could see fear in the officer's eyes.

¶ 5 Charges of fourth degree assault (domestic violence) and intimidating a public servant were filed in the Grant County Superior Court. Mr. Montano moved to dismiss the intimidation charge pursuant to *State v. Knapstad*, 107 Wash.2d 346, 729 P.2d 48 (1986). The defense conceded that Mr. Montano had actually threatened Officer Smith, but argued that there was no attempt to influence official actions. The prosecutor argued that the threats began after the arrest, so it was reasonable to conclude they were being made for the purpose of obtaining release. The trial court granted the motion, reason-

ing that the threats alone did not prove a purpose to influence the officer to change his actions. It was equally possible that the defendant was just expressing anger at the arrest. The State then appealed to this court.

ANALYSIS

[1][2][3] ¶ 6 Under *Knapstad*, a trial judge can dismiss a criminal charge without prejudice prior to trial when the undisputed facts fail to establish that the defendant is guilty of the charged offense. *Id.* at 356- 357, 729 P.2d 48. Where there is a dispute about the facts, the motion to dismiss must be denied. *Id.* at 356, 729 P.2d 48. Because there are no disputed facts, the trial court does not make factual findings in support of its ruling. *Id.* at 357, 729 P.2d 48. A court reviewing the sufficiency of the evidence at trial must view the evidence in a light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). We believe that same standard also applies in a pretrial motion to dismiss under *Knapstad*.

*2 [4] ¶ 7 It is a crime to threaten a public servant in order to influence that person's official actions. The statute provides in relevant part:

(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.

....
 (3) "Threat" as used in this section means
 (a) to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
 (b) threats as defined in RCW 9A.04.110(25).[FN1]

RCW 9A.76.180. The elements of this offense are (1) use of a threat (2) to influence a public servant's official behavior.

¶ 8 This statute has twice been the subject of published opinions. *State v. Stephenson*, 89 Wash.App. 794, 950 P.2d 38, review denied, 136 Wash.2d

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1018, 966 P.2d 1277 (1998), involved a First Amendment challenge to the statute. The decision in *State v. Burke*, 132 Wash.App. 415, 132 P.3d 1095 (2006), involved a challenge to the sufficiency of the evidence to support a conviction. Not surprisingly, both parties relied upon *Burke* in their arguments to the trial court and, again, in this court.

¶ 9 *Burke* involved the situation where Officer Billings chased some underage drinking suspects into a house and out again into the backyard where a large drinking party was underway. The suspects escaped in the crowd and the officer had to abandon the pursuit. *Id.* at 417, 132 P.3d 1095. When he turned to leave, the crowd surrounded him. Chris Burke charged the officer and "belly bumped" him. *Id.* After a brief scuffle, Burke assumed a "fighting stance" and the two men came to blows. *Id.* at 417-418, 132 P.3d 1095. Burke eventually was arrested and subsequently was charged and convicted of third degree assault and intimidating a public servant. *Id.* at 418, 132 P.3d 1095. At trial, Burke testified that he was drunk and very disappointed that the party was ending because of the appearance of the police. *Id.*

¶ 10 This court overturned the intimidating a public servant conviction. *Id.* at 421, 132 P.3d 1095. The court found that there was sufficient evidence that Burke had threatened the officer. Burke had used "profanities and threats" against the officer. *Id.* He also had assumed the fighting stance. This evidence was sufficient to prove that Burke had threatened the officer. *Id.*

¶ 11 The court concluded, however, that there was no evidence that the threats were made for the specific purpose of influencing the officer's actions. Burke made no specific statement suggesting an attempt to influence the officer's actions, and the physical attack likewise did not suggest that Burke was communicating to the officer that he should undertake a particular course of action. *Id.* The prosecutor argued that the jury could reasonably infer that Burke intended to influence the officer's actions because there was no other reason for him to

act as he did. *Id.* at 421-422, 132 P.3d 1095. This court disagreed, noting that mere anger alone did not show intent to influence. *Id.* at 422, 132 P.3d 1095. The court also rejected the argument that Burke must have intended to influence the officer to not end the party. The court noted that the officer was not undertaking any such action at the time he was threatened and there was simply no basis for drawing any inference of intent to influence. "The evidence must show a connection, however weak, between Burke's anger and intent to influence Billings." *Id.* Finding that there was no evidence that anything more than anger motivated Burke's actions, this court reversed the conviction for failure to prove the intent to influence element. *Id.* at 422-423, 132 P.3d 1095.

*3 [5] ¶ 12 Similarly here, Mr. Montano argues that his anger at being arrested did not show intent to influence Officer Smith's actions. However, we think there is a significant distinction between this case and *Burke*. Unlike the situation in *Burke*, here the officer was undertaking an official action at the time of the threats. He had arrested Mr. Montano and was taking him to jail when the threats began. The threats continued during transport. This is in stark contrast to *Burke* where the officer had abandoned his pursuit of the suspects and was simply trying to leave the scene.

¶ 13 We believe a rational trier-of-fact could infer that Mr. Montano's threats were designed to get the officer to change his course of action even if there was no explicit "I will attack you unless you release me" statement. The threats began when the officer took Mr. Montano into custody and continued throughout the transportation process until the officer turned him into the jail. 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.

¶ 14 It is, of course, also possible that the trier-of-fact will determine that Mr. Montano was simply

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angry and vented that anger during the arrest process without attempting to influence the officer's official actions. Indeed, the repeated threats and statements without an express request for the officer to release him tend to suggest simple anger was all that was involved. That decision, however, is one left to the trier-of-fact. Viewed in a light most favorable to the prosecution, there is evidence, "however weak," [FN2] from which a trier-of-fact could find Mr. Montano intended to influence Officer Smith's official actions. Under *Knapstad*, the trial court erred in deciding what inference was to be drawn from the evidence.

¶ 15 The order of dismissal is reversed and the case remanded for trial.

WE CONCUR: SCHULTHEIS, C.J., and
SWEENEY, J.

FN1. The definition of "threat" in the criminal code is now codified at RCW 9A.04.110(27) as a result of the enactment of LAWS OF 2007, ch. 79, § 3.

FN2. *Burke*, 132 Wash.App. at 422, 132 P.3d 1095.

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