No. 82855-5

J.M. JOHNSON, J. (dissenting)—A reasonable jury may infer that Montano's threat of physical harm against an arresting police officer, after Montano had physically resisted arrest, was an attempt to intimidate the officer into releasing him. It is well established that juries may properly consider circumstantial evidence and reasonable inferences. However, the majority today declares that no reasonable jury could ever make such an inference from a threat and surrounding circumstances. The majority repeats the trial court's error by assuming the jury's role, weighing the evidence, and making its own factual finding. This interference with proper jury functions is legally erroneous and contrary to sound policy and common sense. I dissent.

A *Knapstad* motion should be denied if, construing all inferences in the light most favorable to the State, any reasonably jury could convict the defendant. *State v. Knapstad*, 107 Wn.2d 346, 353, 356, 729 P.2d 48 (1986).

Our courts properly instruct juries in criminal cases to consider circumstantial evidence and reasonable inferences from the evidence. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.01, at 170 (3d ed. 2008) (WPIC). Judges even instruct juries that these inferences may be as probative as direct evidence. *Id*. This is especially true in the context of intimidation, when the coercive nature of a threat may be inferred from context instead of expressly spelled out. If any reasonable jury could have reasonably inferred from these facts that Montano intended to intimidate Officer Smith, Montano's *Knapstad* motion should have been denied and the case allowed to proceed to trial.

A review of the facts of the case, with inferences reasonably drawn in a light favorable to the State, demonstrates that a reasonable jury could have inferred that Montano's threat, complete with its attendant circumstances, was an intent to intimidate the officer into not booking Montano at the jail. Montano first demonstrated a willingness to harm law enforcement officers by forcefully resisting arrest. Montano then orally threatened to physically harm Officer Smith once Smith went off duty. Montano made further statements about Smith's alleged fear of Montano. Surely one possible intention of Montano was to get Smith to end their confrontation by dropping

the arrest.

Jurors bring their common sense to fact-finding and know that it is normal to utter threats to influence conduct. There is no dispute Montano did threaten Officer Smith. One may infer from the threat and its attendant circumstances that Montano was attempting to influence Smith's conduct by making Smith afraid of Montano's future behavior (if his arrest proceeded to booking at jail). This is an attempt to intimidate an officer. Given the brevity and nature of their relationship, it is reasonable that Montano's only or primary intent was to secure his release. Releasing Montano without booking would be an official police action. A jury could thus properly and reasonably convict Montano of intimidating a public servant under RCW 9A.76.180. The majority's new, general rule that threats alone can never justify a charge of intimidation is an erroneous reading of the statute adopted by the legislature.[1] Majority at 6 (adopting a rule requiring evidence of an attempt to influence beyond "the threats themselves or the defendant's generalized anger"). And if the majority views Montano's resisting arrest and clear lack of respect for law enforcement as distinct from his threat, the majority

[1] I agree with the majority that mere insults are insufficient to survive a *Knapstad* motion. Majority at 9. But this case is not about mere insults. It is about threats, coupled with circumstantial evidence that may indicate an attempt to intimidate.

compounds its error by applying its new rule to a case where the additional circumstantial evidence further indicates intent to intimidate.

Of course, other interpretations of the events are possible (and one jury function is to consider those alternatives). The trial court and today's majority chose one interpretation—perhaps Montano was just vocalizing his frustration and anger. *See* Verbatim Transcript of Defendant's Motion to Dismiss (VT) at 7;[2] majority at 8. That multiple, contradictory inferences are possible indicates only that material facts are in dispute. If so, granting a *Knapstad* motion is improper. Our system of justice dictates that juries hear the evidence and decide which inference is correct. Yet the trial court below determined one inference was better, and today's majority approves. It is just as inappropriate for a court to determine facts on a criminal *Knapstad* motion as on a civil motion for summary judgment. *Knapstad* motions are about the existence of evidence, not its weight or credibility. We should let the jury

[2] When making its *Knapstad* ruling, the trial court stated:

> The State here argues that [Montano's purpose of intimidating Officer Smith is] obvious from the setting and the words that were said, but, uh, is it? Or could *an equal argument* be made that it's [*sic*] anger over the officer's decision to, uh, arrest the defendant and I think, clearly, uh, one person can say, well, he's angry, he's, he's upset, he's ticked off and he's venting it on the officer . . . .

VT at 7 (emphasis added).

decide.

Today's case may comport with the Court of Appeals decision in *Burke* and dicta in *Stephenson*. *State v. Burke*, 132 Wn. App. 415, 132 P.3d 1095 (2006); *State v. Stephenson*, 89 Wn. App. 794, 807, 950 P.2d 38 (1998). However, those cases are not precedent in this court. Both cases are contradicted by cases in numerous jurisdictions (including Washington State) that conclude crimes of intimidation may rest on inferences arising from threatening conduct alone. *See United States v. Balzano*, 916 F.2d 1273, 1291-92 (7th Cir., 1990); *State v. King*, 135 Wn. App. 662, 666-67, 670-71, 145 P.3d 1224 (2006); *Reed v. State*, 91 Ark. App. 267, 270-71, 209 S.W.3d 449 (2005); *Commonwealth v. Burt*, 40 Mass. App. Ct. 275, 277, 663 N.E.2d 271 (1996); *People v. Thomas*, 83 Cal. App. 3d 511, 513-14, 148 Cal. Rptr. 52 (1978); *State v. Scherck*, 9 Wn. App. 792, 793-94, 514 P.2d 1393 (1973). Like *Burke*, these cases are postconviction challenges to the sufficiency of the evidence. And although these cases involve statutes criminalizing intimidation of witnesses, not public servants, the core requirement of intent to intimidate is the same. Each of these courts held that juries could properly infer from threatening conduct alone that the threatening party intended to coerce or intimidate. If evidence is sufficient postconviction to allow a

reasonable jury to convict a defendant, it must be sufficient to allow the State to proceed to trial.

By ignoring the possibility that a threat could be evidence of an attempt to intimidate, today's ruling also discounts an entire category of evidence. By its own language and reliance on *Burke*, the majority suggests that only direct evidence is sufficient to support an intimidation charge under RCW 9A.76.180. *See* majority at 1-2; *Burke*, 132 Wn. App. at 421 (suggesting that direct evidence other than a threat is needed to support an intimidation charge). This is contrary to the "pattern" criminal jury instruction in this state that *all* evidence, direct and circumstantial, is to be considered by the jury and that neither category is inherently more probative of guilt than the other. 11 WPIC 5.01. As a result of today's ruling, lower courts may require an express causal link between a threat and the conduct a defendant wants the public official to take (or not take). Perhaps some suspects will be kind (or foolish) enough to put their threats into an express if-then format. However, common sense tells us that attempts to intimidate are more often implied. "Arguably, a veiled threat is scarier than a specific one." *King*, 135 Wn. App. at 671. A veiled threat may be more effective and thus the choice of many who seek to intimidate public servants. Limiting the state to only direct

evidence to prove an intimidation charge is unwise and not required by the statute, and the majority provides no compelling justification for imposing such a policy choice.

Conclusion

Circumstantial evidence and reasonable inferences from such evidence may be considered by a jury in determining whether a suspect attempted to intimidate a public servant. If it is debatable whether reasonable inferences exist that Montano attempted to intimidate Officer Smith, this factual question should go to a jury, not be decided by a court. I dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Debra L. Stephens