

FILED

JUN 13, 2016

Court of Appeals
Division III
State of Washington

NO. 33174-1-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH FELIX DELGADO, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

- A. Was the language in the information charging Delgado with stalking under RCW 9A.46.110 constitutionally deficient when it used the phrase "reasonable fear" to encompass both the victim's subjective and objective mental states required under the second element of the stalking statute? (Assignment of Error No. 1).
- B. Did the to-convict instruction for the crime of stalking misstate an essential element when it stated the jury must find "Jacobs reasonably feared" that Delgado intended to injure her when "reasonably feared" encompasses both the victim's subjective and objective mental states? (Assignment of Error No. 2)
- C. Did sufficient evidence support Delgado's conviction for stalking when any rational juror could easily conclude that despite her attempts to salvage their rocky relationship, Jacobs reasonably feared that her abusive, controlling, violent husband intended to harm her? (Assignment of Error No. 3)

II. STATEMENT OF THE CASE.

The State adopts and supplements the procedural and substantive facts recited by appellant Joseph Felix Delgado in his Statement of the Case. RAP 10.3(b).

Lisa May Jacobs¹ characterized her relationship with her husband, appellant Joseph Felix Delgado, as "a very rocky one." RP 251. Over the course of their brief marriage, she moved out somewhere between five and

¹ Lisa Mae Jacobs is also referred to as Lisa Mae Jacobs-Delgado. For consistency with appellant's brief and in consideration of how she was addressed at trial, Mrs. Jacobs-Delgado is referred to here as Jacobs.

ten times. RP 322. In the beginning, the relationship was good, but Delgado became possessive, controlling, and manipulative. RP 251–52. He wanted to know who his wife was calling and texting, and where she was going. RP 252. Once, as the two were side by side in bed he grabbed for her phone to see who she was texting, leaving scars on her arm. RP 426. During that incident, he pulled her pinkie finger back so hard she needed medical attention. RP 426.

Delgado had physically assaulted Jacobs at least 10 times. RP 327. He spit in her face. RP 415–16. He pulled her hair. RP 418. He shoved her hard enough to knock her to the floor. RP 420. He knocked her glasses off her face, then picked them up and intentionally broke them. RP 431. Some of the assaults happened in front of her daughter. RP 326. Her daughter was around six years old. RP 430.

Delgado once ripped a shirt off Jacobs when they were in bed after she objected to him reciting sexual experiences with a former girlfriend. RP 252. Another time, he held her down on the bed and drove his elbow down into her temple. RP 427. It hurt “very bad” and made Jacobs feel as if she were passing out. *Id.* She screamed and screamed. RP 428. In another incident, Delgado was jerking Jacobs around by her hair and the television set got knocked over. RP 429.

On November 20, 2013, Delgado slugged Jacobs with his fist on the left side of her chest, leaving a fist-shaped bruise. RP 257. He hit her hard and it hurt. *Id.* In that incident, he also pulled her hair and knocked her to the ground. RP 258. Her fingers somehow got cut. *Id.* They may have been cut when he yanked her car keys out of her hand. RP 342. Defense counsel asked “You testified that on that date . . . you were afraid of him.” RP 348. Jacobs replied: “Well, sure.” RP 348. Defense counsel asked: “So it was because of his past conduct towards you that you were afraid of him?” RP 349. Jacobs replied: “Yes, sir.” RP 349.

About a month earlier, Jacobs was trying to move out when Delgado followed her to her van, broke the key off inside the van door, scratched the van, and seriously scratched Jacobs’ face. RP 325. He did this in front of her daughter, who was strapped into a car seat. RP 326.

The Delgados tried to work on their relationship after the November assault, with the help of a pastor, a counselor, and friends. RP 260. Within a week, they had moved back in together. RP 301. They were living in a recreational vehicle (RV) Jacobs owned. RP 300–01. Their relationship was still rocky. RP 301. They were arguing and fighting. RP 302. Delgado pushed and shoved Jacobs, and cursed at her and her daughter. *Id.* A restraining order Jacobs had obtained against Delgado was in effect. RP 303.

Jacobs and her daughter moved out again before Christmas. RP 303. She considered the move temporary. *Id.* Delgado had refused to move out of her RV. RP 304. He told her if anybody was going to leave, it would be her. *Id.* On January 5, 2014, Jacobs went to the RV to retrieve her belongings. *Id.* Delgado told her moving out was a big mistake and called her a bitch and a cunt. RP 305. He said the words in front of her friend. *Id.*

A few days earlier, Delgado had hit Jacobs on the back of her head and broken her cell phone. RP 362–63. He threw her clothes and her daughter’s clothes into a pile outside and “dumped milk all over it.” RP 365.

By January 13, 2014, Delgado had left numerous messages on Jacobs’s cell phone. RP 307. He left vulgar messages Jacobs erased. *Id.* Finally, she reported his calls to law enforcement after receiving a particularly offensive message. RP 308. That message “was definitely very upsetting.” RP 396. The tone of his voice, and how he was talking, intimidated Jacobs. RP 399. It put fear in her. RP 400.

The parties again tried to reconcile. RP 311. Delgado had called Jacobs claiming to have attempted suicide over their breakup. *Id.* Jacobs moved back into the RV. RP 312.

By this time, the first charges in this case had been filed against Delgado. RP 315. Delgado ordered Jacobs to write to his attorney and tell him she wanted to rescind the case and the charges. RP 313. Delgado told her “there would be consequences if [she] didn’t.” RP 313. She took that to mean “another beating, another hair pulling, another dramatic verbal, hour-long verbal abuse.” *Id.* She believed he would follow through with his threats and harm her. RP 314. The charges threatened his ability to see his own daughter and he had made it clear that for “anything that stands between him and his daughter, there will be consequences. He didn’t care who it was.” *Id.* He had once told her he would break the knees of his daughter’s maternal grandmother to prevent his daughter from living with that side of the family. RP 407. He had said it would be better for his daughter to be in foster care. *Id.* Jacobs was scared by his threat of “consequences.” RP 317.

Delgado rejected the first two letters Jacobs wrote to his lawyer, wadding them up and throwing them away. RP 314. He told her specifically what to say when recanting her report of the November 20 assault where he had publicly hit her chest and knocked her to the ground. RP 314.

Jacobs changed her phone number as a result of the incidents with Delgado. RP 318.

During closing, the prosecutor discussed the elements of stalking in the to-convict instruction, Instruction 8. RP 535–37. After giving the jury the definition of “harass” and reciting Delgado’s harassing and threatening phone messages, he identified “the next issue” as “whether *it would cause a reasonable person to suffer substantial emotional distress.*” RP 536 (emphasis added). He concluded, “Element two shows that she reasonably feared him.” RP 537.

III. ARGUMENT.

A. The language in the information charging Delgado with stalking under RCW 9A.46.110(1)(b) was not constitutionally deficient when it used the phrase “reasonable fear” to encompass both the victim’s subjective and objective mental states required under the second element of the stalking statute.

Because Delgado here challenges for the first time the constitutionality of the stalking count charging language, this Court must liberally construe the language of the information in favor of validity. *State v. Kjorsvik*, 117 Wash. 2d 93, 102, 812 P.2d 86 (1991). The two-pronged “liberal construction” standard considers (1) whether the necessary facts appear in any form or can be found by fair construction in the charging document; and if so, (2) whether Delgado can show he suffered actual prejudice as a result of inartful or vague language. *Id.* at 105-06. Under the first prong of the liberal construction test, reviewing

courts look to the face of the charging document itself. *Id.* at 106. Under the prejudice prong courts may look beyond the document to determine whether the defendant actually received notice of the charges. *Id.*

An information is constitutionally adequate when it includes all the essential statutory and nonstatutory elements of the crime. *State v. Moavenzadeh*, 135 Wash. 2d 359, 362, 956 P.2d 1097 (1998); *State v. Vangerpen*, 125 Wash. 2d 782, 787, 888 P.2d 1177 (1995). The exact words of the statute are not required as long as the elements appear in some form, and may even be implied if the language supports that result. *Moavenzadeh*, 135 Wash. 2d at 362; *Kjorsvik*, 117 Wash. 2d at 105–06.

The question here is whether the phrase “*and as a result said person was placed in a reasonable fear*” encompasses both the subjective and objective requirements of the second statutory element of the stalking statute, RCW 9A.46.110(1)(b), such that they “appear in any form or can be found by fair construction in the charging document.” It does.

The second element of the stalking statute requires that “[t]he person being harassed or followed is placed in fear that the stalker intends to injure the 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). The word “fear” appears twice, referring first to the feeling felt by the stalker’s victim and second, to the

feeling that would be felt by a reasonable person in the same situation. The word “reasonable,” however, appears only once, referring to the “reasonable person” assessment to be applied to the victim’s fear. The plain language of the statute does not require both a subjectively reasonable fear on the part of the victim (e.g., Delgado’s hypothetical schizophrenic) and the objectively reasonable fear of the reasonable person. By alleging “as a result [of Delgado’s actions] said person was placed in a reasonable fear,” the charging language adequately stated both the subjective and objective statutory requirements.

Washington courts agree. The subjective and objective components of RCW 9A.46.110(1)(b), the fear-of-injury element, are frequently fused and described as some variant of “reasonable fear.” *See, e.g., State v. Askham*, 120 Wn. App. 872, 881, 86 P.3d 1224 (2004) (stalking requires proof the “*victim reasonably fears injury* to him- or herself, another, or their property”); *State v. Becklin*, 133 Wn. App. 610, 616 n.1, 137 P.3d 882, 885 (2006) (stalking victim must *reasonably fear personal injury*) *rev’d on other grounds* by *State v. Becklin*, 163 Wn.2d 519, 527, 182 P.3d 944, 947 (2008) (“a defendant is guilty of ‘stalking’ if he or she knowingly or intentionally engages in a repeated course of conduct ... that seriously alarms, annoys, harasses, or is detrimental to the victim *such that it reasonably causes substantial emotional distress*) (emphasis added); *State*

v. *Johnson*, 185 Wn. App. 655, 667, 342 P.3d 338, 345 (2015) (crime of stalking committed when “person being harassed or followed *is placed in reasonable fear of injury*”) (emphasis added); *State v. Lee*, 82 Wn. App. 298, 306, 917 P.2d 159, 164 (1996) (determination of whether victim’s “*fear was reasonable* was one for the finder of fact in light of all the circumstances”) (emphasis added).

The charging language clearly included both the necessary subjective and objective facts, that Delgado’s actions caused Jacobs to be afraid and that, under the circumstances, her fear was reasonable.

The second prong of this Court’s analysis is whether Delgado can show he suffered actual prejudice as a result of inartful or vague language. He cannot. The charging language was neither inartful nor vague. It did not, as Delgado argues, somehow create a new, non-statutory element of “fear that is reasonable based solely on the victim’s perceptions and experiences.” Br. of Appellant at 8. Nothing in the language of RCW 9A.46.110(1)(b) even hints at such a requirement. Nor is there anything in the record indicating Delgado or his attorney thought they had to challenge such a fear instead of the fear felt by a reasonable person in Jacobs’ circumstances.

The phrase “reasonable fear” accurately notified Delgado the State would have to prove both that his alleged acts caused Jacobs to feel afraid

and that her fear was objectively reasonable. The charging language was constitutionally sufficient. This Court should affirm Delgado's stalking conviction.

B. The to-convict instruction for the crime of stalking did not misstate an essential element when it stated the jury must find "Jacobs reasonably feared" that Delgado intended to injure her because "reasonably feared" encompasses both the victim's subjective and objective mental states.

For the same reasons, this Court should find the "to-convict" jury instruction accurately stated all essential elements of the crime of stalking. The instruction required that the jury find "Lisa Jacobs reasonably feared that the defendant intended to injure her; . . ." CP 89.

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). The appellate court reviews challenged jury instructions de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions 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, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

Here, the prosecutor's careful closing argument eliminated any scintilla of confusion the jury may have had concerning whether Jacobs's

fear had to be that of a reasonable person or merely some sort of distress reasonable only to her. After giving the jury the definition of “harass” and reciting Delgado’s harassing and threatening phone messages, the prosecutor identified “the next issue” as “whether it would cause a reasonable person to suffer substantial emotional distress.” RP 536. He concluded, “Element two [of the to-convict stalking instruction] shows that she reasonably feared him.” RP 537.

The challenged to-convict instruction did not relieve the State of its burden of proving every element of the crime of stalking. The written instruction allowed both sides to argue their theory of the case, did not mislead the jury, and properly informed the jury of the applicable law. It did not relieve the State of its burden to prove Jacobs’s fear was objectively reasonable, which, under the facts of this case, it undeniably was.

Instruction 8 did not deny Delgado his right to due process.

C. *Sufficient evidence supports Delgado’s conviction for stalking because any rational juror could easily conclude that despite her attempts to salvage their rocky relationship, Jacobs reasonably feared her abusive, controlling, violent husband intended to harm her.*

“The due process clause of the Fourteenth Amendment requires the State to prove each essential element of the crime charged beyond a reasonable doubt.” *Apprendi v. New Jersey*, 503 U.S. 466, 476-77, 120 S.

Ct. 2348, 147 L. Ed. 2d 435 (2000). Whether the State has met its burden—production of substantial evidence supporting each element—is a question of law subject to de novo review. *State v. Butler*, 165 Wn. App. 820, 829, 269 P.3d 315 (2012). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)).

In this case, evidence is sufficient to prove the second stalking element because, when viewed in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt Jacobs was placed in fear that Delgado intended to harm her and that her feeling of fear was one a reasonable person in the same situation would experience. Delgado selectively points to testimony that Jacobs was irritated by, but not afraid of, a message playing “Sweet Annie,” a song special to the couple, and by a voice message of someone preaching. Br. of Appellant at 13. Delgado also points to her testimony at RP 397 that she did not take the third call, a “very offensive” phone message, as a threat that he would injure her. Br. of Appellant at 13. He omits her subsequent clarification that: “With that third call, with his voice, I did [feel

intimidated] because the tone of his voice, how he was talking, yes.” RP 399. Upon further questioning by defense counsel, Jacobs confirmed: “With that third phone call with his voice, his tone of voice, how he was talking and how he was saying it, it put fear in me.” RP 400.

Delgado also argues that because Jacobs did not contact law enforcement every time Delgado contacted her, and that she moved back in with him after receiving his messages, her fear was not that of a reasonable person in the same situation. Br. of Appellant at 14. His arguments are unpersuasive.

Jacobs testified to multiple acts of physical abuse and emotional abuse during the couple’s brief marriage. He had spit on her, RP 415–16, pulled her hair, RP 258, 418, punched her, RP 257, scratched her, RP 325, knocked her to the ground, RP 420, threatened her, RP 305, 313, jerked her around by her hair, RP 429, and told her he would rather break the knees of his daughter’s maternal grandmother than allow the child to live with that side of the family. RP 407. He had let her know that if the charges in this case impaired his ability to see his youngest daughter, there would be “consequences.” RP 317.

Delgado’s argument ignores Jacobs’ testimony that she and her husband tried repeatedly to make their relationship work, RP 260, 301,

322–23, even seeking help from friends, a pastor, and a counselor. RP 260.

It is now well understood that “domestic violence tends to recur, and to intensify in frequency and degree of violence over time. Expert testimony would have shown that the consequences of domestic violence often lead to seemingly inconsistent conduct on the part of the victim.” *State v. Grant*, 83 Wn. App. 98, 109, 920 P.2d 609, 614 (1996). “As is reflected in the present case, victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others.” *Id.* at 107–08.

Delgado argues the fact Jacobs moved back in with him demonstrates her “fear was not one that a reasonable person in the same situation would experience under all the circumstances.” Br. of Appellant at 14. On the contrary, the history of Delgado’s violent behavior shows exactly how reasonable it was for Jacobs to fear her husband. It was objectively unreasonable, albeit understandable, for her to continue to try to build a life with an abusive, domineering, possessive, suspicious, manipulative, and assaultive husband.

The evidence supported the jury's conclusion that Jacobs had been placed in reasonable fear by Delgado's intentional and repeated harassment. This Court should affirm his conviction for stalking.

IV. CONCLUSION.

The language charging Delgado of stalking accurately states the statutory element required by RCW 9A.46.110(1)(b), as does the "to-convict" jury instruction. Ample evidence supports the jury's conclusion that Jacobs was reasonably frightened by his repeated harassment. His conviction should be affirmed.

DATED this 13th day of June, 2016.

Respectfully submitted,

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COURT OF APPEALS, DIVISION III
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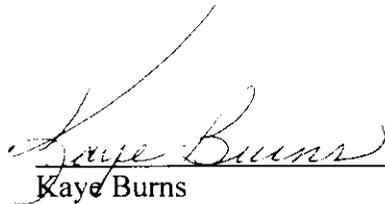
STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33174-1-III
)	
v.)	
)	
JOSEPH FELIX DELGADO,)	DECLARATION OF SERVICE
)	
Appellant.)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch
gaschlaw@msn.com

Dated: June 13, 2016.



Kaye Burns