

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28408-5-III

Respondent,

Division Three

v.

JASON OLIVER NUNN,

UNPUBLISHED OPINION

Appellant.

Siddoway, J. — Jason Nunn appeals his conviction of intimidating a public servant, a class B felony, imposed as a result of threatening remarks he made toward an officer shortly after his arrest. He argues that substantial evidence does not support the charge and that he should be resentenced on his accompanying conviction of third degree assault. The State concedes that the evidence presented at trial was insufficient in light of our Supreme Court’s recent decision in *State v. Montano*.¹ We agree, vacate the conviction, and remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

¹ 169 Wn.2d 872, 239 P.3d 360 (2010).

On June 30, 2009, Jason Nunn was stopped while driving his vehicle by Klickitat County Deputy Sheriffs Michael Kallio and Jason Ritoch after Deputy Kallio identified Mr. Nunn as the driver. Deputy Kallio ordered him out of the car in order to arrest him on a separate matter unrelated to his driving. Mr. Nunn was uncooperative with the officers while being handcuffed, prompting Deputy Ritoch to threaten the use of a “taser” gun. Report of Proceedings (RP) at 58. Mr. Nunn then complied while directing a string of abusive remarks toward the officers, including calling one a “fucking pig” and the other a “swine.” RP at 58, 130.

Deputy Kallio held onto Mr. Nunn as he walked him toward the patrol cars. At this time, Mr. Nunn dropped a lit cigarette from his mouth toward the deputy, causing him to move his arm away out of concern for being burned. Mr. Nunn was then placed in the back seat of a patrol car where he continued to yell profanity and make remarks such as, ““You think you’re big, you think you’re so tough now.”” RP at 61.

Deputy Ritoch transported Mr. Nunn to the jail. The deputy described Mr. Nunn’s verbal assaults during this time as “escalating” and viewed them as an attempt to dehumanize him. RP at 65. While being led to the booking area, Mr. Nunn informed the deputy that ““I’ll be out of here in fifteen days. I can’t wait to meet you on the street.”” RP at 68, 88-89. Mr. Nunn never made any requests or specific threats to the deputy. According to the deputy, Mr. Nunn was agitated and upset during the entirety of the

encounter, which lasted 30 to 45 minutes.

Mr. Nunn was convicted after a jury trial of intimidating a public servant and third degree assault. The court imposed concurrent midrange sentences of 50 months on each count. This appeal followed.

ANALYSIS

Mr. Nunn challenges the sufficiency of the evidence supporting his conviction of intimidating a public servant, arguing that no evidence reflects that he threatened Deputy Ritoch with the intent of influencing him to do or not do something in his official capacity. The State appropriately concedes that the conviction must be dismissed for this reason. Br. of Resp't at 3-5.

Standard of Review

The standard of review for a defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine "whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt." *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding.

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State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Sufficiency of the Evidence

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(1). Our Supreme Court recently clarified the evidentiary showing that must be made to support a conviction of this offense in *Montano*. There the court held 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.

In *Montano*, an officer attempted to arrest Jose Montano after witnessing him shove his brother. *Id.* at 874. While attempting to detain him, Mr. Montano broke free and tried to pull the officer to the ground. *Id.* At this point, a second officer arrived on scene and tased Mr. Montano twice before they were able to subdue him. *Id.* at 875. Mr. Montano resorted to attacking the officers verbally after being handcuffed, threatening that “I know when you get off work, and I will be waiting for you.” *Id.* He also made other abusive remarks toward them, including, “I’ll kick your ass” and “I know you are afraid, I can see it in your eyes.” *Id.* During the ride to the jail, Mr. Montano told an officer that “you need to retire. I see your gray hair.” *Id.*

Mr. Montano was charged with a number of offenses, including intimidating a public servant. *Id.* The trial court dismissed this charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). *Id.* This court reversed the trial court and remanded the charge for trial. *State v. Montano*, 147 Wn. App. 543, 546, 196 P.3d 732 (2008). The Supreme Court reversed this court and agreed with the trial court that Mr. Montano’s “threats and taunts provided no evidence of any attempt to influence the police officers.” *Montano*, 169 Wn.2d at 880. It concluded that “because the State failed to provide any evidence—aside from Montano’s threats and angry behavior—of his intent to influence the police officers, the State did not make a prima facie showing that the elements of the offense . . . were met.” *Id.*; see also *State v. Burke*, 132 Wn. App. 415, 422, 132 P.3d 1095 (2006) (recognizing that “[e]vidence of anger alone is insufficient to establish intent to influence [a public servant’s] behavior. The State must show that [the defendant’s] anger had some specific purpose to make [the public servant] do or not do something.”).

The facts of the instant case are indistinguishable in all material respects to *Montano*. As in that case, Mr. Nunn verbally abused officers and made threatening remarks, but no evidence suggests that Mr. Nunn’s behavior had the specific purpose of making the arresting officers do or not do something in their official capacities. Evidence of anger and threatening remarks alone is insufficient to support a charge of intimidating

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a public servant, and the State demonstrated no more than that in this case. Mr. Nunn's conviction of intimidating a public servant is vacated and the matter is remanded for resentencing on the remaining conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, A.C.J.

Sweeney, J.