

NO. 49249-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MONTOYA,

Appellant.

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

The Honorable Sally F. Olsen, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE COURT'S ADMISSION OF TESTIMONY THAT MR. MONTOYA PREVIOUSLY ENGAGED IN STALKING BEHAVIOR WAS NOT INVITED ERROR

The state argues that Mr. Montoya invited error by attempting to exclude testimony about the details of Mr. Montoya's stalking of Ms. Stormo's cousin. BOR, at 10. A party may not set up an error at trial and then complain of it on review. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). Invited error does not occur, however, when the court makes its own decision that results in an error. Id.

When the court was considering whether to allow testimony about Mr. Montoya's stalking of Ms. Stormo's cousin, defense counsel objected to the admission of that evidence. 1RP 26-27. Defense counsel also objected in a motion in limine to characterizing Mr. Montoya's behavior as stalking. 1RP 31. The court decided to allow testimony about prior stalking behavior, and defense counsel acknowledged the court's ruling, but noted an objection to it. 1RP 32.

The request to bifurcate the issue of Mr. Montoya's prior conviction and the motion in limine to prevent the use of the phrase "stalking behavior" indicate that Mr. Montoya did not invite the court

to allow testimony to that effect. The court's decision to allow that testimony was its alone; therefore, it was not invited error. Allowing testimony about stalking behavior was error because it was extremely prejudicial and did not aid the jury in determining whether Ms. Stormo had a reasonable fear of injury. Where the court already determined that testimony about the facts of Mr. Montoya's prior conviction were unduly prejudicial, it should not have allowed similarly prejudicial testimony that he previously engaged in stalking behavior.

2. "INJURY" AS USED IN THE STALKING STATUTE
REQUIRES MORE THAN SUBJECTIVE FEAR ON
THE PART OF THE VICTIM

In arguing that sufficient evidence supported Mr. Montoya's conviction in this case, the state asserts that – in regard to alleged victim Amy Stormo – “[i]t is sufficient that Montoya harassed her causing her significant distress—fear—under circumstances where that fear and distress were reasonable.” BOR, at 16. This is not a correct reading of the statute.

The plain language of RCW 9A.46.110 requires that

[t]he person being harassed or followed is placed in fear that the stalker *intends to injure the person*, another person, or property of the person of another person. The feeling of fear must be one that a

reasonable person in the same situation would experience under all the circumstances.

RCW 9A.46.110(1)(b) (emphasis added).

Had the legislature meant only to require that the victim claim fear, it would not have included the phrase “that the stalker intends to injure the person” after the word fear in subsection (b) of the statute. Furthermore, the “significant distress,” which could also be characterized as emotional distress, that the State asserts is adequate to prove stalking is covered by another element of the statute. Subsection (1)(a) provides that the first element of stalking is that the defendant “repeatedly harasses or repeatedly follows another person.” RCW 9A.46.110(1)(a). By requiring, in addition to experiencing harassment, that the victim must reasonably fear that the defendant “intends to injure the person, another person, or property,” the legislature made clear that more than a subjective statement of fear was required to prove stalking.

In the opening brief in this case, in making the argument that there must be a fear of injury, the argument was phrased as fear of bodily injury. The State correctly points to State v. Askham, 120 Wn. App. 872, 882, 86 P.3d 1224, review denied, 152 Wn.2d 1032, 103 P.3d 201 (2004), in arguing that this is not uniformly the case

for the crime of stalking generally. Under that case, the court held that the injury feared can include injury to livelihood and reputation. Id. at 882. However, absent any suggestion that Mr. Montoya's presence was hurting her business or that he was attempting to do so, the only other type of injury contemplated by the statute would be bodily injury. Emotional distress could not constitute the injury because the statute requires fear of injury in addition to an experience of harassment. RCW 9A.46.110(1)(b). Under the circumstances of this case, therefore, the injury feared had to be bodily injury.

The state also argues that the case of State v. Ainslie, 103 Wn. App. 1, 11 P.3d 318 (2000), requires only that the victim assert fear and that it was reasonable to be afraid. In that case

[a]n unknown man repeatedly parked within sight of a 14-year-old girl. While she was walking alone, the girl witnessed the man exit and stand near his car. And even after this man was chased by the girl's father, he continued to park in the same place near her home.

In Ainslie, the court did not expressly discuss the "fear of injury" proof requirement. Id. at 6-7. However, the victim was a 14-year-old girl. Id. at 3. The victim's father confronted the defendant and he still returned. Id. at 3-4. The defendant was warned by a police officer about parking in front of the victim's residence and

merely changed location to across the street. Id. at 4. Ainslie is distinguishable from this case because, based on the victim's tender age and the nature of the adult defendant's behavior, in that case it was reasonable for the jury to infer that the victim feared she would be injured. Such an inference cannot be made in Mr. Montoya's case. It is not reasonable to infer that posting publicly to a Facebook page and showing up at a business would cause a reasonable fear of injury.

The question of what constitutes "injury" under the stalking statute is relevant to both the question of whether testimony about "stalking behavior" should have been admitted under 404(b) and whether sufficient evidence to convict existed in this case. Because there must be some fear of actual injury under the statute, be it physical or to reputation, rather than the existence of a generalized feeling of fear or harassment, the testimony about "stalking behavior" should not have been admitted under 404(b). Nothing in the phrase "stalking behavior" is relevant to whether Ms. Stormo reasonably feared injury and it is unduly prejudicial. Also, because the statute requires a fear of injury, the evidence of public Facebook posts and visits to a business was not sufficient for a reasonable juror to find beyond a reasonable doubt that Ms.

Stormo's fear of such an injury was reasonable. Nothing about Mr. Montoya's behavior would make a reasonable person fear injury.

B. CONCLUSION

Mr. Montoya's argument that no testimony about prior incidents of stalking should be admitted and that his behavior should not be described as stalking did not invite the court's error of allowing testimony about prior stalking behavior because defense counsel never advocated for the compromise position the court reached.

The stalking statute requires that the victim fear injury in addition to experiencing distress or harassment. Because fear of injury is required by the statute, only evidence relevant to the jury's determination of whether there was such fear and whether that fear was reasonable should have been admitted. Because testimony about prior stalking behavior is not relevant to whether the victim had such fear and whether that fear was reasonable, it should not have been admitted under ER 404(b). Without this prejudicial evidence, there was insufficient evidence for a jury to find beyond a reasonable doubt that Ms. Stormo reasonably feared injury. Even if the evidence was properly admitted, however, it failed to provide the jury with any additional evidence that would allow it to find

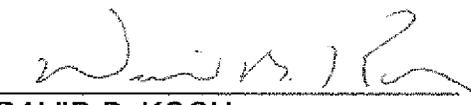
beyond a reasonable doubt that Ms. Stormo reasonably feared injury.

DATED this 30th day of May, 2017.

Respectfully submitted,
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