

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAY PARKER FOUST,

Defendant-Appellant.

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UNPUBLISHED

June 3, 2010

No. 289997

Missaukee Circuit Court

LC No. 08-002228-FH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of three counts of resisting and obstructing arrest, MCL 750.81d(1), one count of intimidating a witness, MCL 750.122(7)(A), and one count of ethnic intimidation, MCL 750.147b. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On August 17, 2008, Michigan State Police Troopers Joseph Cairnduff and Rubin Rodriguez responded to a domestic disturbance call at the residence of defendant and his spouse. Cairnduff testified that as he and Rodriguez approached the front door, he heard a male and a female “screaming inside the residence.” Cairnduff testified that before he and Rodriguez could knock on the door, a female, later identified as defendant’s wife, came outside to meet them, informing them that defendant was intoxicated and had pushed her against a wall and hit her in the arm.

With the spouse’s permission, Cairnduff, Rodriguez, and defendant’s spouse entered the residence, while Cairnduff spoke with the spouse in the kitchen, Rodriguez went into the living room where defendant was laying on a couch. Rodriguez testified that he approached defendant and asked him to tell “his side of the story,” but defendant refused to talk with him and instead told him that he and Cairnduff “didn’t have the right to be there.” Cairnduff testified that he and Rodriguez explained that his spouse had asked them to enter the residence, but defendant continued to yell at the officers for being in his house and threatened to hurt them if they refused to leave. Rodriguez testified that he reiterated to defendant that he and Cairnduff were there to hear defendant’s version of the events, but defendant “stood up from the couch [and] said ‘you (expletive deleted) spick [sic], why don’t you go back to Mexico.’”

After speaking further with the spouse, Cairnduff determined there was probable cause to arrest defendant for domestic assault, and at some point prior to defendant's arrest, defendant told his spouse that she was a "no good bitch and he was going to get her later." Cairnduff testified that he and Rodriguez informed defendant that he was under arrest, and with the assistance of Rodriguez was eventually able to handcuff defendant.

The officers' car contained police equipment in the backseat, Cairnduff called Missaukee County Sheriff's Department Sergeant Todd Stephan and Deputy Chris Tombs to ask them to assist at the residence because their patrol vehicle had a cage-secured backseat. While he was doing so, defendant kicked Cairnduff in the shins, and when Stephan and Tombs arrived, all four of the officers had to forcibly place defendant in the backseat of the sheriff vehicle.

Stephan and Tombs transported defendant to the police station, and Cairnduff and Rodriguez followed behind them in their patrol car. Stephan testified that defendant threatened Stephan and Tombs during the trip to the police station, stating that he wanted to "put a bullet in our heads." Tombs testified that as they were driving he heard a "loud bang" and saw blood on the divider separating the front seat and the backseat. Tombs noticed that defendant was bleeding from the head, and observed defendant hit his head a second time on the divider.

Rodriguez testified that when Cairnduff opened the door of the backseat of the sheriff vehicle, defendant kicked the door from the inside, hitting Rodriguez in the knee. Once defendant was out of the vehicle, Rodriguez testified that defendant made eye contact with him, spit in his face, and said, "you (expletive deleted) spick [sic], go back to Mexico." Rodriguez testified that he felt intimidated by defendant's actions and believed that defendant was "going to harm somebody." Cairnduff testified that he asked Tombs to place a hand towel over defendant's face to prevent him from spitting at anyone else, and the officers escorted defendant into the jail. Defendant was tried and convicted on the charges set forth *infra*, and this appeal ensued.

On appeal, defendant argues that because the motivation for his actions toward trooper Rodriguez was the same as his motivation for resisting and assaulting trooper Cairnduff, plaintiff failed to show that defendant intended to intimidate or harass Rodriguez because of the officer's ethnicity. MCL 750.147b states in relevant part as follows:

(1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

(a) Causes physical contact with another person.

(b) Damages, destroys, or defaces any real or personal property of another person.

(c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

Rodriguez and Cairnduff both testified that defendant directed an ethnic slur at Rodriguez on multiple occasions. Rodriguez testified that defendant first used the slur when speaking to him while the two were in the residence before defendant's arrest. In addition, both officers testified that when defendant spat on Rodriguez after being transported to the police station, he looked directly at Rodriguez and again uttered the slur. Defendant's use of the slur could certainly be found by a rational trier of fact to show that he had the specific intent to target Rodriguez because of his race or national origin. The use of the slur immediately following the contact serves to reinforce this conclusion.

Regarding possible additional motivations for physical contact asserted to be ethnically intimidating or harassing, *People v Schutter*, 265 Mich App 423, 430; 695 NW2d 360 (2005) provides the following guidance on the language of MCL 750.147b(1)(a):

This statutory language is rather straightforward and broad. It contains no limiting language to suggest that ethnic intimidation may only be charged when the specific intent to intimidate or harass is only reason for the underlying predicate criminal act. Instead, the statute only requires some act of physical contact committed maliciously and accompanied by a specific intent to intimidate or harass because of race, color, religion, gender, or national origin. . . . [T]he statute . . . [is] satisfied if this specific intent is formed before the commission of the underlying predicate criminal act. That is so regardless of any other additional motivations for the underlying predicate criminal act that may have existed earlier.

All of the officers involved in arresting and transporting defendant testified that he was physically uncooperative and directed obscenities to them throughout the process. However, the fact that defendant was belligerent and assaultive toward other officers does not mitigate fact that the physical contact on Rodriguez was committed maliciously and "accompanied by a specific intent to intimidate or harass because of race, color, religion, gender, or national origin." *Schutter*, 265 Mich App at 430. Our review of the record clearly supports the conclusion that defendant's contact with Rodriguez was intended to harass or intimidate the officer based on his ethnicity. It was Rodriguez who defendant spat at and initially targeted with physical contact. Therefore, sufficient evidence was adduced to support the conviction. MCL 750.147b(1); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

Defendant next argues that his conviction for witness intimidation conviction is not supported by sufficient evidence and must be vacated. Defendant's wife testified that as he was being led out of the residence in handcuffs, he told her "I'll get you you (expletive deleted) bitch." On appeal, defendant argues that defendant's statement only constituted a "general threat," and that such a threat is not sufficient to find a defendant guilty under the relevant statute.

MCL 750.122 governs witness tampering, and sets forth several methods of tampering with a witness. In *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003), this Court described the statute's reach as follows:

The unifying theme among these subsections is an attempt to identify and criminalize the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding, as defined in subsection 12(a). In the most general sense, the Legislature identified four different categories of witness tampering: bribery (subsection 1), threats or intimidation (subsection 3), interference (subsection 6), and retaliation (subsection 8). That the Legislature chose *not* to place all these different types of tampering in the same subsection suggests that the Legislature considered them to be distinct. [Emphasis in original.]

The subsection under which defendant was charged is not specified in the felony information or on the judgment of sentence. The court instructed the jury as follows regarding the charge:

To prove this charge, the Prosecutor must prove the following elements beyond a reasonable doubt. That the defendant willfully impeded, interfered with, prevented, or obstructed, or attempted to willfully impede, interfere with, prevent, or obstruct a witness, Elizabeth Foust, to attend, testify, or provide information in or for a present or future official proceeding.

For purposes of this crime, you can consider an official proceeding to mean a proceeding heard by a judicial officer.<sup>[1]</sup> . . .

Given these instructions, the pertinent part of the statute is subsection 122(6): “A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.”

Looking to the language of subsection 122(6) as juxtaposed against the other subsections, *Greene* concluded that the crime of witness tampering under subsection 122(6) consists of the following:

In summary, to prove that a defendant has violated MCL 750.122(6), applying the explanations of various terms provided in this opinion, the

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<sup>1</sup> MCL 750.122(12)(a) provides as follows:

As used in this section:

(a) “Official proceeding” means a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.

prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In this last part of the definition we use the word interference to include all types of conduct proscribed in subsection 6.

*Greene* explained the second of these elements as follows:

[A]s long as the interference at issue does not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, any act or attempt to impair the witness's *capacity* to attend, testify, or provide information in or for a present or future official proceeding violates subsection 6. [*Greene*, 255 Mich App at 441 (emphasis in original).]

Here, the act underlying the charge occurred when defendant swore at his wife and threatened, according to the prosecutor "to get her later or something to that fact." Describing that moment, the prosecutor argued in favor of conviction of witness intimidation as follows:

She was afraid then and I submit to you that fear carries over and continued in her mind because he did this; I'm going to get you and implicit within that, if you come to court and testify against me, I'm going to get you. I'll get you later. . . . There's always time for revenge. Later still hasn't come in the mind of Beth Foust and later hasn't come in the mind of Mr. Foust.

Reviewed in context, it was reasonable for a jury to find that defendant intended to intimidate his wife with the threat of future harm. However, *Greene* states that "the interference at issue . . . [cannot] consist of . . . threats or intimidation, or retaliation," as those acts are contemplated in other subsections of the statute. It is true that "[i]t is the jury's function alone, when considering the evidence, to determine what weight and credibility to give the evidence." *People v Wolfe*, 440 Mich 508, 514-516; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992), citing *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). However, in order for defendant's conviction to be upheld, the Court must find that a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Herndon*, 246 Mich App at 415. Plaintiff may have provided sufficient proof of witness intimidation under another subsection of MCL 750.122, but it did not show that defendant acted in a proscribed manner under § 122(6) to impede or interfere with his wife's ability to testify at a proceeding before a judicial officer.

We reverse defendant's conviction and sentence for witness intimidation and affirm all of defendant's remaining convictions and sentences. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Stephen L. Borrello