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IN THE APPELLATE COURT OF THE STATE OF WASHINGTON
DIVISION 1

STATE OF WASHINGTON,

Respondent,

vs.

CLARENCE ANDREW KINTZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY
THE HONORABLE CHARLES R. SYNDER

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME COURT

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STATE OF WASHINGTON
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THOMAS DUNN
Attorney at law
510 East Holly Street
Bellingham, WA 98225
WSBA# 35279
(360) 733-1529

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I. IDENTITY OF THE PETITIONER:

Clarence Andrew Kintz, Petitioner herein, urges this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. CITATION TO THE COURT OF APPEALS DECISION

Petitioner Kintz seeks review of The Court of Appeals, Division One Opinion issued March 10, 2008 affirming the conviction. In particular, Petitioner seeks review of the published part of the Opinion, pages 1 through 9, defining the term "separate occasion."

On April 30, 2008, the Court of Appeals issued an Order Publishing Opinion in Part herein: pages 1 through 9, defining the term "separate occasion." On that same date, the Court of Appeals issued an Order Denying Motion for Reconsideration herein.

III. ISSUE PRESENTED FOR REVIEW

The Issue Petitioner Kintz asked this Court to review regards the legal definition of "separate occasion." It is submitted that the brief contact between Petitioner and the respective victims does not amount to more than one "occasion," and accordingly there was not sufficient evidence to convict Petitioner for either charge. The Court of Appeals determined that said issue is an issue of law which is reviewed de novo and opined as follows:

> Neither the statute nor case law provides a definition of "separate occasions." Undefined terms are given their plain and ordinary meaning unless a contrary legislative intent appears. (Citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P .2d 549 (1992)). Webster's Third New International Dictionary 1560 and 2069-70 (1969) defines "occasion" as "a particular occurrence: happening, incident."

> "Separate" is defined as "set or kept apart," "not shared with another: individual, single," autonomous, independent, distinct and different. Based on these definitions, a "separate occasion" is a distinct, individual, non-continuous occurrence or incident. Thus, if Kintz had several individual incidents with Gudaz and Westfall, his activities meet the plain meaning of "separate occasions."

State v. Kintz, 2008 WL 625303 at 7.

Petitioner submits that the plain and ordinary meaning of "occasion" is at best ambiguous as applied to the facts herein. Petitioner further submits the Court of Appeals read into Webster's definition the term "non-continuous." Petitioner now requests that this Court review the Court of Appeals holding regarding the definition of "separate occasion," and whether there were sufficient evidence herein to support the element of "repeated" following or harassment.

III. STATEMENT OF THE CASE

A. Pretrial Proceedings

On May 16, 2006, a Motion to Dismiss per State v. Knapstad, 107 Wash.2d.346, 729 P.2d 48 (1986), was heard before Trial Court Judge Snyder. The primary issue raised there regarded whether the State alleged sufficient facts to sustain Stalking convictions under either cause number therein, and, in particular, whether there were sufficient allegations to support the element of "repeated" following or harassment of the victims by Petitioner [hereinafter "Defendant"]. "Repeatedly" is defined as more than one "occasion." The trial court denied Defendant's motion after briefing and oral argument.

It was stipulated at this hearing that both Stalking charges were erroneously filed as Felony Stalking and, accordingly, both charges were amended to Misdemeanor Stalking. Verbatim Report of the Proceedings [hereinafter "RP"] May 16, 2006.

On May 30, 2006, a Motion to Join Cause Numbers 06-1-00190-0 and 06-1-00324-4, initiated by the State, was heard before Judge Snyder. Cause Number 06-1-00190-0 was a Stalking case regarding an incident on January 28, 2006 at East Lake Samish Drive with complaining witness, Jennifer Gudaz [hereinafter the "Gudaz Incident"]; Cause Number 06-1-00324-4 was a Stalking case regarding an incident on December 21, 2005 at Lake Padden Park with complaining witness, Theresa Westfall [hereinafter the "Westfall Incident"]. The trial court granted the State's Motion to Join over Appellant's opposition after briefing and oral argument. RP May 30.

B. <u>The Gudaz Incident</u>

Jennifer Gudaz testified to the effect that she was jogging around Lake Samish on January 28, 2006 when a white van traveling north going the opposite direction passed her. RP pages 81-82. The white van turned around and stopped, then the driver asked Jennifer Gudaz for directions to an address. Ms. Gudaz stopped running and told the driver she did not know the address and then continued jogging. RP pages 83-85. The white van passed Ms. Gudaz and parked in a driveway. Ms Gudaz jogged passed the white van then the white van passed Ms. Gudaz and stopped a little bit in front of her and the driver again asked Ms. Gudaz for directions. The driver handed Ms. Gudaz a clipboard to draw a map to "*get him out of there.*" Ms. Gudaz drew him a map and handed the clipboard back to the driver and started jogging again. RP pages 86-89.

The van drove past Ms. Gudaz and stopped again on the side of the road. Ms. Gudaz ran past the white van and turned left onto North Lake Samish. The white van pulled up next to Ms. Gudaz into the oncoming traffic lane facing the wrong way. The driver then said "*do you need a ride.*" Ms. Gudaz answered "*No.*" The driver asked "*You*

don't need money?" Ms Gudaz answered *"No. Maybe your road is up there,"* pointed and started running. PR pages 90-92.

The white van continued traveling in the same direction as Ms. Gudaz was running until it was out of her sight. Ms Gudaz ran down a road that goes down to the lake and hid between a fence and a shed there. RP pages 92. Ten to fifteen minutes later Ms Gudaz encountered bicyclists who accompanied Ms. Gudaz toward a county park. Ms. Gudaz and the bicyclists saw the white van again before they reached the park, but there was no further contact between Ms. Gudaz and the driver of the white van. RP pages 92-94.

C. The Westfall Incident

Ms. Westfall testified that on December 21, 2005, she left Lake Padden Park walking with her three children and two dogs pushing a jogging stroller when she encountered a person parking a van in the trailer parking area. RP pages 213- 214. Ms. Westfall believed the person parking the van said *"parking in it."* RP page 215.

As Ms. Westfall left the park and came out to 40th Street, the van drove slowly by her at a walking pace, and then drove out of visual field. Before too long, the van came up from behind Ms. Westfall. Apparently, the van made a right onto Samish Way and made a triangular loop to come up behind Ms. Westfall. RP pages 217-218. The van passed Ms. Westfall, pulled into the trailer court parking lot to turn around, and came back directly toward Ms. Westfall. RP page 219. The van turned around behind Ms. Westfall and passed her again. The van continued to the stop sign at the intersection of 40th Street and Samish Way. The van was sitting there as Ms. Westfall crossed Samish Way. Soon after crossing Samish Way, after passing Harrison Street, Ms. Westfall called

911. RP pages 221-222. The van drove up by Ms. Westfall again on 40th Street and continued passed her straight up 40th. Ms. Westfall did not see the van again. RP page 223.

On August 9, 2006, Defendant was sentenced under cause number 06-1-00190-0 to serve 365 days in the Whatcom County Jail with 90 days suspended; Defendant was sentenced under cause number 06-1-00324-4 to serve 365 in the Whatcom County Jail with 90 days suspended. The sentences were to be served consecutively. Judgment and Sentencing number 06-1-00190-0 and Judgment and Sentencing number 06-1-00324-4.

IV. ARGUMENT

Defendant submits that the issue of the legal definition of "separate occasion" set forth by the Court of Appeals constitutes an issue of substantial public interest. RAP 13.4(b)(4). Said definition significantly affects the Stalking Statute because a citizen may now be charged and convicted of Stalking under allegations of only a brief encounter with an alleged victim provided the encounter was momentarily interrupted for only a few minutes. For example, a citizen could be charged and convicted of Stalking under the Court of Appeals' definition of "repeated" following or harassment merely by making a flirtation gestures to another at a night club then breaking contact for only minutes and making another flirtation gesture.

Accordingly, the interest of the public cries for review so as to obviate such an unjust result. Public interest is heighten because the Court of Appeals has published the portion of the Opinion regarding the definition of "separate occasion," giving said definition increased precedent.

By reason of the following points and authorities, Defendant respectfully submits that the issue presented herein was wrongly decided by the Court of Appeals and, accordingly, the public interest militates for reviewed by this Court:

The standard of review in a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences from the evidence are to be drawn in the State's favor and interpreted most strongly against the defendant. State v. Partin, 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977).

The Stalking Statute, RCW 9A.46.110 provides in pertinent part:

> (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** harasses or **repeatedly** follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of 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 did not intend to place the person in fear or intimidate or harass the person....
>
> (6) As used in this section:
>
> (a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time....

(b) "Harasses" means unlawful harassment as defined in RCW 10.14.020....

(d) **"Repeatedly" means on two or more separate occasions.** [My emphasis]

The Harassment Statute, RCW 10.14.020 provides in pertinent part:

(1) "Unlawful harassment" 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. [My emphasis]

(2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.... Constitutionally protected activity is not included within the meaning of "course of conduct." [My emphasis.]

Additionally, "following" has been judicially defined as deliberately and **repeatedly** correlating one's movements or appearances with those of another person to establish contact with that person. State v. Lee, 82 Wash.App. 298, 306, 917 P.2d 159 (1996), aff'd, 135 Wash.2d 369, 957 P.2d 741 (1998) [my emphasis].

The term "separate occasion" is not defined by statute and Defendant submits that because the respective events occurred over a very brief period of time, neither Stalking charge herein is supported by a finding that Defendant followed or harassed either Ms. Gudaz or Ms. Westfall, respectively, on two or more "separate occasions." Although the record does not reflect an explicit period of time, it can be reasonably inferred from the record that both incidents occurred within 20 minutes or so.

Defendant further submits that what constitutes a "separate occasion" for purposes of the Stalking statute is an area of first impression. This author has not found any Washington case sustaining a conviction for Stalking where the defendant has followed or harassed a victim in such a short time frame as the time frames of the respective events herein.

The following are some examples of cases where the courts have found sufficient facts to support repeated following or harassment. These cases are distinguishable from the matter at bar because the occasions there occurred over a period of days or longer:

In State v.Ainslie, 103 Wash.App. 1, 11 P.3d 318 (2000), the defendant argued that the State did not provide sufficient evidence that his actions met the definition of "follow" under **RCW 9A.46.110**(1)(a). The Court found there was sufficient evidence to support the conclusion that the defendant followed the victim, in part, because the defendant *regularly* parked in front of the mailboxes near the victim's house during times when the victim was in the neighborhood, the defendant got out of his car just as the victim was walking toward him, and the defendant was seen in the victim's yard.

In State v. Askham, 120 Wash.App. 872, 86 P.3d 1224 (2004) review denied, 120 Wash.App. 872, 86 P.3d 1224 (2004) , the court found there was sufficient evidence based on evidence tracing the e-mails sent to the victim therein from the defendant on *different dates* together with evidence that the defendant admitted he went through Mr. Schlatter's garbage *three times between September and February.*

In State v. Lee, 82 Wash.App. 298, 917 P.2d 159 (1996), aff'd 135 Wash.2d. 369 (1998), was a consolidated case. The court there found that in both matters there was sufficient evidence to sustain the following element based on *numerous unwanted*

contacts between the defendants and the victims during numerous *dates.* In State v. Zatkovich, 113 Wash.App. 70, 52 P.3d 36 (2002), the Appellate Court upheld the trial courts ruling that defendant was subject to an exceptional sentence because there was sufficient evidence in the record to support the State's contention that the defendant had violated the Stalking Statute by **repeatedly** harassing the victim and her family. The trial court's oral ruling stated:

> I am going to impose an exceptional sentence beyond the standard range. I find that the current offenses, stalking as charged in Count II, involves domestic violence as defined under the statute. This offense was part of an **ongoing pattern** of physical abuse of the victim, manifested by **multiple incidents over a prolonged period of time**. It amounts to a fatal attraction syndrome, which is beyond what the legislature indicated for stalking, unranked offense, 0 to 12 months, nonviolent.

Id at 78. [My emphasis.]

Because Washington case law does not appear to provide this Court with any guidance with respect to determining what constitutes a "separate occasion," Defendant urges this Court to look to another jurisdiction for such guidance:

In State v. Rico, 741 So.2d 774 (1999), the Louisiana Court of Appeals found the defendant there did not repeatedly follow or harass the alleged victim. The Louisiana Stalking Statute, LRS 14:40.2 is similar to the Washington Stalking Statute and provides in pertinent part:

> A. Stalking is the willful, malicious, and **repeated** following or harassing of another person with the intent to place that person in fear of death or bodily injury.... [My emphasis.]
>
> C. For the purposes of this Section, the following words shall have the following meanings:
>
> (1) "Harassing" means engaging in a knowing and willful pattern of conduct directed at a specific person which seriously alarms, annoys, or distresses the person, and which serves no legitimate purpose. The

conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the person.

(2) "Pattern of conduct" means a series of acts over a period of time, however short, evidencing an intent to inflict a continuity of emotional distress upon the person.

The facts in State v. Rico are as follows:

On the evening of March 16, 1997, eighteen year old Suzanne Duhon ("Suzanne"); her three-month-old daughter, Abby; and her mother, Charlotte Duhon ("Ms. Duhon"), returned from a trip to Wal-Mart in Marksville, Louisiana to Ms. Duhon's apartment in Simmsport, Louisiana. As they were unloading packages from Suzanne's vehicle, two men in a pickup truck passed. As the truck passed, the driver leaned out and hollered "Hey Baby." The driver was identified by Suzanne and Ms. Duhon as the defendant.

After unloading the packages, Suzanne returned to her vehicle preparing to go to her home a few blocks away. The defendant pulled his truck to the stop sign at the end of Ms. Duhon's road, made a right turn, and then pulled over on the side of the road. As Suzanne passed the defendant by the side of the road, he pulled behind her and began following her.

Ms. Duhon noticed the defendant pull behind Suzanne and she became concerned. Consequently, Ms. Duhon ran to her vehicle to follow Suzanne and the defendant.

Upon noticing the defendant following her, Suzanne turned onto a side road to go to her home. When she reached her home, Suzanne ran inside and yelled to her thirteen-year-old brother, Jeffery Duhon, to get into her car. Suzanne then drove out of her driveway. The defendant turned his vehicle around and proceeded to follow Suzanne. In an attempt to lose the defendant, Suzanne turned behind a fish market. When she pulled around the fish market, the defendant proceeded behind her.

At this point, Ms. Duhon caught up with her daughter and yelled for her to go to Dan and Evelyn's Café in Simmsport to call the police. Suzanne proceeded to the café located on Highway One and the defendant proceeded to Martin Luther King Drive. Ms. Duhon continued to follow the defendant and recorded his license plate number. The defendant then stopped, exited his vehicle and inquired if Ms. Duhon had a "f... problem." Ms. Duhon then left to meet her children at the café. The entire incident lasted five (5) to ten (10) minutes. State v. Rico, 741 So.2d at 775-6 (1999).

In applying the foregoing facts to the Louisiana Stalking Statute, the court held as follows:

LRS 14:40.2 does not define the term "repeated...." Webster's

> Dictionary defines "repeated" as "renewed or recurring again and again."
>
> The defendant's conduct, although improper, was not a renewed or recurring following. The evidence supports the conclusion that the conduct was a continuous following which occurred once. Thus, viewing the word "repeated" in its usual sense and resolving any doubt or ambiguity of the Statute in favor of the defendant, the State failed to prove the defendant's conduct was a "repeated" following.

State v. Rico, 741 So.2d at 777 (1999).

It is submitted that the facts in Rico are much more similar to the facts herein than any of the foregoing Washington cases cited interpreting RCW 9A.46.110, at least with regard to temporality of the purported following or harassment. Accordingly, this Court should also hold that Mr. Kintz's following or harassment of the respective victims was a continuous event that occurred once.

It is further submitted that like the Rico court, this Court should also resolve ambiguity of the statute in favor of Defendant pursuant to the Rule of Lenity: If after examination, the provision of a statute is subject to more than one reasonable interpretation, it is ambiguous. If a statute is ambiguous, the rule of lenity requires interpretation of the statute in favor of the defendant absent legislative intent to the contrary. State v. Jacobs, 154 Wash. 2d 596, 600-1, 115 P.3d 281 (2005) (Citing In re Post Sentencing Review of Charles, 135 Wash.2d 239, 249, 955 P.2d 798 (1998); State v. Roberts, 117 Wash.2d 576, 585, 817 P.2d 855 (1991)).

This author has found no authority or legislative history in support of the proposition that the legislature intended an interpretation of "separate occasion" contrary to the one that Defendant now urges this Court to adopt.

Defendant submits that the term "separate occasion" does have more than one reasonable interpretation: Does "separate occasion" mean an event occurring over the

course of a day or several hours; or does it mean an event occurring within only a few minutes, such that there could be a series of "separate occasions" each lasting only minutes, each interrupted by only minutes? Accordingly, the term "separate occasion" is ambiguous and this Court should resolve said ambiguity in favor of Defendant and hold that the term "separate occasion" means an event occurring at least over a substantial period of time.

It is submitted that Black's Dictionary definition of "occasion" further supports Defendant's position that he did not repeatedly follow or harass the respective victims. Black's Dictionary defines "occasion" as carrying an idea of opportunity, necessity, or even cause in a limited sense. Black's Law Dictionary, Fourth Revised Edition, 1229 (1968) (Citing Commonwealth v. Tsouprakakis, 267 Mass. 496 (1929)). Defendant submits the connotation of said definition suggests that "occasion" means an event or series of events having some identified cohesive meaning or purpose. Both the Westfall Incident and the Gudaz Incident were continuous single events, constituting only one occasion, because each incident, though briefly interrupted by the Defendant breaking off contact with the respective victims and then re-contacting them again moments later, possessed an idea of one single opportunity, having one single identified cohesive meaning, when considered in light of the entire respective incident.

Consistent with Black's definition of "occasion," the definitions of "following" and/or "harassment" can only be met under the facts herein if considered as resulting from the entire respective incident, and not resulting from only one of the contacts with the respective victims. It is submitted that the record does not support sufficient evidence that either Ms. Gudaz or Ms. Westfall **reasonably** suffered substantial emotional distress

as a result of one of the brief contacts with Defendant. If any reasonable emotional distress resulted, it did so as a result of the entire continuous respective incident.

Likewise, the record does not support sufficient evidence that Defendant deliberately maintained visual or physical proximity to either Ms. Gudaz or Ms. Westfall **over a period of time** or deliberately and **repeatedly** correlated his movements or appearances with those of the respective victims to establish contact with them as a result of one of the contacts. If there was any such visual or physical proximity maintained or **repeated** correlation of Defendant's movements or appearances with those of the respective victims, it was as a result of the entire continuous event. Accordingly, the entire respective incidents can only be deemed one single respective "following" and/or one single respective "harassment."

Defendant respectfully submits that the Court of Appeals syllogism regarding the legal definition of "separate occasion," previously cited, is flawed. Webster does not define "separate" as "non-continuous." However, the Court read into said definition the term "non-continuous" in support of its holding that Defendant engaged in more than one "separate occasion" such that the State had provided sufficient evidence to convict Defendant on each of the respective charges herein. [1]

But even if this Court were to accept the Court of Appeals' definition, it is also problematic because it begs central questions implicitly posed by this appeal, to wit, is a

---

[1] While Petitioner contends that his actions in this case do, not as a matter of law, constitute two "separate occasions" and the this Court should apply the analysis applied in Rico, it could be argued that the Stalking Statute is unconstitutionally vague under either the Court of Appeals' definition or under the test applied in Rico because neither construction gives fair notice of what activities are prohibited. State v. White, 97 Wash.2d 92, 99, 640 P.2d 1061 (1982) (Citing Baggett v. Bullitt, 377 U.S. 360, 373, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964)).

"separate occasion" necessarily "non-continuous?" Is an encounter interrupted by only a few minutes necessarily "non-continuous?" The Court of Appeals answered in the affirmative without analysis, explanation or supporting authority. Defendant submits that, although the question is not dispositive, the respective encounters herein each possessed significant continuity.

Further, Webster's defining term "not shared with another" militates for a definition of "separate occasion" contrary to the Court of Appeals' definition because, obviously, the transactions and occurrences Defendant engaged in with the respective victims were "shared."

All of the foregoing redounds toward Defendant's position that the term "separate occasion" is ambiguous and this Court should apply the Rule of Lenity and hold that the State has not proved sufficient evidence such that Defendant harassed or followed the respective victims on two or more separate occasions. Alternatively, by reason of the foregoing analysis, Defendant submits that even if this Court were to apply the Court of Appeals' definition of "separate occasion," which Defendant submits is flawed, Defendant's encounters with the respective victims were continuous and, accordingly, the respective encounters constituted only one occasion.

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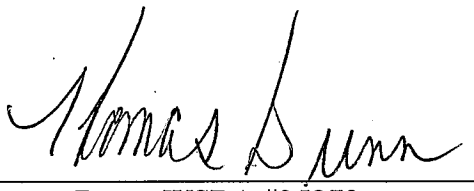
V. CONCLUSION

By reason of the foregoing points and authorities, Defendant respectively submits that the issue of the legal definition of "separate occasion" constitutes an issue of substantial public interest and is an area of first impression. Accordingly, Defendant respectfully urges this Court to accept review, and reserve the decision below.

Dated this 19th day of May 2008.

Respectively Submitted By:



Thomas Dunn; WSBA #35279
Attorney for Appellant

VII. APPENDIX

Court of Appeals Opinion Affirming	Case #: 58717-0-1
Court of Appeals Order Denying Motion for Reconsideration	Case #: 58717-0-1
LRS 14:40.2:	Louisiana State Stalking Statute
RCW 9A.46.110:	Washington Stalking Statute
RCW 10.14.020:	Washington Statute defining Harassment

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CLARENCE ANDREW KINTZ, aka CHUCK KINTZ, Appellant.	)	No. 58717-0-I (linked with No. 60082-6-I) DIVISION ONE UNPUBLISHED OPINION FILED: March 10, 2008

APPELWICK, C.J. — A person commits stalking by intentionally and repeatedly harassing or following another person. RCW 9A.46.110. The stalking statute defines repeatedly as "on two or more separate occasions." RCW 9A.46.110(6)(e). Kintz argues that multiple encounters with an individual over a very short period of time are not encounters on separate occasions. Kintz also appeals joinder of the two charges, the admission of Evidence Rule (ER) 404(b) evidence and the constitutionality of his sentence. We affirm.

Facts

Theresa Westfall was walking in Lake Padden Park with her three children and two dogs on December 21, 2005. As they were leaving the park on foot, she noticed a person parking a white van "that looked out of context . . . because most people at the lake are either walking their dogs or jogging, and this person

was smoking a cigarette and sort of parking a van." The driver said something to Westfall as she walked by, but she didn't understand him. Westfall thought he said something with the word "parking" in it, so she speculated that he thought her car was nearby and that he was repositioning his van so he would not block her car. She did not see the driver, and also made a point of not looking at him. Westfall's car was not nearby, so she just ignored the driver and kept walking with her children and dogs.

The group walked down a trail that then emerges onto a road. When they came out onto the road, the van came up behind them driving very slowly. The van drove next to them at a walking pace and eventually drove past them, out of eyesight. The van soon came from behind again and drove slowly past Westfall and her children, pulled into the trailer court parking lot, and turned around and drove toward them. By Westfall's count, the van drove past them at least five times. Eventually, the white van pulled up behind the group, drove past and then sat at the stop sign where they had to cross the street. There was little traffic, and according to Westfall, "he was obviously waiting for something, and I felt like he was following me, and I didn't want him to follow me home." After crossing the street, she stopped to call 911 and reported that a white van had been following her in the park. The operator told her to stay where she was and that an officer was in the area and would try to apprehend the person.

A police officer stopped a white van approximately five minutes after this report and within a mile of Westfall's location. Kintz was the driver. The officer advised Kintz that two women had called and said his behavior had scared them.

Kintz responded that he was lost and looking for a friend's house. He also stated that he and his wife had argued so he had come to the park to hang out. The police informed Kintz they would document the events and that he needed to leave and stay away from the park because he was scaring people.

On January 28, 2006, Jennifer Gudaz jogged on the narrow road around Lake Sammish. She ran north in the southbound lane so that she could see oncoming traffic. She noticed a white van that drove past her, going south. Soon after, the van came from behind her and stopped next to her in the northbound lane. The driver of the van then asked her for directions to an address. Gudaz told him that she did not know the address and resumed jogging. Shortly after, she saw the same van sitting in the driveway of one of the nearby homes. Gudaz thought that the driver was a repairman who had finally found the correct house. But, he soon came up behind her, passed, and stopped a little ahead of her in the northbound lane. Once again, the driver asked for directions, but this time he did not provide an address or seem to know where he wanted to go. He merely said "[g]et me out of here." The driver tried to hand Gudaz a clipboard out the window and wanted her to draw a map. Gudaz became frustrated because the driver did not know if he wanted to go north or south on the highway. She drew a rough map showing the route to the highway and then continued her jog. The white van drove away, out of sight.

Gudaz then saw the van a fourth time, sitting by the side of the road. The van pulled into the oncoming traffic lane next to her, facing the wrong way. The driver asked Gudaz if she needed a ride or needed money. Gudaz responded

that she did not need a ride or money and ran away. When Gudaz lost sight of the van, she ran down a road toward the lake and hid between a fence and a shed. She estimates that she hid for about 10 to 15 minutes before she saw three bicyclists stopped on the road. She ran up to the bicyclists and asked for help. She was scared and crying. The bicyclists walked with Gudaz toward the county park where one of them had a cell phone in her car. As they walked toward the park, they saw the white van drive slowly over a bridge and then speed up when the driver saw Gudaz and the bikers. The van drove quickly past the small group, so they all concentrated on remembering the license plate number. When they reached the park, Gudaz called the police and reported the encounters and license plate number. The white van was registered to Kintz' wife, Mary Kintz.

Based on these facts, the State charged Kintz with misdemeanor stalking using separate informations, one related to Westfall and one related to Gudaz. The State then moved to join the charges for trial. Despite Kintz' objection, the trial court joined the two counts and tried them together. During the trial, the court allowed two witnesses, Brigid Vonk and Nancy Nelson, to provide evidence of other bad acts as part of the case-in-chief. Another witness, Elizabeth Page, gave similar testimony as rebuttal. Kintz objected to the admission of this evidence of other bad acts under ER 404(b).

Brigid Vonk testified in the case-in-chief about an incident involving a man in a white van who pulled into her driveway and asked her for help finding an address. After she told the driver she did not know the address, he asked her to

come with him to find it. She refused and went into her home. Vonk called the police two hours after the incident because she "had a very creepy feeling about the situation." She later identified Kintz in a photo montage.

Nancy Nelson also testified in the case-in-chief that a man driving a white van held a clipboard out the window and asked her to write down directions to an address while she was walking to work at Western Washington University. Nelson began describing and pointing the way to the address, but the driver insisted she write the directions. He kept pushing the clipboard out the window to her. He looked confused and did not listen to her oral directions. Finally, the driver said he would pull over and write down the directions himself. But, he drove away immediately, without stopping to write down the directions Nelson had provided. Nelson called the police and described the incident and driver, because she felt the incident was suspicious and made her uncomfortable. According to Nelson, "I felt very strongly that he wanted more than directions." An investigating officer thought that the description of the driver, van, and incident was similar to another case that had been reported involving Kintz. The officer showed Nelson a photo montage and she identified Kintz.

Finally, the trial court allowed Elizabeth Page to testify on rebuttal about her experience in Lake Padden Park on December 21, 2005. On the same day that Theresa Westfall walked in the park and encountered the white van, Page also saw a white van while she was standing in the parking lot with her dog. The van briefly parked next to her car and then left. As she was putting her dog in her car, the van pulled up behind her so that Page was between the two vehicles,

next to the passenger door of the van. The driver waved at her to come around to his side of the car. Instead, Page told him to roll down the window. He gestured "almost aggressively" and repeatedly with his clipboard for her to come around to his window. He asked her where the other lake was—which she felt was an odd question since there is only one lake. Page explained that there were two entrances but there was only one lake. Then she gave him directions to the main entrance. Page got into her car and observed the van leave the lot. The van did not follow her directions but parked in another lot. Page drove past the van as she exited the park and noted the license plate. She waited at the exit of the park for five minutes to see if the van would leave the park. When the van never exited, she called the police because she believed his request for directions was implausible and suspicious.

In response to the evidence presented at trial, Kintz produced an expert witness, Elizabeth Nyblade, who testified that Kintz suffered from cognitive disorders including ADHD (attention deficit hyperactivity disorder). The jury convicted Kintz of both counts of stalking. The trial court sentenced him to 365 days in jail with 90 days suspended sentence for each count.

Discussion

I. Repeatedly Harassed or Repeatedly Followed

The stalking statute reads, in pertinent part, that "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 harasses or repeatedly follows another person. . . ."

RCW 9A.46.110(1)(a). The statute defines repeatedly as "on two or more separate occasions." RCW 9A.46.110(6)(e). Kintz contends the encounters charged do not amount to separate occasions because each charge resulted from multiple contacts over a very short period of time.

According to both Kintz and the State, we should review this claim for sufficiency of the evidence. But, the facts of Kintz' contacts with the women are undisputed[1]—he drove past Westfall and Gudaz several times. The dispute concerns whether these contacts occurred on two or more separate occasions with respect to each victim, or whether they were merely on-going contacts on the same occasion. Whether the evidence is sufficient turns on the legal meaning of separate occasion. Therefore, the initial inquiry is an issue of law, which we review de novo. State v. McCormack, 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

Neither the statute nor case law provides a definition of "separate occasions." Undefined terms are given their plain and ordinary meaning unless a contrary legislative intent appears. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992). Webster's Third New International Dictionary 1560 and 2069-70 (1969) defines "occasion" as "a particular occurrence: happening, incident." "Separate" is defined as "set or kept apart," "not shared with another: individual, single," autonomous, independent, distinct and different. Based on these definitions, a "separate occasion" is a distinct, individual, non-continuous occurrence or incident. Thus, if Kintz had several

[1] In this portion of his brief, Kintz does not dispute identity as he does in section II below.

individual incidents with Gudaz and Westfall, his activities meet the plain meaning of "separate occasions."

Given the nature of the stalking in this case—repeated incidents of physical proximity with visual and/or verbal contact—the trial court concluded Kintz' conduct satisfied the "separate occasions" requirement of the statute.

> There's time, space between those incidents, not a lot, obviously but time, space. There's a period of time where Mr. Kintz and the alleged victim are not even in the same, in sight of each other, in the same or close proximity. They're separated both physically by sight and over time, and he comes back and makes contact again.
>
> . . . .
>
> [W]e have separate, discrete, levels of contact, separated by periods of time where the parties are not in contact and where the parties are, in fact, physically and visually separated. That constitutes to me the second time and the third time for a repeat under the purposes of the statute.

We agree with the trial court's reasoning. The legislature could have defined separate occasions as separate days or dates or as separated by a minimum time period, but it did not do so. This suggests that the legislature did not intend a stalking charge to hinge on a pre-defined interval of time between incidents.

Here, Kintz repeated his visual and verbal contact with each victim on separate occasions. For each of the charges, Kintz had several discrete encounters with his victims. Gudaz testified that she saw Kintz at least five times. Each time he either drove by her or stopped to talk to her and then drove out of eyesight. These breaks in contact, with time and distance between Kintz and Gudaz, separated the encounters into individual events. Similarly, Westfall saw Kintz in the parking lot and then lost sight of him when she walked down the trial. When she lost sight of Kintz, this particular incident ended. As soon as she

emerged onto the road, the white van came up behind her, marking another encounter. These are two, individual encounters. Each contact between Kintz and his victims constitutes a separate occasion.

Therefore, we conclude the trial court did not err in interpreting the repeated contact provision of the statute, or in finding that sufficient evidence supported a conclusion that Kintz had contact with the victims on separate occasions as contemplated by the statute.

II. Proof of Identity for the Westfall Charge

Kintz challenges the sufficiency of the evidence of his identity for the charge relating to the encounters with Theresa Westfall. In a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Hendrix, 50 Wn. App. 510, 514, 749 P.2d 210 (1988). Determination of identity is a question of fact for the jury. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). But, "the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." Id. Without corroborating facts or circumstances linking the defendant to the crime, a witness' inability to identify the defendant requires reversal. Hendrix, 50 Wn. App. at 515 (citing United States v. Musquiz, 445 F.2d 963, 965 (5th Cir. 1971); United States v. Johnson, 427 F.2d 957, 961 (5th Cir. 1970)). Kintz contends

that the trial court should have directed a verdict for him on the Westfall incidents, because she failed to identify him as the man in the white van.[2]

Kintz fails to acknowledge that even though Westfall could not positively identify him, circumstantial evidence pointed to him as the driver of the van. On issues of sufficiency, circumstantial evidence is not considered any less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Westfall called 911 from the park immediately following the fifth time she saw the white van drive by her. The police pulled over a white van within five minutes of Westfall's call and less than a mile from where Westfall had last seen the vehicle. Kintz was the driver. Police informed him that he had been scaring women in the park and he responded that he was lost and also that he had gone to the park to hang out. Kintz admitted his presence in the park to the police.

Given Kintz' admission that he had been in the park, his possession of the white van, and the proximity in time and distance to Westfall's location, a finder of fact had ample circumstantial evidence to determine beyond a reasonable doubt that Kintz was the driver of the white van stalking Westfall. The trial court did not err by refusing the directed verdict.

III. Joinder of the Charges

The State charged Kintz with misdemeanor stalking by separate informations for each victim. The State moved to consolidate the charges for

[2] Elizabeth Page had not testified at this point. Her testimony was not considered.

trial.[3] Kintz opposed consolidation arguing that the evidence of the two charges were not cross-admissible under ER 404(b). The trial court granted the motion and consolidated the charges for trial. Offenses properly joined under Criminal Rule (CrR) 4.3 are consolidated for trial unless the court orders severance under CrR 4.4. The question of whether two offenses could have been properly joined under CrR 4.3 is reviewed de novo. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Determination of whether joinder unduly prejudices the defendant, requiring separate trials, is within the discretion of the trial court and will not be overturned without a showing of manifest abuse of that discretion. State v. Weddel, 29 Wn. App. 461, 464-65, 629 P.2d 912 (1981). Once the court determines charges are amenable to joinder, the trial court considers cross-admissibility of the evidence between the various counts, the jury's ability to compartmentalize the evidence, the trial court's ability to separately instruct the jury on each charge, and the strength of the evidence on each count. State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004).

Under Washington's permissive joinder rules, two offenses may be joined if the offenses "are of the same or similar character, even if not part of a single scheme or plan." CrR 4.3(a)(1). In this case, the offenses have significant similarities. Both charges involve stalking women on remote roads in parks by repeatedly driving by them in a white van. These parallels clearly yield two offenses "of the same or similar character." See e.g., State v. Weddel, 29 Wn.

[3] Joinder applies to charging documents under CrR 4.3. Joined offenses are consolidated for trial unless they are severed. CrR 4.3.1(a). Since Kintz was charged under two separate informations and both offenses were tried together, the charges were not joined but were consolidated. Our case law makes no distinction between joinder and consolidation for trial.

App. 461, 465, 629 P.2d 912 (1981) (burglary and attempted burglary are offenses "of the same or similar character" so joinder requirements were satisfied); State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804 (1985) (attempted rape and kidnapping proper for joinder because both involved use of force to overcome resistance and had sexual connotations). Because the two stalking charges were "of the same or similar character" they were amenable to joinder. State v. Pleasant, 21 Wn. App. 177, 182, 583 P.2d 680 (1978).

Once joinder is appropriate, the trial court must inquire whether consolidation of the charges in a single trial would be unduly prejudicial. Id. "Where the general requirements for joinder are met and evidence of one crime would be admissible to prove an element of a second crime, joinder of the two crimes usually cannot be prejudicial." Weddel, 29 Wn. App. at 465. Therefore, if evidence from the Gudaz and Westfall incidents would have been cross-admissible in separate trials, the consolidated trial did not improperly prejudice

The two series of encounters qualify as other crimes evidence governed by ER 404(b) and are, therefore, cross-admissible. Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show (that he acted) in conformity therewith." But, such crimes are admissible as evidence of motive, intent, knowledge, identity, or absence of mistake or accident. ER 404(b). To admit other crimes evidence, the court must define the applicable exception, determine relevance and balance the probative value against the prejudice of the evidence. State v. Smith, 106 Wn.2d

772, 776, 725 P.2d 951 (1986). The court ruled the Westfall and Gudaz incidents as cross-admissible for both intent and modus operandi. Evidentiary rulings are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) cert. denied, 120 S. Ct. 285 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court admitted the evidence both to show intent and modus operandi. We note that case law has narrowed the use of the modus operandi exception to ER 404(b). "The modus operandi 'must be so unusual and distinctive as to be like a signature.'" Foxhoven, 161 Wn.2d at 177 (quoting State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). The details of the incidents do not meet the "high degree of similarity" needed for admission as evidence of modus operandi. Coe, 101 Wn.2d at 777. The court erred in concluding that the evidence was admissible to establish modus operandi.

A stalking offense requires proof of intent to harass or follow. Because the defense argued lack of intent, the other bad acts evidence became admissible to prove intent. RCW 9A.46.110. At trial, counsel attempted to show that Kintz did not intend to stalk Gudaz, he merely needed directions. When Gudaz testified that she drew a very rough map and was not very helpful because she wanted to resume her run, defense asked "if you would have drawn this man a map to show him how to get out of there besides just a circle and a straight line, do you think maybe this situation wouldn't have occurred?" During closing, counsel referred to this testimony.

> Her map—remember she talked about drawing a map. Her map was a circle, and he said, "How do I get to the freeway?" And she draws a line. That's how you get to the freeway, and she keeps on running. I would submit to you that if Miss Gudaz would have been halfway normal toward Chuck like any of us would have been and answered his questions, get him out of the situation that he was in down there, he would have been gone."

He emphasized that Kintz only wanted directions, and that requesting directions does not amount to a crime. "Constitutionally protected activity, think about that. It means we can drive around and be lost and ask for directions, and that's not a crime. We can talk to people. That's not a crime." Through this line of questions and statements, the defense was clearly trying to show that Kintz did not intend to stalk Gudaz—he was merely asking for directions and needed to keep returning because she did not give him adequate assistance.

On appeal, Kintz contends that the charged offenses do not require evidence of other bad acts to prove intent—the jury can infer intent from the acts themselves. According to Kintz, since he did not testify he could not deny an intention to follow or harass Gudaz or Westfall. Kintz also cites Nyblade's testimony that he told her that he had the ability to form the intent regarding something that is defined as a crime. But, this contention both belies the trial strategy employed by the defense and missed the point. The question for purposes of joinder is whether or not the evidence is cross-admissible not whether it will actually be required or admitted.

Common scheme or plan is the exception "generally used when the occurrence of the crime or intent are at issue." State v. Foxhoven, 161 Wn.2d 168, 179, 163 P.3d 786 (2007). To amount to a common scheme or plan, the

other crimes must show "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The degree of similarity for the admission of evidence of a common scheme or plan must be substantial. State v. DeVincentis, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). But, uniqueness is not required. Id. at 21. The trial court "need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it." Id. at 13. A common scheme or plan shows intent when "the very doing of the act charged [was] still to be proved." Lough, 125 Wn.2d at 853. The evidence here is sufficient to allow a trier of fact to conclude that a common scheme or plan existed.

Common scheme evidence of similar incidents helps negate the defense that Kintz only wanted directions and lacked intent to harass or follow. The trial court did not abuse its discretion by concluding that the Gudaz and Westfall incidents were cross-admissible to show intent. See Lakewood v. Pierce County, 106 Wn. App. 63, 70, 23 P.3d 1 (2001).

In addition to cross-admissibility, the court must also consider the jury's ability to compartmentalize the evidence from each defense, the ability of the court to instruct the jury to consider the evidence of each crime, and the strength of the State's evidence on each count. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). Kintz argues he was embarrassed by the admission of the other offenses and that the jury could cumulate the evidence against him.

Kintz provides no evidence to support his bare argument that he would be prejudiced. The incidents were factually distinct enough to allow the jury to compartmentalize them. One victim jogged alone around the lake, while the other walked with her small children and dogs. Kintz repeatedly spoke to Gudaz, but did not have a spoken exchange with Westfall. One could argue that the cumulation of evidence is a risk in any case with joinder of parties or counts. Severence is not necessarily required where the court can clearly instruct the jury.

Kintz does not argue that the court could not properly instruct the jury. The trial court issued separate to-convict instructions for each victim. To highlight that the instructions apply to different incidents, the trial court underlined the date and victim's name in each instruction. In addition, the court explicitly instructed the jury to consider the counts separately. "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." The jury is presumed to follow the instructions including the instruction to consider only the evidence applicable to each charge.

Kintz also contends that he wanted to testify on one charge but not the other, since he never had verbal contact with Westfall. But, "a defendant's mere desire to testify only to one count is an insufficient reason to require severance." Weddel, 29 Wn. App. at 467. Severance is only required "if the defendant makes a convincing showing to the trial court that he has important testimony to give concerning one count and a strong need to refrain from testifying about the

other." Id. at 468. In pre-trial motions, counsel argued that Kintz had a strong reason to testify on one charge but not the other because "he made admissions in one and not in the other" and he had a felony conviction that could impeach him. The trial court considered these arguments and determined the defendant's concerns about testifying should not prevent joinder. "I think it only makes a different [sic] if the [S]tate can use impeachment evidence in one case and not the other, and I'm not sure that that's the situation that we have here . . . I think it's pretty clear that the court's intent with regard to the use of this evidence for impeachment, that it's going to be a real uphill battle to present that, and therefore, the impeachment ruling goes away." The trial court found Kintz' concerns about testifying did not amount to a "strong reason" requiring the severance of the charges for trial. The evidence showed that the defense was unsure of whether Kintz would testify and what he would say that might amount to prejudice.

The State had strong evidence on each of the individual counts. On the count involving the contact with Westfall, the State provided circumstantial evidence of the white van and Kintz' proximity to Westfall within minutes of her call to the police. During this police contact, Kintz admitted to being in the park. Gudaz provided eyewitness testimony about the various encounters she had with Kintz. The other witnesses supported the testimony of Westfall and Gudaz by providing evidence of other, similar acts. The State had sufficiently strong evidence on each of the counts, such that consolidation of the counts was appropriate.

Based on the evidence presented, the trial court did not abuse its discretion when it determined consolidation would not unduly prejudice Kintz.

IV. Admission of Other Evidence

In addition to the joinder issue, Kintz also alleges that the trial court erroneously admitted ER 404(b) testimony from other women who had experienced similar, uncharged encounters with Kintz. During a pretrial hearing, the trial court ruled it would allow some of the evidence for modus operandi and intent. The court considered the Vonk and Nelson incidents "sufficiently close in terms of the details and the nature of the contact for them to be admissible to, to talk about and essentially provide evidence of the modus operandi, essentially the mechanism and the process which he uses." The Page incident was admissible for rebuttal only. Page had contact with Kintz within minutes of the encounters with Westfall. The trial court allowed this as rebuttal only to show intent, "insofar as it [was] the same day, and he was asking directions and then did not leave the park area, that that [sic] would also be something that could come in with regard to rebuttal, with regards to intent."

As discussed above, case law has limited admission of evidence under modus operandi exception to ER 404(b). But, the testimony of Vonk, Nelson, and Page was properly admissible to show intent and common scheme or plan. The incidents with the women were similar—involving Kintz, the white van, requests for directions and clipboard[4]. These similarities rise to the level of common scheme or plan, and are relevant to show intent and the commission of

[4] Two of the three uncharged incidents involved a clipboard.

a crime—that Kintz intended more than merely asking for directions. The trial court did not abuse its discretion by admitting testimony concerning these three incidents.

V. Allegations of Prosecutorial Misconduct

Kintz contends that the cumulative effect of some of the prosecutor's questions to the defense expert witness amounted to prosecutorial misconduct. Kintz objected to several lines of questioning and eventually moved for a mistrial. The trial court denied the motion and continued to verdict. We review rulings on allegations of prosecutorial misconduct for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). When the defendant moves for a mistrial based on prosecutorial misconduct, we give deference to the trial court's ruling since "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial." Id. at 719 (quoting State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). Kintz must establish that the prosecutor's conduct was both improper and prejudicial such that "there is a substantial likelihood the misconduct affected the jury's verdict." Stenson, 132 Wn.2d at 718-19.

At the pretrial hearing the court ruled Kintz' prior luring conviction inadmissible. During a break in cross-examination of defense expert, Nyblade, the State made a motion to introduce evidence of Kintz' past luring conviction through her testimony. The trial court determined that this prior crimes evidence was highly prejudicial and denied the State's motion. Nonetheless, the State asked Nyblade several questions hinting at the existence of a previous

conviction. For example, "[Y]ou happen to know that your client has been told very clearly in the past not to do what did he [sic] to these women; isn't that right?" Defense counsel objected to this question. The objection was sustained and the jury was told to disregard the question. A few minutes later the prosecutor asked about the witness' knowledge of Kintz' past problems while abusing drugs. The court sustained an objection and told the witness not to answer the question.

In addition to these references to the inadmissible past conviction, the prosecutor asked Nyblade about Kintz' use of the term "self-gratification" when describing his behavior to her. Nyblade testified that Kintz told her "I was on drugs when I did this. My reason was self-gratification." The prosecutor then asked, "you took that, what he said to understand that he meant that he was masturbating; isn't that correct?" The expert testified that she did not know what Kintz meant by "self-gratification" and did not request clarification. The prosecutor then asked, "And you didn't clarify, because you knew what he meant when he said self-gratification was masturbation; isn't that right?" The defense did not object to this line of questioning.

After Nyblade's testimony, the defense moved for a mistrial. The trial court stated that Kintz' objections had been sustained and the jury had been told to disregard the question. The court expressed some concerns about the masturbation testimony, but ultimately denied the mistrial because "the last few questions were that he really didn't give her any sexual connotation at the time, and I think that came out pretty clearly that he said nothing about that, so

although I think it's troublesome, I don't think it's enough to declare a mistrial at this point." The trial court did not find adequate evidence of prosecutorial misconduct to necessitate a mistrial.

Indeed, the prosecutor's conduct does not appear improper. The masturbation questions stemmed from Kintz' comment to the expert witness about his actions. The defense introduced the witness to testify about Kintz' mental problems and his ability to form intent. The masturbation questions related to the information she used to formulate her conclusions about Kintz' capacity for intent. If these questions were misconduct, they were not prejudicial. Nyblade's responses showed no evidence that Kintz meant masturbation when he claimed "self-gratification" as his motivation, so the questions ultimately resulted in little harm.

Kintz also alleged misconduct based on the prosecutor's allusions to the inadmissible luring conviction. He contends that misconduct arises upon inquiry into details of a prior conviction, as in State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981). In Coles, the defendant admitted his two prior convictions for assault during direct examination. Id. at 569. During cross-examination, the prosecutor asked for details about the assaults and raised other uncharged incidents. Id. at 569-570. The prosecutor also revisited the prior convictions during his closing arguments as circumstantial evidence of the defendant's guilt. Id. at 571.

Kintz' reliance on Coles is misplaced. In Coles, the prosecutor elicited details about the convictions and prior acts and mentioned the convictions

specifically during closing. Here, the prosecutor did not directly raise or comment on the inadmissible prior conviction. He made allusions to the fact that Kintz had been told not to engage in the intimidating behavior. But, the allusions, as recounted above, were vague. The jury may have been left wondering about Kintz' past, but had no knowledge that he had any past convictions or bad acts other than those properly admitted. This differs significantly from Coles, where the jury heard details of the assaults from the defendant. Here, the prosecutor's questions hinted at prior crimes evidence, but did not cross the line by revealing the inadmissible evidence. Even if the questions about Kintz' past did stray into misconduct, the defense's objections and judge's instruction to the jury cured any harm.

The prosecutor's comments did not constitute misconduct. Moreover, none of the statements were sufficiently prejudicial to affect the jury's verdict. The trial court did not abuse its discretion by denying the mistrial.

VI. Sentence

Kintz received two consecutive sentences of 365 days with 90 days suspended for each count. He claims the cumulative sentence of 550 days is grossly disproportionate given his prior history of one felony conviction and the nature of the crimes.

A sentence violates the Washington State Constitution if it is disproportionate to the crime for which it is imposed. State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113 (2000); See Wash. Const. art. I, § 14. To determine whether a sentence is disproportionate, "we consider (1) the nature of the

offense, (2) the legislative purpose behind the sentencing statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in Washington." Wahleithner v. Thompson, 134 Wn. App. 931, 936, 143 P.2d 321 (2006) (citing State v. Fain, 94 Wn.2d 387, 397, 395 P.2d 720 (1980).

Kintz does not argue that his individual sentences are disproportionate. Indeed, the individual sentence meted out for each stalking charge is proper since a gross misdemeanor is punishable by a maximum of one year in jail. RCW 9A.20.021(2). In addition, trial courts have discretion to impose misdemeanor sentences consecutively. Wahleithner, 134 Wn. App. at 939 (citing Mortell v. State, 118 Wn. App. 846, 851-52, 78 P.3d 197 (2003)); See also State v. Gailus, 136 Wn. App. 191, 201-202, 147 P.3d 1300 (2006). As the individual sentences are proper, Kintz attacks the cumulative length of the sentence. "Defendant is sentenced to 550 days incarceration for two incidents each consisting of contact with a women [sic] over the course of 20 minutes." But, this is not the proper unit of analysis for sentence proportionality. Proportionality review occurs for each individual sentence; it does not consider the cumulative effect. Wahleithner, 134 Wn. App. at 936. "Only on the very rare occasion when a consecutive sentence is shockingly long has a court held cumulative sentences cruel and unusual." Id. at 937.

Kintz has not shown that his individual sentences are improper and has not given an argument as to why this is the rare example that should review a cumulative sentence. We affirm the sentence.

VII. Cumulative Error

Kintz contends that even if the individual errors above do not warrant reversal, the combined effect of the errors requires reversal. "While it is possible that some of these errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial." State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). But, as seen above, the appealed issues do not amount to errors. When no prejudicial error occurs, cumulative error does not apply. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not require reversal.

We affirm.

Appelwick, C.J.

WE CONCUR:

Schindler, A.C.J.

Ajid, J.

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

STATE OF WASHINGTON, Respondent, v. CLARENCE ANDREW KINTZ, aka CHUCK KINTZ, Appellant.	No. 58717-0-I (linked with No. 60082-6-I) ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Clarence Andrew Kintz, having filed his motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 30th day of April, 2008.

FOR THE COURT:

Appelwick, J.
Judge

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STATE OF WASHINGTON
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→ § 40.2. Stalking

A. Stalking is the intentional and repeated following or harassing of another person that would cause a reasonable person to feel alarmed or to suffer emotional distress. Stalking shall include but not be limited to the intentional and repeated uninvited presence of the perpetrator at another person's home, workplace, school, or any place which would cause a reasonable person to be alarmed, or to suffer emotional distress as a result of verbal or behaviorally implied threats of death, bodily injury, sexual assault, kidnaping, or any other statutory criminal act to himself or any member of his family or any person with whom he is acquainted.

B. (1)(a) Notwithstanding any law to the contrary, on first conviction, whoever commits the crime of stalking shall be fined not less than five hundred dollars nor more than one thousand dollars and shall be imprisoned for not less than thirty days nor more than one year. Notwithstanding any other sentencing provisions, any person convicted of stalking shall undergo a psychiatric evaluation. Imposition of the sentence shall not be suspended unless the offender is placed on probation and participates in a court-approved counseling which could include but shall not be limited to anger management, abusive behavior intervention groups, or any other type of counseling deemed appropriate by the courts.

(b) Whoever commits the crime of stalking against a victim under the age of eighteen when the provisions of Paragraph (6) of this Subsection are not applicable shall be imprisoned for not more than one year, with or without hard labor, fined not more than two thousand dollars, or both.

(2)(a) Any person who commits the offense of stalking and who is found by the trier of fact, whether the jury at a jury trial, the judge in a bench trial, or the judge at a sentencing hearing following a jury trial, beyond a reasonable doubt to have placed the victim of the stalking in fear of death or bodily injury by the actual use of or the defendant's having in his possession during the instances which make up the crime of stalking, a dangerous weapon or is found beyond a reasonable doubt to have placed the victim in reasonable fear of death or bodily injury, shall be fined one thousand dollars or imprisoned with or without hard labor for one year, or both. Whether or not the defendant's use of or his possession of the dangerous weapon is a crime or, if a crime, whether or not he is charged for that offense separately or in addition to the crime of stalking shall have no bearing or relevance as to the enhanced sentence under the provisions of this Paragraph.

(b) If the victim is under the age of eighteen, and when the provisions of Paragraph (6) of this Subsection are not applicable, the offender shall be imprisoned for not less than one year nor more than two years, with or without hard labor, fined not less than one thousand nor more than two thousand dollars, or both.

(3) Any person who commits the offense of stalking against a person for whose benefit a protective order, a temporary restraining order, or any lawful order prohibiting contact with the victim issued by a judge or magistrate is in effect in either a civil or criminal proceeding, protecting the victim of the stalking from acts by the offender which otherwise constitute the crime of stalking, shall be punished by imprisonment for not less than ninety days and not more than two years or fined not more than five thousand dollars, or both.

(4) Upon a second conviction occurring within seven years of a prior conviction for stalking, the offender shall be imprisoned with or without hard labor for not less than one hundred eighty days and not more than three years, and may be fined not more than five thousand dollars, or both.

(5) Upon a third or subsequent conviction occurring within seven years of a prior conviction for stalking, the offender shall be imprisoned with or without hard labor for not less than two years and not more than five years, and may be fined not more than five thousand dollars, or both.

(6)(a) Any person thirteen years of age or older who commits the crime of stalking against a child twelve years of age or younger and who is found by the trier of fact, whether the jury at a jury trial, the judge in a bench trial, or the judge at a sentencing hearing following a jury trial, beyond a reasonable doubt to have placed the child in reasonable fear of death or bodily injury, or in reasonable fear of the death or bodily injury of a family member of the child shall be punished by imprisonment for not less than one year and not more than three years and fined not less than fifteen hundred dollars and not more than five thousand dollars, or both.

(b) Lack of knowledge of the child's age shall not be a defense.

C. For the purposes of this Section, the following words shall have the following meanings:

(1) "Harassing" means the repeated pattern of verbal communications or nonverbal behavior without invitation which includes but is not limited to making telephone calls, transmitting electronic mail, sending messages via a third party, or sending letters or pictures.

(2) "Pattern of conduct" means a series of acts over a period of time, however short, evidencing an intent to inflict a continuity of emotional distress upon the person. Constitutionally protected activity is not included within the meaning of pattern of conduct.

(3) Repealed by Acts 1993, No. 125, § 2.

D. As used in this Section, when the victim of the stalking is a child twelve years old or younger:

(1) "Pattern of conduct" includes repeated acts of nonconsensual contact involving the victim or a family member.

(2) "Family member" includes:

(a) A child, parent, grandparent, sibling, uncle, aunt, nephew, or niece of the victim, whether related by blood, marriage, or adoption.

(b) A person who lives in the same household as the victim.

(3)(a) "Nonconsensual contact" means any contact with a child twelve years old or younger that is initiated or continued without that child's consent, that is beyond the scope of the consent provided by that child, or that is in disregard of that child's expressed desire that the contact be avoided or discontinued.

(b) "Nonconsensual contact" includes:

(i) Following or appearing within the sight of that child.

(ii) Approaching or confronting that child in a public place or on private property.

(iii) Appearing at the residence of that child.

(iv) Entering onto or remaining on property occupied by that child.

(v) Contacting that child by telephone.

(vi) Sending mail or electronic communications to that child.

(vii) Placing an object on, or delivering an object to, property occupied by that child.

(c) "Nonconsensual contact" does not include any otherwise lawful act by a parent, tutor, caretaker, mandatory reporter, or other person having legal custody of the child as those terms are defined in the Louisiana Children's Code.

(4) "Victim" means the child who is the target of the stalking.

E. Whenever it is deemed appropriate for the protection of the victim, the court may send written notice to any employer of a person convicted for a violation of the provisions of this Section describing the conduct on which the conviction was based.

F. The provisions of this Section shall not apply to a private investigator licensed pursuant to the provisions of

Chapter 56 of Title 37 of the Louisiana Revised Statutes of 1950, acting during the course and scope of his employment and performing his duties relative to the conducting of an investigation.

G. The provisions of this Section shall not apply to an investigator employed by an authorized insurer regulated pursuant to the provisions of Title 22 of the Louisiana Revised Statutes of 1950, acting during the course and scope of his employment and performing his duties relative to the conducting of an insurance investigation.

H. The provisions of this Section shall not apply to an investigator employed by an authorized self-insurance group or entity regulated pursuant to the provisions of Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, acting during the course and scope of his employment and performing his duties relative to the conducting of an insurance investigation.

→9A.46.110. Stalking

(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 harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of 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 did not intend to place the person in fear or intimidate or harass the person.

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) 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 communication, the sending of an electronic communication to the person.

(5)(a) Except as provided in (b) of this subsection, a person who stalks another person is guilty of a gross misdemeanor.

(b) A person who stalks another is guilty of a class C felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.602, while stalking the person; (v) the stalker's victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community correction's officer, and the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Follows" means 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.

(b) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

(c) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(d) "Repeatedly" means on two or more separate occasions.

→10.14.020. Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Unlawful harassment" 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.

(2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."