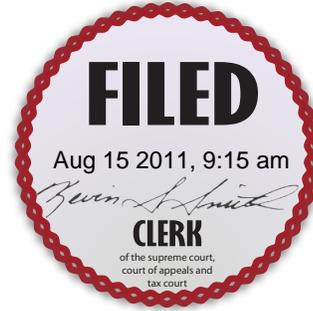


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LEONARD E. LUNA,)
)
 Appellant-Defendant,)
)
 vs.) No. 57A03-1103-CR-114
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-1003-FD-107

August 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Leonard E. Luna (“Luna”) appeals his conviction for Intimidation, as a Class D felony,¹ raising the single issue of whether sufficient evidence supports his conviction. We affirm.

Facts and Procedural History

At 2:39 a.m. on March 24, 2010, Indiana State Police Officer Dave Caswell (“Officer Caswell”) stopped a car driven by Luna’s son, Jeremy Luna (“Jeremy”), for a seatbelt violation. Kendallville Police Officer Doug Davis assisted Officer Caswell in the stop. As Officer Caswell arrived at Jeremy’s driver’s side window, he observed that Jeremy had his seatbelt positioned underneath his left arm, rather than across his body; Jeremy told Officer Caswell that he had been wearing his seatbelt. Officer Caswell gave Jeremy a warning.

Later that day, Luna telephoned the Kendallville Police Department and spoke with dispatcher Michelle Mawhorter (“Mawhorter”). The following exchange took place:

Dispatch: Kendallville Police.

Luna: Yes, last night two young officers stooped [sic] my son for no cause and I would like to know who were two officers names [sic].

Dispatch: Who is your son?

Luna: Pardon me?

Dispatch: Who is your son?

Luna: Jeremy Lee Luna.

¹ Ind. Code § 35-45-2-1(b)(1).

Dispatch: Where was he stopped at?

Luna: He was parked over on Wayne Street and Main.

Dispatch: About what time?

Luna: At about three o'clock in the morning, three, three thirty. Then the state boy pulled him over in the middle of the street saying he didn't have his seatbelt on. How can a state boy see, uh, see, uh see a person driving down the road in the middle of the night with no lights on and and see if they have seatbelts on. Anyhow, I would like to know what the state boy done with the meth bottle he found last night full of meth, did he take it home and cut it up or did he turn it in?²

Dispatch: Okay. That is a question for the State Police. Okay? I don't have anything to do with, I can't even help you with the State Police part.

Luna: Okay. What about Kendallville?

Dispatch: Well, I am looking.

Luna: I already contacted, I already contacted my son's lawyer and he said if it continues to happen that I could file harassment charges against Kendallville and sue you all.

Dispatch: Okay. Well you know I am going to transfer you to the Chief of Police, he is not here right now, but you are welcome to leave him a message and I am sure he will call you back.

Luna: Uh, you just tell him that if it, if it continues to happen, it's going, things is [sic] going to change around here and people will start, uh, ending up like they do in Kentucky on the side of the road with a bullet in their head.

Dispatch: You know sir this is a recorded line, you are aware of that?

Luna: I don't care what it is. You tell that state boy also that that could happen to him too.

²Luna had also called the police department on a different occasion to report a one-pot methamphetamine lab.

Tr. 47-49.

Mawhorter contacted Kendallville Police Officer Mike McCann who investigated and notified the Indiana State Police of the telephone conversation. They then notified Officer Caswell. On March 26, 2010, the State charged Luna with Intimidation, as a Class D felony.³ A bench trial was held on February 1, 2011. At its conclusion, the trial court found Luna guilty as charged and sentenced him to one and one-half years in the Department of Correction, all of which was suspended except for 98 days,⁴ and one year of probation. The trial court also ordered Luna to pay a fine of \$100, court costs of \$164.00, and a public defender fee of \$100.

Luna now appeals.

Discussion and Decision

Standard of Review

When reviewing the sufficiency of the evidence, we will affirm “if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.” Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005) (quoting Davis v. State, 813 N.E.2d 1176, 1178 (Ind. 2004)). We do not reweigh the evidence or assess the credibility of the witnesses. Id. It is the job of the trial court to determine whether the evidence sufficiently proves each element

³ The State amended the charging information on May 20, 2010, to specify the individuals intimidated.

⁴Luna had served 49 days in jail awaiting trial, and earned matching credit time for those days spent incarcerated.

of an offense, and we consider conflicting evidence most favorably to the trial court's ruling.

Id.

Intimidation

Luna challenges the sufficiency of the evidence supporting his conviction by arguing that he did not issue a "threat." Specifically, he maintains that what he communicated was not a threat but instead a warning that police behavior could lead to violence, as it did in Kentucky. We cannot agree.

In order to secure a conviction of intimidation as a Class A misdemeanor, the State must prove beyond a reasonable doubt that the defendant (1) communicated a threat to another person; (2) with the intent that the other person engage in conduct against his will or be placed in fear of retaliation for a prior lawful act. I.C. § 35-45-2-1. The offense is a Class D felony if the threat is to commit a forcible felony or if it is communicated to a law enforcement officer. I.C. § 35-45-2-1(b). A "threat" is defined as an expression, by words or action, of an intention to, among other things, "unlawfully injure the person threatened or another person, or damage property" or to "commit a crime." I.C. § 35-45-2-1(c). "Whether a communication is a threat is an objective question for the trier of fact." Ajabu v. State, 677 N.E.2d 1035, 1041 (Ind. Ct. App. 1997), trans. denied.

To "communicate" a threat requires that a person make a thing known or transmit information to another. J.T. v. State, 718 N.E.2d 1119, 1123 (Ind. Ct. App. 1999). The intimidation statute does not limit the phrase "communicates a threat to another person" to only those threats made directly to or in the presence of the threatened party. Id. Thus,

communication may be indirect, and it is sufficient that the defendant uses means of communication that he knew or had good reason to believe would reach the victim. Id.

Here, the trial judge had sufficient evidence to conclude that Luna intimidated Officer Caswell. The State introduced an electronic recording of the conversation between Luna and the Kendallville Police Department, where he told the dispatcher to tell “that state boy”⁵ that if he stops his son again, “it” could happen to him too, meaning ending up on the side of the road with a bullet in his head. Officer McCann testified that based on his training and experience, this meant to be shot. Shooting a person with a gun constitutes unlawfully injuring a person and it is also a crime. Thus, there was sufficient evidence that Luna’s words were a “threat” and his arguments to the contrary are an invitation to reweigh the evidence, which we will not do. Wright, 828 N.E.2d at 906.

As for the other elements of the offense, we observe that Luna communicated his threat via telephone to a police dispatcher, which is a medium he knew or should have had good reason to know would reach Officer Caswell. Indeed, he explicitly told Mawhorter to relay his message to the chief of police and “that state boy.” Tr. 49. Mawhorter did relay the message to Officer McCann, who called the Indiana State Police, who then informed Officer Caswell. Thus, the State introduced sufficient evidence to demonstrate that Luna communicated his threat.

Furthermore, Officer Lance Waters of the Kendallville Police Department, who has investigated several intimidation cases, testified that he interpreted Luna’s call to mean that

⁵ Luna testified that when he said “state boy” he was referring to a State Trooper. Tr. 79.

Luna was upset about the traffic stop and that his statements were a threat to the officer who stopped his son and a threat to officers who would stop him in the future. This evidence is sufficient to support the conclusion that Luna's threat was intended to place Officer Caswell in fear of retaliation⁶ for a prior lawful act.⁷ The trial judge could also have reasonably concluded that Luna intended to convince Officer Caswell to engage in conduct against his will, *i.e.*, refrain from performing his duties as a State Police officer. See Ajabu, 677 N.E.2d at 1041-43 (affirming a conviction for intimidation where the defendant intended to prevent a prosecutor from carrying out his official duties).

Additionally, Officer Caswell is an employee of the Indiana State Police, a law enforcement agency. Luna threatened to shoot him or other officers with a gun if they stopped Luna's son again, which is a forcible felony.⁸ The State therefore introduced sufficient evidence to support Luna's conviction for Intimidation as a Class D felony.

Affirmed.

MATHIAS, J., and CRONE, J., concur.

⁶ Again, a threat can be an intention to "unlawfully injure the person threatened or another person." I.C. § 35-45-2-1(c). In other words, the person placed in fear need not fear for his own safety. J.T., 718 N.E.2d at 1124 n.6. The statute applies whether the threat is made to unlawfully injure the person threatened or another person. Id. Here, it is reasonable to conclude that Officer Caswell could have feared for his own safety or the safety of other officers who might stop a member of the Luna family.

⁷ A vehicle may be stopped to determine compliance with state seatbelt laws. I.C. § 9-19-10-3.1.

⁸ A "forcible felony" means a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being. I.C. § 35-41-1-11.