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Court of Appeals
Division I
State of Washington

NO. 72140-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEREK WHITTAKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether sufficient evidence supports Whittaker's conviction for felony stalking, where Whittaker repeatedly followed and harassed Spalding, causing her substantial emotional distress.

2. Whether the trial court properly sentenced Whittaker for both felony stalking and felony violation of a court order, where the State proved more than two contacts during the charging period.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Derek Whittaker was charged by amended information with Domestic Violence Felony Violation of a Court Order (count 1) and Felony Stalking (count 2). CP 1-2. The State further alleged that each of the crimes involved domestic violence and that the offenses were committed shortly after being released from incarceration. Id.

The jury found Whittaker guilty of both counts as well as the aggravating circumstances. CP 22-27. The Court imposed a prison-based DOSA. CP 77-86.

2. FACTS OF THE CRIME.

Sayward ("Sadie") Spalding is a hair dresser who lives and works in Duvall, a small town northeast of Seattle. 3RP¹ 69-70. Spalding is married and lives with her husband and young child. 3RP 70.

Spalding first met Derek Whittaker in 2012. 3RP 75. Spalding cut Whittaker's hair when his mother was unable to do so due to health issues. Id. The two became friends. Shortly after Spalding met Whittaker, she began having problems in her marriage. 3RP 80. Spalding and her husband informally separated, sleeping in separate bedrooms and considering what to do next with their marriage. Id. During this time, Spalding's relationship with Whittaker evolved, and the two spent more time with each other. 3RP 81. Although they did not date in a traditional manner, they were physically affectionate and sexually active with each other. 3RP 84, 140.

¹ The verbatim report of proceedings consists of four volumes, which are referred to in this brief as follows: 1RP (February 11, May 13, May 22, May 28, 2014); 2RP (May 28, 2014); 3RP (May 29, 2014); and 4RP (June 2, June 3, June 27, 2014).

After several months, Spalding ended her relationship with Whittaker, telling him that she wanted to work on saving her marriage. 3RP 85. Whittaker's behavior changed, and he did not fully understand or accept Spalding's wishes. 3RP 86. He repeatedly appeared at Spalding's workplace and home. 3RP 87. At times, he would leave when asked, but at other times he would not respect Spalding's wishes. 3RP 42, 62, 89. At first, Whittaker's behavior was a nuisance, but as it escalated, Spalding became increasingly concerned. 3RP 122. An incident on Spalding's birthday was the turning point, after which Spalding became afraid of Whittaker. 3RP 123. On that incident in August of 2013, the defendant showed up unexpectedly at Spalding's door. Id. Thinking it was her sister, Spalding answered the door. Id. Whittaker was belligerent and drunk. Id. He kicked and banged on the door, yelling, screaming and barging into the foyer. 3RP 124. Whittaker did not leave until Spalding called 911. 3RP 124.

After that incident, Whittaker's behavior continued to escalate. He had a distorted view of Spalding's relationship with her husband. 3RP 125. He repeatedly threatened to hurt himself in front of Spalding and he actually burned himself and cut himself in front of her. 3RP 125, 130. He threatened to shoot himself in front of her so that she would have to live with that memory. 3RP 161.

Spalding obtained a protection order. 3RP 90. Whittaker continued to contact Spalding by phone, text and in-person. 3RP 91. Spalding reported some, but not all, of these violations. 3RP 92. As a result of the violations, Whittaker was twice convicted of violating a court order. CP 20-21.

Meanwhile, Spalding continued to work as a stylist, and planned to open her own salon. In November 2013, she reached an agreement to rent space in a building on Main Street in Duvall. 3RP 73. She liked the building because it was secure and close to home. Id. The salon space was in the back of the building; the street-front space was occupied by Match Coffee and Wine, a restaurant run by the landlords, Jolene and Charlie Chase.

3RP 8-10, 73. Spalding named the salon Bella Couture. 3RP 39. Heather Jordan, who had worked with Spalding before, agreed to join Spalding at Bella Couture. Id. Spalding spent time after Thanksgiving preparing the salon. 3RP 98.

Whittaker was out of town between November 3 and December 17 or 18. 3RP 93-94. Almost immediately after his return, Whittaker called Spalding repeatedly. 3RP 94. In one call, Whittaker congratulated Spalding on opening a new shop, saying, "I've seen it. It looks great." 3RP 95. Whittaker also sent Spalding many text messages, some of which she saved. Ex. 11-15. In those text messages, he talked about wanting to see Spalding "one more time," and said that they would "cross paths again as different people." Id. Spalding again warned Whittaker about the no-contact order. 3RP 110.

Spalding was convinced that Whittaker would come to her salon, but she did not want her clients to be disturbed if she needed to call 911. 3RP 110. Prior to the opening of Bella Couture, Spalding and Jordan devised a code word to use in the event that Whittaker appeared. 3RP 51, 110. On January 3, Spalding and

Jordan were working in the salon for the first day. 3RP 108.

Jolene Chase was working at Match Coffee and Wine and saw Whittaker walk past Match, towards Bella Couture. 3RP 19-20.

Whittaker stopped at the salon's door and stared in the window. Id.

Spalding's back was to the door, but Jordan saw Whittaker.

3RP 48. He walked towards the bathroom, banged loudly on the door until it was opened, and then stayed in the bathroom for several minutes. 3RP 30. Whittaker then walked out of the building, stopping to stare in the salon's window. 3RP 33, 50.

Again, Jordan saw Whittaker. 3RP 50. She tried using the pre-arranged code word, but she and Spalding were so flustered that it did not work. 3RP 111. Jordan called 911. 3RP 51. By the time police arrived, Whittaker was no longer in the vicinity. 4RP 19.

He was arrested the next day. 3RP 187.

Spalding had difficulty remembering specific dates, but estimated that there had been 40 to 50 incidents in the 18 months that Spalding knew Whittaker. 3RP 128, 154. Whittaker's behavior had a significant impact on Spalding's life. She became reclusive, and found herself always looking over her shoulder. 3RP 129. She

cut off many relationships because she was afraid for her friends' safety. Id. Spalding purchased surveillance cameras and put in a security system at home. 3RP 131. In short, her "whole life changed." 3RP 129.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS WHITTAKER'S CONVICTION FOR FELONY STALKING.

Whittaker asserts that the State did not prove that he stalked Spalding. This argument should be rejected because there was sufficient evidence from which a rational jury could find that Whittaker repeatedly followed and harassed Spalding.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Id. Circumstantial and direct evidence carry equal weight when reviewed by an appellate court. Id. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718. When alternative means are presented to a jury, each alternative must be supported by substantial evidence. State v. Garcia, 179 Wn.2d 828, 835-36, 318 P.3d 266 (2014).

A person commits the crime of stalking if he or she "intentionally and repeatedly" harasses or follows a person, and the person being harassed or followed is placed in reasonable fear of injury. RCW 9A.46.110(1). The stalker must either intend to frighten, intimidate, or harass the person; or know or reasonably

should know that the person is afraid, intimidated, or harassed. Id. Stalking is a felony if it violates any protective order protecting the person being stalked. RCW 9A.46.110(5)(b)(ii). “Repeatedly harassing” and “repeatedly following” are alternative means of committing stalking. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

For purposes of the crime of stalking, RCW 9A.46.110(6)(e) defines the word “repeatedly” to mean harasses or follows “on two or more separate occasions.” A “separate occasion” means “a distinct, individual, noncontinuous occurrence or incident.” Kintz, 169 Wn.2d at 548. To convict a person of stalking under RCW 9A.46.110, a jury must find two or more “distinct, individual, noncontinuous occurrences or incidents” of following or harassment. Id. at 551. “[I]t is repetition, not duration, that the legislature has made the sine qua non of stalking ... because the repetition of contacts alerts the victim (and the trier of fact) to the stalker’s criminal intent, i.e., that he is purposefully targeting the victim, as opposed to coming into contact with her by chance.” Id. at 559-60.

a. Whittaker Repeatedly Followed Spalding.

Whittaker first argues that the State did not prove that he repeatedly followed Spalding. Whittaker is wrong because the evidence showed that Whittaker followed Spalding when he surveilled the salon and then followed her twice on January 3.²

RCW 9A.46.110(6)(b) defines "following" as:

Deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

Whittaker argues that it was impossible for him to have followed Spalding to her salon prior to January 3 because Spalding testified at one point that she was not at the salon after December 10. However, viewing the evidence in the light most favorable to the State, there was no way for Whittaker to know where the location of Spalding's new salon without following or surveilling her in some way: there were no signs outside the building, the salon had not yet opened, and Spalding did not send out any press

² Whittaker was charged with stalking Spalding between December 17, 2013 and January 3, 2014.

releases announcing the opening. Spalding spent some time in the weeks before the opening readying the salon, and often parked her recognizable car out front. Although she claimed that she was not in the shop in late December, she also repeatedly emphasized that she was bad with dates. The only reasonable inference for the jury to make was that Whittaker established visual contact with Spalding at her salon sometime before January 3. This incident was the first episode of "following" Spalding.

Although Whittaker describes the January 3 events as one episode of following, a jury could properly conclude that it was two. The facts of Kintz's "Westfall incident" are instructive. Kintz initially contacted Westfall in a parking lot of a Bellingham park. Id. at 540. Westfall proceeded with her family down a trail and out to a road. Once on the road, Kintz drove past Westfall six times, causing her to become very scared. Id. at 541. After several of these passes, Kintz drove briefly out of Westfall's sight. Id.

On appeal, Kintz argued that the Westfall incident was "only one ongoing 'following' briefly interrupted by a short break in visual proximity," and thus the State could not show that Kintz stalked

Westfall “repeatedly.” Id. at 552. The Supreme Court rejected this argument, finding that the Westfall incident consisted of four distinct episodes separated by an interruption of Kintz’s contact with Westfall. Id. at 555. Despite the fact that the Westfall incident occurred in one general location on one day, the Court held that “a rational trier of fact could easily have found Kintz guilty of stalking Westfall by following her on two or more separate occasions.” Id. at 555-56.

Here, Whittaker twice maintained visual proximity with Spalding on January 3—once on his way in the building, and once on his way out of the building. Although both episodes occurred in the same location, they were at least five minutes apart. This interruption is consistent with the facts of Kintz, and a rational juror could find that Whittaker twice maintained visual contact with Spalding on January 3.

Whittaker maintained visual proximity with Spalding on at least three occasions: once before the salon opened and twice on January 3. Therefore, sufficient evidence supports the repeated-following prong.

b. Whittaker's Repeated Contacts Constituted Harassment Because They Caused Spalding Actual And Substantial Emotional Stress.

Whittaker next claims that insufficient evidence showed that he harassed Spalding. Specifically, he argues that Whittaker's actions did not cause Spalding actual and substantial emotional distress because she said she was "numb" when she received the texts. Whittaker's argument should be rejected because it ignores the rest of Spalding's testimony about the effects of Whittaker's behavior.

For the purposes of proving stalking, "harass" means:

a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

RCW 9A.46.110(6)(c), 10.14.020.

There are no magic words that a witness must utter for the State to establish actual and substantial emotional distress. In State v. Askham, 120 Wn. App. 872, 883-84, 86 P.3d 1224 (2004), the defendant repeatedly contacted the victim, sending threatening or disturbing emails. The victim did not testify that he was suffering from “actual and substantial emotional stress,” and the trial court did not make such a finding. The victim testified that the contact was embarrassing and irritating. Id. at 884. Nonetheless, the Court held that after taking all inferences in favor of the State—and considering the facts and entire course of conduct—a reasonable fact finder could find that the course of conduct was such as would cause emotional distress and that it did in fact cause emotional distress. Id.

Here, the evidence at trial showed that Whittaker’s behavior had a profound impact on Spalding’s life. She cut off ties with most of her friends. She changed her personal phone number and shut down her social-media accounts. 3RP 129-31. She took measures to guard her own personal security and when she found out that the defendant may return to Duvall, she tried to avoid seeing him. 3RP 131.

Although the defendant's behavior began as a nuisance, it eventually "scared the living daylights out of [Spalding]." 3RP 58. She was particularly concerned that he would carry out a threat to hurt her or kill himself in front of her family. She did not say that this fear ever lessened, and it is reasonable to believe that she was both numb *and* extremely disturbed. The jury had the opportunity to watch Spalding's behavior while describing her reactions and the impact on her life. Just as in Askham, a reasonable fact finder could find that the course of conduct would cause actual and substantial emotional distress. Therefore, sufficient evidence supports the harassment prong of Whittaker's stalking conviction.

2. THE TRIAL COURT PROPERLY SENTENCED WHITTAKER FOR BOTH FELONY STALKING AND FELONY VIOLATION OF A COURT ORDER.

Whittaker claims that his conviction for felony violation of a court order merges with his conviction for felony stalking and that his conviction for felony violation of a court order should be vacated. Whittaker's argument should be rejected because the State proved more than two contacts between Whittaker and

Spalding. Therefore, the additional contacts are not essential elements of the felony stalking conviction.

The double jeopardy clauses of the United States and Washington constitutions are the foundation for the merger doctrine. State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). The doctrine is a rule of statutory construction and applies only where the Legislature has clearly indicated that in order to prove a particular degree of crime, “the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.” Id. The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code. Id.

In Parmelee, this Court addressed whether two of the convictions for violation of a court order merged with the felony stalking conviction “because the statute requires more than one underlying act—repetitive behavior—to constitute stalking.” Id. at 710. This Court held that two of the three convictions for violating the protection orders merged with the stalking conviction because they

were “essential elements of the crime of felony stalking.” Id. at 710-11.

Here, Whittaker was convicted of stalking Spalding between December 17, 2013, and January 3, 2014. He was also convicted for violating the court order by contacting Spalding on January 3, 2014. The crime of stalking was elevated to a felony by proof that Whittaker also violated a court order. While the State had to prove only two violations to convict Whittaker of felony stalking, evidence of stalking included many more than two contacts. Whittaker harassed Spalding by text and phone call multiple times in between December 17 and January 3. He surveilled her, finding her salon before it was open. Finally, on January 3, Whittaker twice contacted Spalding by appearing outside her salon, walking away, and then returning to the door of her salon. Any two of these violations would have been sufficient to prove felony stalking. As this Court held in Parmelee, only two protection order violations are essential elements of the crime of felony stalking and merge into the stalking conviction. Parmelee, at 711. Any additional protection order violations are not essential elements and thus

stand as independent convictions. Id. Consequently, Whittaker's convictions do not merge.³

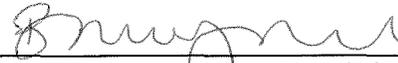
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Whittaker's conviction and his judgment and sentence.

DATED this 14 day of May, 2015.

Respectfully submitted,

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³ If Whittaker prevails on the first claim of error, there is no merger issue.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T Swift, the attorney for the appellant, containing a copy of the Brief of Respondent, in State v. Derek John Whittaker, Cause No. 72140-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of May, 2015.

UBrame

Name:

Done in Seattle, Washington