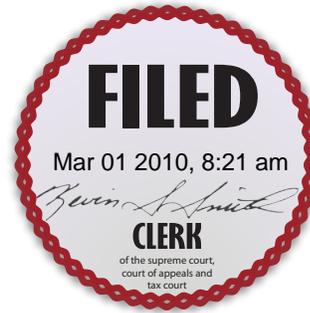


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSE O. APARICIO-GARCIA,)

Appellant-Defendant,)

vs.)

No. 49A04-0907-CR-422

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 16
The Honorable Kimberly J. Brown, Judge
Cause No. 49G16-0904-FD-41399

March 1, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jose O. Aparicio-Garcia (Aparicio-Garcia), appeals his conviction for intimidation, a Class D felony, Ind. Code § 35-45-2-1.

We affirm.

ISSUE

Aparicio-Garcia raises one issue on appeal, which we restate as follows: Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Aparicio-Garcia had committed the crime of intimidation, a Class D felony.

FACTS AND PROCEDURAL HISTORY

Aparicio-Garcia was living with April Gamble (Gamble) in an apartment located in Marion County, Indiana. On April 19, 2009, Aparicio-Garcia left the house around 5:00 p.m. to drink with friends. Five hours later, he returned to the residence inebriated. Gamble was already in bed. After entering the bedroom, Aparicio-Garcia asked Gamble to have intimate relations. She refused and when Aparicio-Garcia insisted, Gamble “smacked” him. (Transcript p. 13). Aparicio-Garcia held Gamble down with his hands on her wrists. She became upset and scared and bit him in the arm. Aparicio-Garcia released Gamble and started to hit her face and eye with his open hand, causing her face to bleed and her eye to turn black. Aparicio-Garcia then left the apartment for three to four minutes. When he returned, Gamble chased him out with a knife.

Gamble called the police and Officer Matthew Andrade of the Indianapolis Metropolitan Police Department (Officer Andrade) responded. When he arrived at the

residence, he noticed that Gamble's face was bloody and that she was shaky and trembling. Aparicio-Garcia, who was agitated and upset, told Officer Andrade in English that he was angry with Gamble because she did not love him anymore and that she had bitten him in the arm. Officer Andrade placed Aparicio-Garcia under arrest for domestic battery which caused Aparicio-Garcia to become even more upset. After Aparicio-Garcia was handcuffed, he twisted to the right, looked Officer Andrade in the eye and said in English, "I'm going to kick your ass. You can't arrest me for this. I have a lawyer." (Tr. p. 30). Aparicio-Garcia cursed in Spanish, calling Officer Andrade an "asshole, faggot, bastard." (Tr. p. 31). Aparicio-Garcia repeated his statement several times as the Officer led him to the police car.

On April 20, 2009, the State filed an Information charging Aparicio-Garcia with Count I, criminal confinement, a Class D felony, I.C. § 35-42-3-3; Count II, intimidation, a Class D felony, I.C. § 35-45-2-1; Count III, domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3; and Count IV, battery, a Class A misdemeanor, I.C. § 35-42-2-1. On June 16, 2009, the State filed a motion to amend the charging information, changing the language of the threat in the intimidation charge. The trial court granted the State's motion. On June 25, 2009, the trial court conducted a bench trial.

During the trial, Officer Andrade testified that he had been threatened hundreds of times while he was on the force, yet he only actually felt threatened about twelve to fifteen of those occasions, and this was one of those occasions. The Officer stated

[t]his is one of those eerie, creepy feelings where it was personal. Where he looked me in the eye, took the time to turn, to twist while he was in handcuffs, twist and look me in the eye, and tell me what he was going to do to me, after having done what he did to the victim.

(Tr. p. 33).

At the close of the State's evidence, Aparicio-Garcia moved for a directed verdict on the evidence, which was granted by the trial court with respect to Counts I, III, and IV. The trial court found Aparicio-Garcia guilty of Count II, intimidation. He was sentenced to 545 days, with 363 days executed and the balance suspended to probation.

Aparicio-Garcia now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Aparicio-Garcia asserts that the State failed to present sufficient evidence to sustain his conviction for intimidation. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

In order to convict Aparicio-Garcia of intimidation as a Class D felony, the State was required to prove beyond a reasonable doubt that he communicated a threat to Officer Andrade with the intent that the Officer be placed in fear of retaliation for a prior lawful act. I.C. § 35-45-2-1. "Threats" include any "expression by words or action, of an intention to . .

. unlawfully injure the person threatened or another person, or damage property.” I.C. § 35-45-2-1(c).

Aparicio-Garcia contends that his statement to Officer Andrade was not a threat of specific violence but rather a general statement made in anger during a volatile emotional time. We are not persuaded. Aparicio-Garcia’s statement “I’m going to kick your ass” leaves little doubt as to the specific violence Aparicio-Garcia had in mind while he contemplated retaliating against Officer Andrade for arresting him.

We were faced with a similar scenario in *Slayton v. State*, 755 N.E.2d 232 (Ind. Ct. App. 2001). After being handcuffed and while being processed at the jail, Slayton repeatedly told the officer that he “was going to get him” him and that he had “better watch [his] back.” *Id.* at 237. We found this statement sufficient for the purpose of an intimidation conviction. *See also Huber v. State*, 805 N.E.2d 887, 891 (Ind. Ct. App. 2004) (where we characterized the statement “things were not going to be real pretty” as a threat under the intimidation statute).

In the instant case, Officer Andrade testified that he actually felt threatened by Aparicio-Garcia’s statement “I’m going to kick your ass.” He understood Aparicio-Garcia’s outburst to be a threat of violence against him. Therefore, we find that the trier of fact could

reasonably conclude that Aparicio-Garcia threatened Officer Andrade with the intent to place the Officer in fear of retaliation for arresting him.¹ We affirm the trial court.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to convict Aparicio-Garcia of intimidation.

Affirmed.

VAIDIK, J., and CRONE, J., concur.

¹ We find Aparicio-Garcia's argument that the trial court applied a subjective standard in reaching the conclusion that Aparicio-Garcia's statement constituted a threat to be unavailing. *See Owens v. State*, 659 N.E.2d 466, 474 (Ind. 1995), *reh'g denied*. The evidence before this court clearly supports Aparicio-Garcia's intimidation conviction under an objective standard.