**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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| | ) | No. 82855-5 |
| STATE OF WASHINGTON, | ) | |
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| Respondent, | ) | En Banc |
| | ) | |
| v. | ) | |
| | ) | |
| JOSE JUAN MONTANO, | ) | |
| | ) | |
| Petitioner. | ) | Filed September 16, 2010 |
| _____ | ) | |

C. JOHNSON, J. — This case asks us to consider—in the context of a *Knapstad*[1] dismissal—what evidence is necessary for the State to make a prima facie showing that a defendant violated RCW 9A.76.180, the intimidation of a public servant statute. Specifically, we must determine whether a judge or jury may infer, from threats and other actions, that a defendant attempted to influence an official action by a public servant. The trial court ruled that, in the absence of direct

[1] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

evidence of such an attempt, the prosecution failed to make a prima facie case of intimidation. The Court of Appeals reversed, and we reverse the Court of Appeals' decision.

## Factual and Procedural History

While patrolling on February 25, 2007, Officer Darren Smith saw the petitioner, Jose Juan Montano (Montano), shove his brother, Salvador Montano (Salvador). When Officer Smith stopped to investigate, Salvador told the officer that Montano had hit him. The officer asked Montano for identification but Montano had none with him, and when the officer asked Montano for his name, Montano refused to provide it. As Officer Smith attempted to verify Montano's identity, Montano became agitated and began to walk away. Officer Smith grabbed the back of Montano's coat to restrain him, but Montano pulled away. The officer took hold of the coat again and Montano again pulled away. Officer Smith then gripped Montano's wrist and informed him that he was under arrest. Montano broke free, grabbed the officer's wrist, and attempted to pull him over.

During this exchange, another officer, Sergeant Scott D. Jones, arrived at the scene. Because of Montano's continued resistance, Officer Smith asked Sergeant Jones to deploy his Taser. After Sergeant Jones twice warned Montano to stop resisting, and when Montano failed to comply and approached Jones, Jones tased

Montano. Despite the shock, Montano continued to struggle and Jones tased him again. When Montano stopped struggling, Officer Smith handcuffed him and led him to the patrol car. Montano again became angry, pulled away from Smith, and told the officer, "I know when you get off work, and I will be waiting for you." As they walked toward the car, Montano continued to verbally abuse Officer Smith, saying, "I'll kick your ass," "I know you are afraid, I can see it in your eyes," and calling the officer "punk ass." Clerk's Papers at 19.

While Officer Smith drove Montano to the Grant County jail, Montano continued his commentary, noting that "you need to retire. I see your gray hair." Montano repeated that the officer was scared and that he could see it in Smith's eyes.

The State charged Montano with intimidating a public servant, fourth degree assault, and resisting arrest. Montano moved to dismiss the intimidation charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). The trial court granted the motion and dismissed the charge, concluding that the State provided insufficient evidence to satisfy the elements of intimidation. The State then moved to dismiss the remaining charges, without prejudice, in order to avoid speedy trial or double jeopardy issues and to avoid multiple trials.

The State appealed the trial court's dismissal of the intimidation charge to the

Court of Appeals, Division Three, which reversed the trial court and remanded the case for trial. *State v. Montano*, 147 Wn. App. 543, 549, 196 P.3d 732 (2008).

## Issue

Did the State provide sufficient evidence to survive a *Knapstad* motion to dismiss the charge of intimidating a public servant?

## Analysis

Under *Knapstad*, a defendant may make a pretrial motion to dismiss a charge and challenge the State's ability to prove all of the elements of the crime. The trial court has the inherent power to dismiss a charge when the undisputed facts are insufficient to support a finding of guilt. *Knapstad*, 107 Wn.2d at 351. The court must decide "whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt." *Knapstad*, 107 Wn.2d at 356-57. We review de novo a trial court's dismissal of a criminal charge under *Knapstad*. *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194 (2007). In the present case, the trial court concluded that the evidence of Montano's behavior and threats was insufficient to establish a prima facie case of intimidation.[2]

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

[2] To support the intimidation charge, the State offered as evidence only the police report submitted in regards to the circumstances surrounding Montano's arrest. The parties do not dispute that this report was the sole source of facts the trial court considered when deciding Montano's motion to dismiss.

official action as a public servant." RCW 9A.76.180. In order to survive a motion to dismiss, the State must provide some evidence both that the defendant made a threat and that the threat was made with the purpose of influencing a public servant's official action. The parties and the trial court in the present case agreed that Montano's statements to Officer Smith constituted threats.[3] Their disagreement centers on whether sufficient evidence existed that Montano intended his threats to influence an official action by Officer Smith.

We have never considered any aspect of this intimidation statute, and only limited case law exists from the Court of Appeals. However, one decision from the Court of Appeals, Division Two, deals directly with the issue before us: *State v. Burke*, 132 Wn. App. 415, 132 P.3d 1095 (2006). In *Burke*, the defendant was convicted of intimidating a public servant after he yelled profanities and "fighting threats" at a police officer during a house party, as well as "belly bumping" the officer and swinging his fists. 132 Wn. App. at 417-18. The police officer had observed several, apparently underage people drinking beer in front of the house, and he followed them through the house onto the back porch, where he was accosted by the defendant. On appeal, the court reasoned that the evidence did not

[3] Under RCW 9A.76.180, a threat communicates, "directly or indirectly, the intent immediately to use force against any person who is present at the time." A threat may also include any communication defined as a threat in RCW 9A.04.110(27). RCW 9A.76.180.

support a jury's inference that the defendant intended to influence the police officer's official actions. Though the defendant's actions demonstrated his anger at the situation and at the officer, those actions—by themselves—did not evidence an attempt to influence an action by the officer. The court reversed the conviction, holding that "[e]vidence of anger alone is insufficient to establish intent to influence [a public servant's] behavior." *Burke*, 132 Wn. App. at 422.

This rule from *Burke* is consistent with statements in another case addressing the public servant intimidation statute, *State v. Stephenson*, 89 Wn. App. 794, 807, 950 P.2d 38 (1998) (holding that the intimidation statute is not unconstitutionally overbroad). In that case, the court observed that the "attempt to influence" element of the crime cannot be satisfied by threats alone. *Stephenson*, 89 Wn. App. at 807. Thus, the two courts agreed; 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. We agree with this rule.

This rule is simply a part of the general requirement that the State must prove every element of a crime beyond a reasonable doubt. Evidence is insufficient to prove an element if no reasonable jury could have found the element to be met. And in *Burke*, where the defendant's actions showed only that he was angry, the court

held that no reasonable jury could have inferred that the defendant was attempting to influence the police officer; some evidence must independently support the "attempt to influence" element of the crime.

The rules of *Burke* and *Stephenson* are logically sound, and they guide the disposition of the case before us. Montano argues that the Court of Appeals incorrectly distinguished *Burke* from his case. Montano is correct that there is no meaningful distinction between the facts of *Burke* and those before us here.

In its opinion, the Court of Appeals in *Montano* distinguished the present case from *Burke* by pointing out that here, the police officer was taking official action (transporting Montano to jail) at the time Montano made the threats, whereas in *Burke*, the officer had "abandoned his pursuit . . . and was simply trying to leave the scene." *Montano*, 147 Wn. App. at 548. This distinction raises two concerns: first, from the facts portrayed by the *Burke* court, the *Montano* court's conclusion that the officer had abandoned his pursuit appears to be unsupported. But even if the pursuit was abandoned, that fact does not lead inescapably to the conclusion that the officer was engaged in no official action. No court has addressed what constitutes "official action" for the purpose of this statute, and there is no need to consider it here. Second, and more importantly, the statute contains no requirement that the public servant be *presently* engaged in an official action in order for the defendant to

attempt to influence such action. In fact, such an interpretation would eliminate many reasonable applications of this statute. For example, if a person called a police station and threatened to kill any officer who tried to arrest him, the intimidation statute logically applies, even though the official action (arrest) will occur in the future. *See State v. Russell*, noted at 124 Wn. App. 1008 (2004). Under the *Montano* court's reasoning, however, the intimidation statute would apply only if the officer was in the act of arresting the person when the threat was made. Such an interpretation unreasonably limits the application of the public servant intimidation statute, and we reject it. The Court of Appeals' attempt to distinguish Montano's case from *Burke* is unpersuasive.

The *Burke* court's reasoning applies to the facts of Montano's case. Before his arrest, Montano struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in two tasings, Montano grew increasingly enraged and violent. After being subdued physically, he resorted to lashing out verbally, hurling threats and insults at the officers. As in *Burke*, this behavior amply demonstrates Montano's anger at the situation and at the police officers. However, there is simply no evidence to suggest that Montano engaged in this behavior, or made his threats, for the purpose of influencing the police officers' actions. Instead, the

evidence shows a man who was angry at being detained and who expressed that anger toward the police officers. In the absence of some evidence suggesting an attempt to influence, the State has failed to make a prima facie showing that Montano attempted to influence either officer's official action.

The threshold showing required for a prima facie case (and thus to survive a *Knapstad* motion to dismiss) is lower than that required for a conviction. Nonetheless, the State must provide at least some evidence supporting each element of the crime charged to merit consideration by a jury. Here, under the facts alleged by the State, no evidence exists that Montano intended to influence a public servant. The evidence arguably shows that Montano resisted arrest, and charging him with that crime is appropriate. But the State cannot bring an intimidation charge any time a defendant insults or threatens a public servant. Though such behavior is certainly reprehensible, it does not rise to the level of intimidation. The legislature held the same view, as evident by its inclusion in the statute the requirement that the defendant must threaten with the "attempt[] to influence a public servant's . . . official action." RCW 9A.76.180(1). Therefore, some evidence is required to link the defendant's behavior to an official action that the defendant wishes to influence.

Here, Montano's threats and taunts provide no evidence of any attempt to influence the police officers. The State failed to make a prima facie showing that

Montano intimidated a public servant.

## Conclusion

We approve of the logical approach to the intimidation statute adopted by the Court of Appeals in *Burke* and *Stephenson*. Those cases dispose of the issue before us; 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 of intimidating a public servant were met. We therefore reverse the Court of Appeals' decision.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Justice Susan Owens

Justice Mary E. Fairhurst

Justice Gerry L. Alexander

Justice Richard B. Sanders

Justice Tom Chambers