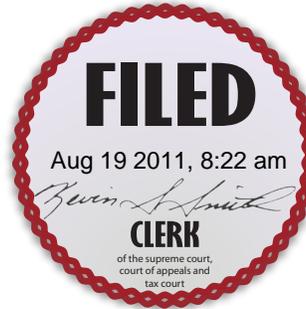


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DONALD HUESING, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-1012-CR-1316  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Steven R. Eichholtz, Judge  
The Honorable Michael S. Jensen, Magistrate  
Cause No. 49G20-1002-FB-10275

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August 19, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Donald Huesing was charged with several felonies that arose after he began threatening Roscoe Paino. The trial court found him guilty as charged. On appeal, Huesing argues that there was insufficient evidence to convict him of class D felony intimidation, where the State specifically alleged that he placed Paino in fear of retaliation for a prior lawful act. We agree and reverse Huesing's intimidation conviction.

## **Facts and Procedural History**

The evidence most favorable to the trial court's judgment indicates that Roscoe Paino had known Donald Huesing since Huesing's birth. In 2007, Paino testified against Huesing in a Hancock County burglary case after he found some jewelry that Huesing stole from a doctor's home. Still, Paino tried to help Huesing get his life straightened out. Paino attempted to get Huesing started in a landscaping business and deeded his home to Huesing to help him get custody of his son. However, after his release from jail in the summer of 2009, Huesing began treating Paino poorly.

On February 9, 2010, Paino reached his limit and contacted Indianapolis Metropolitan Police Detective Kevin Kern. According to the State's witnesses' testimony at trial, on several occasions, Huesing threatened to harm and even kill Paino. Paino told Detective Kern that Huesing threatened to kill him if he ever helped the State send him to prison again. Huesing also threatened to have his gang, the Sur 13s, kill Paino if he cooperated with police in a case against him. On at least one occasion, Huesing pointed a gun at Paino and said, "Pow! You're dead." Tr. at 34. The police arrested Huesing after executing a search warrant

against Paino and Huesing's shared residence. After the arrest, Huesing told the police officer that "the MF'ing snitch that said this is going to get hit. Who told you all this?" *Id.* at 50.

The State charged Huesing with class B felony unlawful possession of a firearm by a serious violent felon, class D felony pointing a firearm, class D felony intimidation, and class D felony neglect of a dependent. Regarding the intimidation charge, the State alleged that:

DONALD HUESING, on or about February 1, 2010, did communicate to Roscoe Paino, another person, a threat to commit a forcible felony, that is: to kill or have fellow gang members kill Roscoe Paino with the intent that Roscoe Paino be placed in fear of retaliation for a prior lawful act, said prior act being: assisting law enforcement.

Appellant's App. at 20. The trial court found him guilty as charged. Specifically, with respect to the intimidation conviction, the trial court stated:

The Court also believes . . . Mr. Huesing . . . did threaten to kill [Mr. Paino] by pointing a gun at him and saying "Pow. You're dead." There will be a finding of guilt as to Count Three.

*Id.* at 88-89. Huesing now appeals, challenging only the sufficiency of the evidence supporting that conviction.

### **Discussion and Decision**

When reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or reassess the credibility of witnesses. *Cooper v. State*, 940 N.E.2d 1210, 1213 (Ind. Ct. App. 2011), *trans. denied*. We focus on the evidence most favorable to the judgment and the reasonable inferences that may be drawn from it. *Id.* The trial court's decision will be

affirmed unless no reasonable factfinder could find that the elements of the crime were proven beyond a reasonable doubt. *Id.*

The intimidation statute reads in pertinent part:

(a) A person who communicates a threat to another person, with the intent:

(1) that the person engage in conduct against the other person's will;

(2) that the other person be placed in fear of retaliation for a prior lawful act; or

(3) of causing:

(A) dwelling, a building, or another structure; or

(B) a vehicle;

to be evacuated;

commits intimidation. A Class A misdemeanor.

(b) However, the offense is a:

(1) Class D felony if:

(A) the threat is to commit a forcible felony;

....

(c) "Threat" means an expression, by words or action, of an intention to:

(1) unlawfully injure the person threatened or another person, or damage property;

(2) unlawfully subject a person to physical confinement or restraint;

(3) commit a crime;

....

Ind. Code § 35-45-2-1.

In *Casey v. State*, we explained that if the defendant is charged with placing the victim in fear of retaliation for a prior lawful act, "the legislature intended to require the State to prove the victim had engaged in a prior act, which was not contrary to the law, and the defendant intended to repay the victim for the prior lawful act." 676 N.E.2d 1069, 1072 (Ind. Ct. App. 1997). While Huesing's pointing of a gun at Paino and uttering "Pow! You're

dead” arguably constituted the communication of a threat to commit a forcible felony against Paino, there is no evidence in the record, nor any reasonable inferences that can be drawn from the evidence, that the threat was made in retaliation for a prior lawful act, as the State alleged in its charging information.

The State argues that Huesing intimidated Paino because he assisted the police in Huesing’s prior burglary conviction. However, the State did not link Huesing’s threat to Paino’s prior lawful act. The record shows that Huesing threatened Paino with a gun in February of 2010, but it does not provide any context from which a reasonable factfinder could find that the threat was made in retaliation for a conviction that occurred almost two years before.<sup>1</sup> “A conviction cannot be based on speculation.” *Gross v. State*, 817 N.E.2d 306, 310 (Ind. Ct. App. 2004).

Huesing’s other threats to kill Paino or have Paino killed if he ever cooperated with police again in a case against him also do not satisfy the elements for intimidation as charged by the State in this case. Under Indiana Code Section 35-45-2-1(a)(2), if the alleged threat is aimed at a future action, then it is not retaliation for a prior lawful act. *Ransley v. State*, 850 N.E.2d 443, 447 (Ind. Ct. App. 2006). Finally, Huesing’s statement that “the MF’ing snitch that said this is going to get hit” could not be considered intimidation because it was never communicated to Paino.

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<sup>1</sup> Huesing’s statements that he would “bash [Paino’s] head in” and that Paino “was walking on thin ice” do not constitute intimidation for the same reason. Tr. at 11-12. The State provided no context from which a reasonable factfinder could connect those threats to Paino’s prior lawful act.

Therefore, because a reasonable factfinder could not find that any of Huesing's threats were in retaliation for a prior lawful act, Huesing's conviction for class D felony intimidation must be reversed.

Reversed.

ROBB, C.J., and NAJAM, J., concur.