

No. 40318-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Michael Van Mieghem

Appellant.

BY  STATE OF WASHINGTON
APPELLANT

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FILED
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable, Judge Paula Casey
Cause No. 09-1-01722-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 11

 1. There was sufficient evidence to support a finding of guilt beyond a reasonable doubt for the crime of Felony Stalking..... 11

 2. The trial court’s written and oral instructions, reviewed as a whole, were a proper statement of law that allowed both sides to argue their respective theory of the case; any error was harmless. 17

 3. The State concurs that Mr. Van Mieghem’s case should be remanded for resentencing..... 24

D. CONCLUSION..... 25

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<i>Neder v. United States</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	24
--	----

Washington Supreme Court Decisions

<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996)	17
<i>State v. Douglas</i> , 128 Wn. App. 555, 16 P.3d 1012 (2005).....	17
<i>State v. Foster</i> , 135 Wn.2d 441, 957 P.2d 712 (1998)	14
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	11
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995), <i>cert. denied</i> , 518 U.S. 1026 (1996).....	17
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	11
<i>State v. Walden</i> , 131 Wn.2d 469, 932 P.2d 1237 (1997)	17

Decisions Of The Court Of Appeals

<i>Butler v. State</i> , 34 Wn. App. 835, 663 P.2d 1390 (1983).....	21
<i>State v. Askham</i> , 120 Wn.App. 872, 86 P.3d 1194 (2004).....	14, 16

<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	23, 24
<i>State v. Noah</i> , 103 Wn. App. 29, 692 P.2d 855 (1984).....	13
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	16

Statutes and Rules

RCW 9.94A.525(2)(c).....	24
RCW 9A.46.110	5, 11
RCW 9A.46.110(4).....	12
RCW 9A.46.110(6)(c).....	12
RCW 9A.46.110(6)(e)	13
RCW 10.14.020.....	12
RCW 10.14.020(2)	13

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to support a finding of guilt beyond a reasonable doubt for the crime of Felony Stalking?
2. Were the trial court's written and oral instructions, reviewed as a whole, a proper statement of law that allowed both sides to argue their respective theory of the case?
 - 2(a). If Jury Instruction No. 10 was erroneous, was the error harmless?
3. The State concurs that Mr. Van Mieghem's case should be remanded for resentencing.

B. STATEMENT OF THE CASE.

On February 3, 2010, a jury found Mr. Van Mieghem guilty of felony stalking, which occurred from January 1, 2009 to October 21, 2009, after jury trial. He was subsequently sentenced to a standard range sentence on February 8, 2010. This appeal timely followed.

In 2009, Mr. Van Mieghem was an inmate at the Thurston County Jail where he became obsessed with Ms. Hocter who was employed as a correctional deputy. [RP 69-70]. Sergeant Matthews of the Thurston County Jail testified that he noticed that Inmate Van Mieghem had a different pattern of behavior when it came to interacting with Deputy Hocter. [RP 70-72]. Sergeant Matthews testified how every time Deputy Hocter would perform her hourly welfare check of the inmates, Mr. Van Mieghem would

stare at her and not walk away from his door until she left. [RP 70-72]. On May 4, 2009, Sgt. Matthews testified that he was informed by Captain Thompson of the jail that Mr. Van Mieghem had sent numerous pieces of correspondence to Deputy Hctor. [RP 72]. Based on the above information, on May 4, 2009, Sgt. Matthews met with Inmate Van Mieghem and informed him that his conduct was toward Deputy Hctor was "border-line" stalking and that he needed to stop; Mr. Van Mieghem told Sgt. Matthews that he would stop. [RP 72].

Detective Adams testified to a number of written notes (referred to as "kites") were sent by Inmate Van Mieghem to Deputy Hctor from April of 2009 to July of 2009; there were fifteen (15) such "kites" entered into evidence. [RP 29-41]. These notes all deal with an apparent obsessive infatuation that Mr. Van Mieghem expressed for Deputy Hctor; the dates of the "kites" range from April 17, 2009 through July 2009 when Mr. Van Mieghem was released from the Thurston County jail. [RP 29-43].

Mr. Van Mieghem wrote in some of these "kites" that he did not know if Deputy Hctor was "gay" based on gossip from the "occupant of Cell 23"; in one of his "kites", he wrote "No gay people need fear me". [RP 32]. He writes in April 2009 "I really do love

you very much and you are the one thing I look forward to when I leave here; I feel like a gigolo and would like to spend money on little presents for you to show I love you but I can't." [RP 33]. Later in April, Mr. Van Mieghem writes, "I do not believe what number 23 told me (referring to the deputy being gay); I believe you want to be friends". [RP 33]. In May of 2009, Mr. Van Mieghem writes,

"I don't believe this about Hoctor. I have lost everything. She is the only one who has cared about me. If she is lesbian so be it, but someone should let me know."

[RP 35].

Also, in May, he writes, "I will fight this (apparently, referring to the sheriff's office attempts to dissuade Mr. Van Mieghem from contacting Deputy Hoctor) and not let Hoctor go." [RP 36].

On May 25, 2009, Mr. Van Mieghem writes,

"I refuse to eat any meds. I can't read it. You can infract me and I won't care. Infractions mean nothing to me. Hoctor was my one person I really cared about here. I won't do what she wants. I won't send her love lyrics from songs. If I did care I wouldn't let anyone know."

[RP 39].

In June, Mr. Van Mieghem continued to write to Deputy Hoctor calling her his "Guardian Angel". On July 1, 2009, Mr. Van Mieghem wrote to Sheriff Kimball of the Thurston County Sheriff's

Office that he does not believe in the stalking law and he “will not obey any order” referring to Deputy Hctor. [RP 42].

In July, 2009, Captain Thompson of the Thurston County Jail, Detective Adams, and Deputy Hctor had a safety planning meeting as Mr. Van Mieghem was scheduled to be released from the jail on July 16, 2009. [RP 43]. Detective Adams testified,

“I met with Captain Thompson and with Deputy Hctor who talked about safety around the facility, where she might park her car where it could be under surveillance, lighted, coming to and from work. We discussed her always having a copy of that anti-harassment order on her person. We talked about security around her home, always carry a cell phone and those types of thing.”

[RP 44-45].

Detective Adams also then testified regarding more correspondence that Deputy Hctor received from the appellant via the United States Postal Service after he had been released from the Thurston County jail. [RP 46-47]. In that correspondence, Mr. Van Mieghem continues to state that he loves Ms. Hctor and will never comply with the laws preventing him from having contact with her. [RP 48-50].

During trial, the jury heard evidence from Detective Adams that Mr. Van Mieghem had been convicted previously of felony stalking on two separate prior occasions (not involving Deputy

Hector): 1) 2009 felony stalking conviction out of Thurston County Superior Court, and 2) 1997 felony stalking conviction out of Thurston County Superior Court. [RP 14-16].

There was also testimony from Detective Adams regarding a series of temporary protection orders and finally a permanent protection order prohibiting Mr. Van Mieghem from having any contact with the protected party Ms. Hector. [RP 17-24].

Detective Adams also testified that she prepared a written notice of warning for stalking to notify Mr. Van Mieghem that, “[T]he behavior you have engaged in could be interpreted as stalking as defined by RCW 9A.46.110;” the notice further stated,

“The Washington law listed above makes stalking a crime. The Thurston County Sheriff’s Office takes this crime seriously. You are hereby put on notice that the above named person does not want to be contact or followed. Any future stalking behavior on your part may be used as evidence against you and result in your arrest and prosecution.”

[RP 26]. Mr. Van Mieghem was warned to not have contact with Ms. Hector in that warning. [RP 26]. On June 30, 2009, Deputy Hutnik of the Thurston County Sheriff’s Office testified that he served Mr. Van Mieghem with a temporary order of protection and the notice of stalking. [RP 106-108].

On June 30, 2009, Lieutenant Klein of the Thurston County Jail was present in the jail working when Deputy Hutnik served the protective order on Mr. Van Mieghem. [RP 110-112]. Lt. Klein testified that Inmate Van Mieghem became upset and agitated when he was informed of the protective order and Mr. Van Mieghem said he would not abide by the order. [RP 110-111]. Lt. Klein also related another occasion where Mr. Van Mieghem “said that if he couldn’t have Joanie (Ms. Hctor) he would jump off the Aurora Bridge and that we would see his obituary in the Seattle Times or P.I. [RP 113]. Lt. Klein also stated that Deputy Hctor’s “work assignments were changed so that she wasn’t working in the area in which he (Inmate Van Mieghem) was housed.” [RP 113].

Deputy Gordon, a Thurston County corrections officer, testified that on June 30, 2009, Inmate Van Mieghem said, “Gordon, I don’t care about the no contact order. I’m going to break it just like I did the last one;” Mr. Van Mieghem then said, “[Y]ou can bet your ass on that.” [RP 119]. According to Deputy Gordon, Mr. Van Mieghem continued to comment regarding the protective order and Deputy recalled the conversation and his thought process as follows:

“He said something like going to the directory and find her, you know, just like he did the last one, statements from the last victim he harassed. I don’t know how he found her, but I was curious and wasn’t sure if he was gonna contact Hoctor or not, so I wasn’t experienced with it, so I went to my sergeant and said, hey, he made this statement. I don’t know if he’s dead serious about contacting Hoctor once he gets out of here, but I’m kind of worried about Hoctor ‘cause she’s a single female and he’s making threats like that.”

[RP 120].

Deputy Gordon also recalled that Deputy Hoctor had told him that Inmate Van Mieghem had “yelled out that he was going to “fuck her”; Deputy Gordon related that Deputy Hoctor told him that during a safety meeting on July 8. [RP 122].

Deputy Joanie Hoctor testified that she had been employed by Thurston County since 1995 and testified that Mr. Van Mieghem was an inmate in the jail during portions of 2008 and 2009. [RP 78-79]. She stated that in February 2009, Mr. Van Mieghem started sending written notes (commonly referred to as “kites”) to her stating that he was “in love” with the deputy. [RP 79-80]. She immediately informed her direct supervisor Lt. Klein. [RP 80].

On June 29, Deputy Hoctor contacted Detective Adams because she received a letter from Mr. Van Mieghem at her private residence; she told the detective “I was, you know, very concerned,

getting concerned about it, and that I felt that he had an infatuation and crush or whatever on me. [RP 82-84]. Deputy Hocter also stated,

“I was afraid that he would possibly stalk me, that he might show up at my residence, that I could meet him at the park, that I could see him in the area that I reside in.”

[RP 85].

Deputy Hocter said that she was concerned that,

“he would show up at my residence in Puyallup and threaten my roommate or possibly threaten me or do something to my dogs that I walk on a daily basis at a park that’s very secluded.”

[RP 85].

In July, 2009, Deputy Hocter said the content of the communications “started concerning me”. [RP 81]. At that point, she expressed her concerns to her lieutenant, her sergeant and her captain in corrections; she also spoke to Detective Adams on numerous occasions. [RP 81]. Deputy Hocter began the process to obtain a protective order. [RP 86]. The first temporary order was granted June 30, 2009, and Deputy Hocter indicated after Mr. Van Mieghem received the protective order his behavior “escalated” and he “became more angry that I would do, file such an order on him.”

[RP 87].

After the protective order, Deputy Hocter received two more letters from Mr. Van Mieghem at her private residence. [RP 88]. Deputy Hocter testified that she had never told Mr. Van Mieghem any private or personal information about herself. After receiving the additional letters from him at her private residence, Deputy Hocter testified,

“I was afraid that he would track me down in Puyallup at my residence. I was afraid that he may show up in my yard, he may show up on my front doorstep. Since he stated in his letter that he was familiar with Puyallup, I was afraid he may know exactly, you know, where I lived and what I lived next to and that he would make his presence there.”

[RP 90].

Deputy Hocter related she expressed her fear to Detective Adams. [RP 91]. She also testified to the following:

“Q. Do you recall any statements in particular he had made to you?

A. I overheard a statement that he made towards me, not directly to me.

Q. What was that statement?

A. It was to the effect of when I get out of here, Hocter, I want to fuck your brains out.

Q. How did you feel when you heard that?

A. Concerned, alarmed, afraid.”

[RP 91-92].

The jury returned a verdict of guilty to one count of felony stalking. [RP (2/3/10) 3]. They also returned a special verdict form regarding under which theory they found which supported the felony stalking charge; the trial judge polled the jurors as to which theory they found guilt. [RP (2/3/10) 3-9]. Seven (7) jurors, including juror #2, juror #3, juror #5, juror #9, juror #10, juror #11, and juror #12, found beyond a reasonable doubt that the defendant did intend to frighten, intimidate, or harass Joanie Hctor; ten (10) jurors, including juror #1, juror #3, juror #4, juror #6, juror #7, juror #8, juror #9, juror #10, juror #11, and juror #12, found beyond a reasonable doubt that the defendant knew, should have reasonably known that Joanie Hctor was afraid, intimidated, or harassed, even if the defendant did not intend to place her in fear or to intimidate or harass her. [RP (2/3/10) 3-9].

The jurors returned unanimous verdicts of "yes" to each of the following questions: (3) Did the defendant violate a protective order protecting Joanie Hctor and (4) Was the defendant previously convicted of the crime of stalking?. [Supplemental Designation of Clerk's Papers, Special Verdict Form].

C. ARGUMENT.

1. There was sufficient evidence to support a finding of guilt beyond a reasonable doubt for the crime of Felony Stalking.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The *Salinas* court held that not only must “all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant,” but “a claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* A reviewing court’s role is not to re-weigh the evidence to determine if it believes guilt exists beyond a reasonable doubt—that is the purview of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Sufficient evidence exists to support a guilty finding, beyond a reasonable doubt, of felony stalking. The relevant statute RCW 9A.46.110 reads as follows,

- (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

- (a) He or she intentionally and repeatedly follows another person; and
- (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, or the property of the person or another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
- (c) The stalker either:
 - (i) Intends to frighten, intimidate, or harass the person; or
 - (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker was not given actual notice that the person did not want the stalker to contact or follow the person.

RCW 9A.46.110(4) states, in addition, that,

“Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. “Contact” includes, in addition to any other form of contact or communications, the sending of an electronic communication to the person. [Emphasis added].

RCW 9A.46110(6)(c), the definition of “harasses” refers to “unlawful harassment” defined in RCW 10.14.020,

[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 10.14.020(2) defines “course of conduct”, in relevant part, as a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Finally, RCW 9A.46.110(6)(e) defines “repeatedly” as two or more separate occasions.

The appellant challenges that the State did not prove that that Deputy Hocter suffered “substantial emotional distress”; the appellant argues that “Mr. Van Mieghem’s unwanted attention caused her concern and later scared her but “she did not indicate that she felt seriously alarmed, seriously annoyed, or seriously harassed, or that his conduct caused her serious detriment.” Based upon the record contained the above Statement of Case, viewed in a light most favorable to the State, there was clearly sufficient evidence that Deputy Hocter suffered substantial emotional distress.

In *State v. Noah*, 103 Wn. App. 29, 39, 692 P.2d 855 (1984), the court stated it would affirm findings that the victim experienced substantial emotional distress and that the course of conduct would have caused substantial emotional distress to a reasonable person so long as substantial evidence supports these findings.

Substantial evidence exists when the record contains evidence of sufficient quantity that the declared premise is true. *Id.*, citing *State v. Foster*, 135 Wn.2d 441, 471, 957 P.2d 712 (1998).

In *State v. Askham*, 120 Wn.App. 872, 86 P.3d 1194 (2004), there were a series of e-mails used in an attempt to ruin the victim's personal and professional life by falsely claiming the victim was involved in white supremacist and pornographic activities. *Id.*, at 875. The only evidence of substantial evidence of emotional distress consists of the victim's repeated testimony that he felt threatened by the e-mails:

"I felt threatened from the get-go on this situation, and quite clearly someone intended to – to have my job, have my career professionally and my social life destroyed"

...

"[I]t's embarrassing, no question; and its irritating...I mean, you – you just can't get away from it. And it keeps coming back and coming back; it's not gone away."

Id., a883-884.

In the present case, Deputy Hctor received numerous written notes and was subjected to obsessive behavior from an inmate in the jail in which she worked. She attempted to deal with it by having her superior talk to Mr. Van Mieghem to no avail; he did not stop. She had her work assignment shifted to minimize her

contact with the inmate. Ultimately, she became scared when she received written correspondence from Mr. Van Mieghem at her private residence. At this point, she became afraid because she had never told him where she lived and she lived out of Thurston County. Mr. Van Mieghem found her home and continued to repeatedly contact her. Deputy Hocter started the process of obtaining protective orders which only escalated Mr. Van Mieghem to engage in more contacts with the deputy. He yelled in the jail that he wanted to have sexual intercourse with her. Again, this all happened after it had been made apparent to Mr. Van Mieghem that Deputy Hocter did not want this contact.

The Thurston County Sheriff's Office, on June 30, 2009, served a letter warning the defendant that he might be charged with stalking based on his course of conduct toward Deputy Hocter. Mr. Van Mieghem continued to send written notes to Deputy Hocter and told the jail administration that he would not stop. Jail administration had a safety meeting with Deputy Hocter to be prepared when Mr. Van Mieghem was released from the jail on July 16.

After he was released from the jail, Mr. Van Mieghem sent another written letter to her private residence. As discussed in the

Statement of Case, Deputy Hocter clearly expressed her fear of the appellants' threat to have sexual intercourse with her. She also expressed fear that the appellant would travel to her home and threaten her or injure her partner or their animals.

As the Court said in *Askham*,

“We must give the State the benefit of all reasonable inference from this testimony, as well as from the facts and circumstances of the entire course of conduct. *State v. Theroff*, 25 Wn. App. 590, 593 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). And when we do so we conclude that 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.”

Askham, at 884. In the present case, Deputy Hocter likewise suffered “substantial emotional distress” and it was a reasonable reaction to the obsessive course of conduct of Mr. Van Mieghem.

The appellant also states that the State failed to prove that Deputy Hocter feared that Mr. Van Mieghem intended to injure a person or damage property. Clearly, again based on the above Statement of the Case, Deputy Hocter feared the actions of the appellant based on his threat to engage her in sexual intercourse, based on his finding out where she lived, and based on his utter refusal to abide by the protective orders and warnings of law enforcement. Deputy Hocter was clear that until the appellant

found out where her private residence was she was concerned but not afraid; however, when he found out where she lived, continued to ignore the protective orders and the orders of the Thurston County Jail, Deputy Hctor became reasonably afraid that Mr. Van Mieghem would harm her, her partner or her animals.

2. The trial court's written and oral instructions, reviewed as a whole, were a proper statement of law that allowed both sides to argue their respective theory of the case; any error was harmless.

An appellate court reviews challenged jury instructions de novo, considering the instructions as a whole when examining the effect of any particular phrase. The challenged portion of an instruction is read in the context of all the instructions given. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Jury instructions are sufficient when both sides can argue their theories of the case, they are not misleading, and when read as a whole properly state the law to be applied. *State v. Douglas*, 128 Wn. App. 555, 562, 16 P.3d 1012 (2005) (citing to *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). "Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Jury Instruction No. 10 instructed the jury as follows

(emphasis added):

To convict the defendant of the crime of stalking as charged in Count I, each of the following six elements must be proved beyond a reasonable doubt:

- (1) That on or about on or between January 1, 2009 and October 21, 2009, the defendant intentionally and repeatedly harassed Joanie Hctor;
- (2) That Joanie Hctor reasonably feared that the defendant intended to injure her or another person or the property of Joanie Hctor;
- (3) That the defendant**
 - (a)** Intended to frighten, intimidate, or harass Joanie Hctor; or
 - (b)** Knew or reasonably should have known that Joanie Hctor was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her;
- (4) That the defendant acted without lawful authority;
- (5) That the defendant**
 - (a)** Had been previously convicted of the crime of stalking; or
 - (b)** Violated a protective order protecting Joanie Hctor; and
- (6) That any of the defendant's acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (4), (6) and either of the **alternative elements (3)(a) or (3)(b), and (5)(a) or (5)(b)**, have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. **To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b), or (5)(a) or (5)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.**

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the six elements, then it will be your duty to return a verdict of not guilty.

When the trial judge read the jury instructions to the jury she gave them additional instruction as to Jury Instruction No. 10:

“If you find from the evidence that elements (1), (2), (4) – and I’m going to add (6) – and you’ll have the original where I have made my change also – and either of the alternative elements (3)(a) or (3)(b) or (4)(a) and (5)(b) – and I’m changing the “or” to “and”, so I’m just going to read this sentence again to you as I have changed it.

Beginning again at the beginning of the sentence, If you find from the evidence that elements (1), (2), (4), and (6) and either of the alternative elements (3)(a) or (3)(b), and (5)(a) or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to each of the alternatives, (3)(a) or (3)(b) or (5)(a) or (5)(b), has been proved beyond a reasonable doubt as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt. **In other words, with respect to elements (3) and (5), all – and I’m just adding this by further explanation. All 12 jurors must agree that either subsection (a) or subsection (b) of either of these instructions has been proved beyond a reasonable doubt, but all 12 need not agree in elements (3) and (5) that either (a) has been proved and all 12 need not agree that (b) has been proved, but all 12 must agree that either (a) or (b) has been proved.**

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of the six elements, then it will be your duty to return a verdict of not guilty.

[Reading of Court’s Instructions, 11-2, (emphasis added)].

The appellant raised the issue that the written jury instructions did not make the relevant standard “manifestly apparent to the average juror.” This Court granted the State’s Motion to Supplement the Record with the transcript of the instructions read to the jury at trial by the trial judge. Based on the trial court’s additional oral instructions, the State submits that the court’s instructions did make the relevant standard manifestly apparent to the average juror.

This contention is demonstrated by the Special Verdict Form returned by the jury and the polling of the jurors as to their verdict and the special verdict. The jury returned a verdict of guilty to one count of felony stalking. [RP (2/3/10) 3]. They also returned a special verdict form regarding under which theory they found which supported the felony stalking charge; the trial judge polled the jurors as to which theory they found guilt. [RP (2/3/10) 3-9]. Seven (7) jurors, including juror #2, juror #3, juror #5, juror #9, juror #10, juror #11, and juror #12, found beyond a reasonable doubt that the defendant did intend to frighten, intimidate, or harass Joanie Hctor; ten (10) jurors, including juror #1, juror #3, juror #4, juror #6, juror #7, juror #8, juror #9, juror #10, juror #11, and juror #12, found beyond a reasonable doubt that the defendant knew, should

have reasonably known that Joanie Hocter was afraid, intimidated, or harassed, even if the defendant did not intend to place her in fear or to intimidate or harass her. [RP (2/3/10) 3-9].

The jurors returned unanimous verdicts of “yes” to each of the following questions: (3) Did the defendant violate a protective order protecting Joanie Hocter and (4) Was the defendant previously convicted of the crime of stalking?. [Plaintiff’s Supplemental Designation of Clerk’s Papers, Special Verdict Form].

The verdict forms and the polling of the jury demonstrate that the jury understood the instructions of the court and they returned a verdict that was supported by law and fact. A poll of the jury at the time a verdict is returned is the equivalent of a final vote by the jurors and, if the poll supports the verdict returned, prior defects in voting procedure are of no consequence. *Butler v. State*, 34 Wn. App. 835, 663 P.2d 1390 (1983).

By their individual answers to the polling by the trial court, the jurors demonstrated that they understood that they needed to be unanimous on each element but they did not need to be unanimous as to which alternative under Jury Instruction No. 10,

(3)(a) or (3)(b).¹ [RP (2/3/10) 3-9]. In fact, the jury was divided with seven jurors finding guilt beyond a reasonable doubt on alternative (3)(a) and ten jurors finding guilt beyond a reasonable doubt on alternative (3)(b); however, all twelve jurors found guilt beyond a reasonable doubt under one alternative or the other. In other words, no juror found that the State failed to prove beyond a reasonable doubt either alternative (3)(a) or (3)(b).

Read as a whole, the jury instructions given by the trial court did make the relevant legal standard manifestly apparent to the average juror. Neither defense counsel nor the State had any exceptions to the jury instructions proposed by the trial court. [RP 115]. The trial court also asked if either party had any objection to her giving further oral explanation regarding jury instructions No. 10; defense counsel responded, “[T]hat’s acceptable to defense, Your Honor.” [RP 115]. The State had no objections and thought the court’s proposed oral further explanation would be helpful to the jury. [RP 115].

¹ As to Jury Instruction No. 10 (5)(a) and (5)(b), the jurors were unanimous under both theories of that element; this is reflected in the Special Verdict Form Question and Answer to #3 and #4; both questions were answered “yes”. In Special Verdict Form Question and Answer to #1 and #2, both questions were answered “not unanimous”.

a. Even if Jury Instruction No. 10 was erroneous, it was harmless error.

It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt. . . . An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal However, not every omission or misstatement in a jury instruction relieves the State of its burden. . . . [E]ven in cases where there are multiple crimes charged and multiple defendants as to some charges, the use of an erroneous instruction may be harmless. . . . [The test for] determining whether a constitutional error is harmless: “Whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” In order to hold the error harmless, we must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. . .

State v. Brown, 147 Wn.2d 330, 339-41, 58 P.3d 889 (2002), (cites omitted).

Applying this test to Mr. Van Mieghem’s case, it is impossible to see how the verdict would have been different if the conjunction “or” had been replaced with the conjunction “and”. This is particularly true when the trial court further orally explained Jury Instruction No. 10. The jury also clearly understood the law based on their responses in the Special Verdict Form and their answers in response to the trial court’s polling regarding their verdict. Absent any indication of confusion or lack of understanding on the part of

the jury regarding the law in their verdict, special verdict or the trial court's polling of the jury, any error in the court's instruction is harmless. "We will not reverse a conviction based on instructional error even on direct review if we are convinced beyond a reasonable doubt that the error was harmless." *State v. Brown*, *supra*, at 340 (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Based on the facts and record of this case, Mr. Van Mieghem was not prejudiced by Jury Instruction No. 10 when reviewed as a whole as given by the trial court.

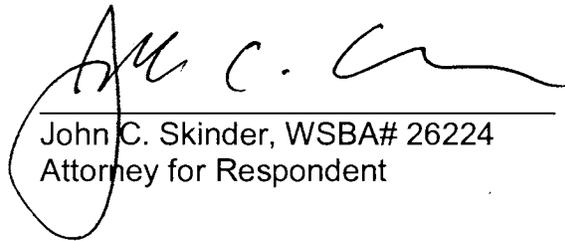
3. The State concurs that Mr. Van Mieghem's case should be remanded for resentencing.

The State concurs that Mr. Van Mieghem should be remanded for resentencing. Mr. Van Mieghem did not object to his offender score of 3 but the State agrees with the Appellant that he cannot waive a challenge to a miscalculated offender score. It would appear, based on the face of the judgment and sentence, that one of Mr. Van Mieghem's convictions for felony stalking might have "washed-out" under RCW 9.94A.525(2)(c). The State would respectfully request that this matter be remanded for resentencing.

D. CONCLUSION.

The State respectfully requests that this Court affirm the appellant's conviction for Felony Stalking but remand the matter back to the trial court for resentencing.

Respectfully submitted this 17th day of September 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

FILED
COURT OF APPEALS
DIVISION II
10 SEP 20 AM 9:20
STATE OF WASHINGTON
BY _____
DEPUTY

--AND--

JODI R. BUCKLAND
BACKLUND & MISTRY
203 EAST FOURTH AVE, SUITE 404
OLYMPIA, WA 98501

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

Dated this 17th day of September, 2010, at Olympia, Washington.


Chong McAfee