IN THE
TENTH COURT OF APPEALS

No. 10-14-00224-CR

TERRY BEN BROCK,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 52nd District Court
Coryell County, Texas
Trial Court No. 22174

CONCURRING OPINION

I write separately only to address the complexity of the statute as it relates to whether the indictment was duplicitous; Issue Two.

Texas Penal Code section 36.06(a) uses the word "or" 12 times in the body of that subsection alone. The offense is entitled "Obstruction or Retaliation." The breadth of the options of alternative manner and means to convict under just one of the subsections of this statute has been commented upon by the Texas Court of Criminal Appeals. *See Cada v. State*, 334 S.W.3d 776 (Tex. Crim. App. 2011).

When the statute is examined in the abstract, it seems to describe two discrete offenses: Retaliation in subsection (a)(1), and Obstruction in subsection (a)(2). When we then turn to the facts of the case as presented, there also seems to have been two theories of why the defendant said what he did to the Judge that most everyone present seemed to have viewed as a threat. But a threat to do what was never clarified. Some of the evidence supported the theory that the defendant was retaliating because the judge had failed to give him a bond without a no-driving restriction. Some of the evidence supported the theory that the defendant intended to cause a mistrial, under the State's theory, obstruct the performance of a public servant. The problem with the "mistrial" theory is that the evidence showed the defendant only wanted to delay the resolution of his trial, not the service of any public servant in the performance of their job. And it does not appear that an effort to lengthen the time necessary to dispose of your own criminal proceeding is a violation of the statute under this theory because the "public servant" (the judge and all the other court participants) is already there doing his job and, thus, is not "prevented or delayed" from doing so. In fact, the defendant wants the public servant to do his job immediately and declare a mistrial, something that did happen in the driving under the influence trial, but not based upon the alleged threat. The judge was simply continuing to do that for which his public services were required. This is somewhat like shooting at a house. The Court of Criminal Appeals

has told us that you cannot do it from within the house. *Reed v. State*, 268 S.W.3d 615, 617-618 (Tex. Crim. App. 2008).

The question is whether the different possible reasons for making the alleged threat make them different manner and means of committing the same crime, or whether retaliation is a different crime than obstruction. The problem, and confusion, is exacerbated in this proceeding. The jury was confused by the charge and the "or" that separated the finding of criminal liability for retaliation from criminal liability for obstruction. When confronted by a jury note to this effect, defense counsel was not surprised; but by then, it was beyond the ability of anyone to address the issue that some still did not see.

Moreover, this is not only a result-of-conduct crime. This crime, as arguably committed on the facts of this case, did not depend on whether the judge felt threatened or was actually harmed. The crime, if committed, was that the defendant threatened to harm a person by an unlawful act because of what they had done in their capacity as a public servant. Thus the crime, if committed, was a result-of-conduct, that is, did the conduct result in a threat of harm by an unlawful act, and circumstances-surrounding-conduct crime, that is, the threatened person's status as a public servant and the threat made in retaliation for something done in that capacity, because there was no suggestion (or evidence) that any public servant was actually harmed.

Because there was only one overt act alleged as a threat against one purported victim, and based on the entire statue as written, even though there must be about a thousand different ways to violate it, *see Cada v. State*, 334 S.W.3d 776 (Tex. Crim. App. 2011), it is still only one crime. Thus, the indictment was not erroneously duplicitous.

For these reasons, I concur in the Court's judgment.

TOM GRAY
Chief Justice

Concurring opinion issued and filed January 7, 2016
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