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No. 60082-6-1
(Linked)

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

CLARENCE ANDREW KINTZ, Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
#06-1-00190-0; #06-1-00324-4

BRIEF OF RESPONDENT

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ORIGINAL

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INTRODUCTION

To commit the crime of stalking, defendant Clarence Kintz had to “intentionally and repeatedly harass[] or repeatedly follow[] another person.” RCW 9A.46.110. The statute defines repeatedly as “on two or more separate occasions.” RCW 9A.46.110(6)(d). This appeal asks the meaning of the term “separate occasions”.

Whatcom County Superior Court Judge Charles Snyder defined separate occasions as contact separated by time and physical distance.

[I]f we take the evidence in a light more favorable to the state, we 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 for purposes of this motion.

(5/16/06 VRP 16). Under the court’s pre-trial decision, the jury would have to decide whether the State proved defendant Kintz repeatedly harassed or followed two female victims.

On July 3, 2006, the Whatcom County Jury found defendant guilty of two counts of stalking, a gross misdemeanor. (Verdict; CP 22). Because the trial court correctly defined the term “separate occasions” and appropriately joined the two cases for trial, the

State respectfully requests this Court to affirm defendant Kintz's convictions and dismiss this appeal.

I. RESTATEMENT OF ISSUES PRESENTED

Defendant Kintz's appeal presents five issues:

A. Stalking requires following or harassing a victim repeatedly, which means on separate occasions. RCW 9A.46.110. Here, defendant Kintz had five discrete contacts with Theresa Westfall and five discrete contacts with Jennifer Gudaz. Did the trial court rule correctly that these contacts, separated by time and physical space, were separate occasions of following or harassment?

B. The trial court may consolidate two similar criminal charges for trial based on: "(1) the jury's ability to compartmentalize the evidence; (2) the strength of the State's evidence on each count; (3) the cross admissibility of evidence between the various counts; and (4) whether the trial court can successfully instruct the jury to decide each count separately." State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004). The trial court found both offenses similar, cross-admissible under ER 404(b) and sufficiently distinct to allow the jury to consider them

separately. Did the trial court appropriately consolidate the two offenses for trial?

C. Evidence of defendant Kintz's following, harassment or stalking of other women is admissible to prove a common scheme or plan if "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court admitted testimony from three women whom defendant followed and contacted in a similar way, claiming he needed directions. Did the trial court abuse its discretion by admitting this evidence?

D. "To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial." State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). During cross-examination, the prosecuting attorney asked three questions of a defense witness that drew objections and an instruction to disregard. Did the trial court correctly conclude that any errors did not require a retrial?

E. "A punishment is grossly disproportionate only if the punishment is clearly arbitrary and shocking to the sense of

justice." State v. Whitfield, 132 Wn. App. 878, 901, 134 P.3d 1203 (2006). The trial court sentenced defendant Kintz to less than the statutory maximum for two counts of gross misdemeanor stalking, ordering the sentences to run consecutively. Was the court's total sentence of one and one-half years clearly arbitrary and shocking to the sense of justice?

II. STATEMENT OF FACTS

A. Defendant Repeatedly Followed Jennifer Gudaz

On the morning of January 26, 2006, Jennifer Gudaz, 28, left her house to run around rural Lake Samish, near Bellingham, Washington. (VRP 81). Ms. Gudaz worked for Western Washington University as the coordinator for the youth aquatics program and rock wall, and she exercised regularly. (VRP 80).

The road around Lake Samish is narrow, with little or no shoulder. Ms. Gudaz would run on the opposite side of the road to see oncoming traffic. While she was out on the 26th, Ms. Gudaz noticed a white van.

Most of the people that live on the lake swerve around you to miss you if you're running, and so I noticed because the car in front had swerved around me, so I gave him a courtesy wave, and then the van didn't, and so I kind of – since we don't really have sidewalks or shoulders there, you kind of get a little nervous

when cars are next to you, and so that's when I noticed it.

(VRP 82). In the white van was defendant Clarence Kintz, 58. He drove past her for the first time and was out of sight.

She became suspicious when the van turned around and came up next to her.

He stopped, and I kind of looked over, and he said – I don't remember if he said, "Hey." I don't remember what the first thing that was said was, but it wasn't like – it was like you and I talking back and forth today. It was like he said something and then said the address, and before that I kept thinking maybe he doesn't know English, or there's something else, or maybe there's – he wasn't like all there, and so I – when he told me the address, I was like nope, and just kept running.

(VRP 84). For the second time, Kintz drove off. Ms. Gudaz was nervous about the van, and noticed it parked down a long driveway near a home. (VRP 86).

Kintz drove up behind her a third time, stopping in front of her and holding out a clipboard.

Q. Did you go up to his window at this time, or did you get close to him?

A. Not quite yet. He tried to hand me a clipboard out of the window and wanted me to draw him a map, and that's when I approached the window.

(VRP 87). Gudaz tried to draw a map, but Kintz could not tell her whether he wanted to go north or south. (VRP 88) ("he's like 'get me out of here'"). After drawing a map to the freeway, Gudaz gave Kintz the clipboard and started running again. (VRP 89).

Ms. Gudaz saw Kintz a fourth time, sitting in his van parked on the side of the road.

Q. You had another contact with him?

A. Well, as I was running, I saw him on the side of the road, and I just kept running past him. He did have a lighter at that point. I don't know what he was lighting, but I could see fire in the vehicle.

Q. So he had stopped by the side of the road?

A. (Witness nods.)

(VRP 90).

Ms. Gudaz's fifth contact with Kintz in his white van alarmed her.

A. He pulled up next to me again. I was still in oncoming traffic. He pulled into the oncoming traffic lane facing the wrong way.

Q. Okay. So he was up pretty close to you?

A. Within a foot.

Q. Okay. How were you feeling at this point?

A. I was debating if I was going to jump in the lake and swim home, or if I was going to run, but I was trying to stay calm.

Q. So what happened?

A. He said, "Do you need a ride?" And I said no, and he said, "Do you need money?" I said no, and he goes, "You don't need money?" And I said, "No. Maybe your road is up there," and pointed and started running.

(VRP 91). Gudaz kept running until Kintz was out of sight. She then hid between a fence and a shed for 10 to 15 minutes. (VRP 92).

When Gudaz saw two bicyclists picking berries by the side of the road, she ran to them yelling for help.

I was a mess. I was crying. I was really scared. I just wanted to go home.

(VRP 93). The bicyclists called the police. Before an officer could arrive, Kintz drove by a sixth time.

[Y]ou can see coming down from the roadway, you go over a bridge, and the van was going quite slow over the bridge coming around the corner, but as soon as he saw us, he sped up and drove pretty quickly past us, and at this point the bikers were surrounding me so that, I mean, there were people on all sides of me.

(VRP 94). The bikers wrote down the van's license plate number and reported it to the investigating officers. The van was registered to Mary Kintz, defendant's wife. (VRP 154).

Whatcom County Deputy Sheriff Brent Wagenaar contacted Mrs. Kintz, who gave him defendant's cell phone number. Deputy Wagenaar called and spoke with Kintz, who admitted that he had spoken with Ms. Gudaz repeatedly while she was jogging.

A. I asked him why he had contacted her. He stated he was lost by that area and was just asking for directions.

Q. Okay, and did you ask him some more questions?

A. I did. I asked him why he contacted her repeatedly, and he told me that, that the road circled the lake, and so he had just coincidentally bumped into her again. Basically, after driving a circle around the lake, he had contacted her again.

Q. Okay. So to understand this, did he admit that he actually spoke with her more than one time?

A. He did, yes. The initial contact he said he was lost, asked for directions and said he had to recontact her after driving around the lake entirely.

(VRP 157). Defendant denied asking Ms. Gudaz if she needed a ride or needed money.

B. Defendant Repeatedly Followed Theresa Westfall

On December 21, 2005, Theresa Westfall, a veterinarian, took her three children and two dogs to walk around Lake Padden,

in Bellingham, Washington. Starting her walk, Ms. Westfall noticed a white van in the parking lot.

I was pushing the jogging stroller holding leashes, and my two other daughters were walking with me, and when we came into the parking area of Lake Padden, the horse trailer parking area, there was a person parking a white van that looked out of context to me 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.

(VRP 214).

Westfalls' first contact with defendant Kintz occurred in the parking lot.

[W]hen we walked by, the person said something to me which I didn't quite understand, but I believe it had the word "parking" in it, and I think he thought I was going to my car which was near where he was parking, and he was just backing up and pulling forward again like he was repositioning his car.

(VRP 215). With her children and dogs in tow, Ms. Westfall began walking down a trail.

The trail eventually reconnected with the road, and Ms. Westfall had her second contact with defendant.

[W]hen we came out to the road out onto 40th at that corner, he was coming from behind us in the van driving real slow, and so when we got out on the road, you know, I was concerned because there's no sidewalk, and I've still got a whole lot of people and a whole lot of stuff that I'm trying to keep off the road, and the person drove by with their window down. I

glanced up, and their window was down, but I didn't look at them, and they just drove by a walking pace by me, and so I told my kids to all look at the ground, and we just looked at the ground and kept walking.

(VRP 217). Defendant's white van passed Ms. Westfall and her children and drove off.

In a few minutes, defendant slowly drove by Ms. Westfall again – the third separate contact.

[B]efore too long, he came back from behind us again. So as we were still walking down this road, he came from behind me and past us again driving slowly.

(VRP 218). Ms. Westfall watched as defendant turned around to make another pass. “[H]e pulled into the, that trailer court parking lot to the right and turned around and came back by us again.”

(VRP 219). After this fourth pass, defendant made one more. “He came by us, went by really slow again and pulled into the parking lots, backed up and drove back by us the other way.” (VRP 219).

During these five incidents, Ms. Westfall tried not to provoke defendant while looking for a way to escape him.

[I]nitially, I thought the best thing would be to ignore him, because I'm a veterinarian. Mean dogs you just don't look in the eye. You just don't look at them and try to ignore them and try to not have any sort of encounter, and I was doing that...When I got right up to this corner on Samish Way, because I was going to cross it to go up to where we live, I did get very, very

scared and angry, and I had a slight wish to pick up a rock and throw it in the window as he went by, but I thought that that would antagonize him. So yeah, I didn't do anything until I crossed the street, and then I got my cell phone out and called 911.

(VRP 221). When Defendant drove away, Ms. Westfall called 911 and quickly took her children home.

Officer Brock Crawford from the Bellingham Police Department responded to the call. Shortly after receiving a description of a white van and its license plate number from dispatch, Officer Crawford stopped Defendant Kintz in a white van near Lake Padden. (VRP 250). Crawford and another officer spoke with Kintz.

A. Initially, Officer Christelli approached the driver's side. I approached the passenger side, and we advised him that a couple separate women had called, and whatever he was doing in the park was scaring them.

A. Okay. How did he respond to that?

Q. Initially, he stated that he was lost and looking for a friend's house on 32nd Street and then after, after we talked for a bit, he stated that he and his wife had just gotten into a fight and that he'd gone to the park to hangout.

(VRP 252-53). The Officers told defendant Kintz to stay away from the park and to not follow women. (VRP 254).

After speaking with defendant Kintz, Officer Crawford then called Ms. Westfall.

She was upset. She was concerned. I recall her saying she stated that she had three children, and she was just concerned for her safety and her children's safety.

(VRP 254-55).

C. Other Complaints About Defendant's Behavior

Three additional women testified about defendant Kintz following them on the pretext of asking for directions. The first, Bridgid Vonk, 25, discovered that a white van had followed her home from the grocery store.

Q. I want to call your attention to March 30th. Do you recall anything unusual happening that day?

A. Yeah, I came home from the grocery store, and a man pulled into my driveway seconds after I got home.

* * * *

Q. What kind of vehicle was the man driving?

A. A white Econoline van, Econoline van.

* * * *

Q. What happened?

A. I was walking up to my front door when he called me over to ask for help looking for an address.

Q. Do you recall what he said to you?

A. He was wondering if I knew where – I don't recall the number, but where an address on Squaticum Way or Drive was, and so I told him that I wasn't sure where it was at, and to keep driving down because people are usually walking around and to ask someone down there.

(VRP 279-80).

Defendant then asked Ms. Vonk to come with him.

Q. When he asked you for directions, he mentioned Squaticum. How was he asking for directions?

A. He just said that he was looking for an address, and if I could help him with it.

Q. All right, and how did he ask you to help him?

A. After a little bit, he asked if I just wanted to come with him and help him look for it.

Q. What did you say?

* * * *

A. I said no.

(VRP 282). Ms. Vonk called the police, "because I had a creepy feeling about the situation." (VRP 283).

The second woman, Nancy Nelson, works for Western Washington University, managing teaching internships for the College of Education. (VRP 289). On the morning of February

23, 2006, she parked a few blocks from campus and walked to her office.

I was walking on the sidewalk toward the university on Cedar, and [Kintz] said, "Excuse me," and I turned, and he asked me, he had a clipboard in his hand that he was holding it out the window, and he asked me for directions.

(VRP 290-91). Ms. Nelson did not take the clipboard, pointing the direction he needed to go.

He kept insisting that I write it down, and I said no, I'm not going to write it down, but I'll tell you how to get there, and I kept trying to tell him, and he wasn't listening. "No, you need to write it down," and he kept pushing his arm out the window further, it appeared to get me to come forward to take the clipboard, and he did this many times, probably six or seven times.

(VRP 291) After Ms. Nelson consistently refused to approach the van and take the clipboard, defendant Kintz said "well, I'll go pull over and write it down myself." (VRP 291).

But Kintz just drove away, and Ms. Nelson did not see him write down anything. (VRP 291). She did remember the address – 1340 Lakeway Drive – and reported the encounter to the police. (VRP 291). Bellingham Detectives later verified that the address did not exist. (VRP 268) ("Kintz said that he didn't remember why he would ask directions to that address").

The third woman, Elizabeth Page, was walking around Lake Padden on December 21, 2005, the same day that defendant Kintz repeatedly followed Theresa Westfall and her children. (VRP 430). After letting her dog run in an off-leash area, she washed her boots and put her dog in the back of her car. She watched as a white van parked, pulled out, drove around the park buildings and returned to the parking lot. (VRP 440).

The white van parked next to her.

I was still on the phone. I had not noticed it approaching, but he had pulled back up. This was all within the span of a couple of minutes within that parking lot and pulled up right behind me, and at that point, I was standing right there between the two cars.

(VRP 440). Defendant Kintz motioned to Ms. Page to come around to the driver's side window.

- A. I was not feeling like doing [that], so I said, "Roll down your window. I can't hear you." He gestured with a clipboard a couple of times, and I said much louder, "Roll down your window. I can't hear you. Do you need something?" And he continued to really, really I thought almost aggressively gesture for me to come around to his far side. Well, the only thing that is on this side is a giant tree, so this would have put me – and I was not going to walk all the way around there. There's no visibility, and I did walk here so that I was standing here, and before I walked over there, I let my dog out of the car door.

Q. Why did you let your dog out of the car?

A. Because I think it's a deterrent. He's a 60-pound dog.

(VRP 441).

Defendant Kintz asked for directions to the "other lake", which made no sense to Ms. Page. "This is Lake Padden. It's one lake, one park. There's two entrances." (VRP 442). She gave him directions to the second park entrance, near the swimming area, and loaded her dog in her car. She was still on the phone with her friend.

I waited for a minute saying to the person on the phone that this was really weird, you know. I have a weird feeling about this, and the van backed out of parking space and drove back out the way, and so I said, okay, he's following directions.

(VRP 443).

But Kintz did not drive very far. As Page testified,

I watched the van park in the parking space looking out over the softball fields, and then I watched for a couple, I don't know, maybe a minute, and then he backed up and parked in another parking spot right there, and I thought, okay, so he's not following the directions I just gave him. If he's really lost, he'd be on the phone. So I, I backed my car out, because I had to go to work and drove past him, and as I drove past I read off the license plate number to my friend on the phone.

(VRP 443). Shortly after this, defendant Kintz began following Theresa Westfall and her children.

Defendant Kintz now appeals his convictions for stalking Jennifer Gudaz and Theresa Westfall.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews defendant's stalking convictions for sufficiency of the evidence.

In a claim of insufficient evidence, a reviewing court examines whether “*any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt,” viewing the evidence in the light most favorable to the State. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005) (internal quotation marks omitted) (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)), overruled on other grounds by Washington v. Recuenco, --- U.S. ---, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006).

The Court reviews the trial court's consolidation of the two stalking charges under CrR 4.3.1, like joinder of the charges under CrR 4.3, *de novo*.

The question of whether two offenses are properly joined is a question of law subject to full appellate review. Questions of law are reviewed *de novo*.

State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

The Court reviews the trial court's admission of evidence under ER 404(b) for an abuse of discretion. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007) ("trial court's decision to admit evidence is reviewed for abuse of discretion").

The Court reviews the trial court's denial of a mistrial for alleged prosecutorial misconduct for an abuse of discretion.

This court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A reviewing court will find abuse of discretion only when " 'no reasonable judge would have reached the same conclusion.' " Id. (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). A trial court's denial of a motion for mistrial will only be overturned when there is a " 'substantial likelihood' " that the error prompting the mistrial affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)). Further, this court has held that trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.

State v. Rodriguez 146 Wn.2d 260, 269-270, 45 P.3d 541 (2002);

State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999) ("trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard").

Finally, the Court reviews defendant's constitutional challenge to his consecutive sentences *de novo*. Wahleithner v. Thompson, 134 Wn. App. 931, 936, 143 P.3d 321 (2006). (reviewing "whether the punishment is grossly disproportionate to the offense committed").

IV. AMPLE EVIDENCE SUPPORTS THE JURY'S VERDICT

After listening to the testimony of Kintz's victims and investigating officers, the Jury convicted defendant Kintz of both counts of stalking. Defendant does not challenge any jury instructions. Instead, Defendant Kintz raises two objections to each conviction: (1) he did not follow or harass the women on separate occasions; and (2) Ms. Westfall could not identify him as the man who followed her. Neither assertion invalidates the jury's verdict.

A. Separate Occasion Means Discrete Contacts, Divided By Time or Physical Space

No reported decision in Washington discusses the meaning of "separate occasion" in the stalking statute. Washington courts have defined other terms in the statute, and these cases support the trial court's ruling here. State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998) ("following"); State v. Askham, 120 Wn. App. 872, 880-84, 86 P.3d 1224 (2004) ("following" and "harassing"); State v.

Ainslie, 103 Wn. App. 1, 6-7, 11 P.3d 318 (2000) (“following” , “fear that is objectively reasonable” and “knows or reasonably should know that the person is afraid”).

In the first case, State v. Lee, the Washington Supreme Court upheld the stalking statute to constitutional challenge. The Court identified the right of a stalking victim to be left alone.

Petitioner Yates maintained visual and physical proximity to Ms. Egan for several months in his pursuit of unwanted contact with her, despite her protestations and despite court orders directing him to have no contact with her. His efforts were neither unintentional nor accidental. They were deliberate and intentional acts which seriously interfered with the right of his victim to be left alone.

State v. Lee, 135 Wn.2d 369, 393-394, 957 P.2d 741 (1998).

Defendant suggests that the important fact is that the unwanted contact occurred “for several months” rather than several minutes as in his case. (Opening Brief at 24) But the length and severity of contact in violation of court orders distinguishes felony stalking from its misdemeanor counterpart. RCW 9A.46.110(5)(b).

The relevant principal in Lee is that stalking involves “deliberate and intentional acts which seriously interfered with the right of the victim to be left alone.” Lee, 135 Wn.2d at 394. The Jury had more than sufficient evidence to conclude defendant Kintz

seriously interfered with Jennifer Gudaz's and Theresa Westfall's right to exercise in public parks. Despite both women's desire to end all contact with him, defendant Kintz persisted and repeatedly attempted to talk with them or have them get in his van.

The Supreme Court's statement in Lee underscores the Legislature's intent in adopting the harassment and stalking statute.

The legislature finds that the prevention of serious, personal harassment is an important government objective. Toward that end, this chapter is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim.

RCW 9A.46.010. Defendant committed "repeated invasions of a person's privacy" by stopping women in rural areas on the pretext of asking for directions. The fact that these repeated invasions occurred in the span of 20 minutes, rather than a day or two, does not make the invasions any less coercive, intimidating or humiliating.

Next, in State v. Askham, 120 Wn. App. 872, 86 P.3d 1224 (2004), the Court of Appeals held evidence of repeated emails was sufficient evidence of stalking.

We must give the State the benefit of all reasonable inferences from this testimony, as well as from the facts and circumstances of the entire course of

conduct. And when we do so we conclude that a reasonable fact finder could find that the course of conduct was such as would cause emotional distress and that it did in fact cause emotional distress.

Askham 120 Wn. App. at 884. The Court upheld defendant Askham's conviction, based on defendant's entire course of conduct. Here, defendant's course of conduct involved repeated, separate contacts with Ms. Gudaz and Ms. Westfall in quick succession. That is sufficient to prove unwanted contact "on separate occasions". RCW 9A.46.110.

Finally, in State v. Ainslie, 103 Wn. App. 1, 11 P.3d 318 (2000), this Court upheld defendant Ainslie's stalking conviction, which involved repeatedly parking his car in front a 14-year old's home. The Court affirmed that Ainslie followed the 14-year old, even though he never contacted her.

Ainslie cites State v. Lee, in which both defendants followed and came into actual contact with their victims. While it is true that the facts of this case are not those in Lee, the evidence nevertheless supports the conclusion that Ainslie followed J.P. Ainslie regularly parked in front of the mailboxes near J.P.'s house during times when J.P. was in the neighborhood, he got out of his car just as J.P. was walking toward him, and he was seen in J.P.'s yard. Perhaps most telling is the fact that neither Proffitt nor C.P. saw Ainslie while J.P. was in Spokane, but Ainslie reappeared in his parked car once J.P. returned.

Ainslie 103 Wn. App. At 6-7. The facts in Lee are sufficient to prove stalking, but they are not the only example. If the jury can reasonably infer repeated following from the evidence, that is sufficient for conviction.

The harassment statute, RCW Ch. 9A.46, prohibits behavior like defendant Kintz's. After getting a clear indication that neither Ms. Gudaz nor Ms. Westfall wanted any contact with him, he continued nonetheless. He made both women reasonably fear for their safety. The fact that this took 20 minutes, rather than a few days, is irrelevant. The repeated contacts, separated by time and physical distance, satisfy the requirement of separate occasions.

The Louisiana Court of Appeals' decision in State v. Rico, 741 So.2d 774 (1999) does not require a different result. First, unlike Washington's statute, Louisiana's stalking statute does not define the word repeatedly. Compare RCW 9A.46.110 ("Repeatedly' means on two or more separate occasions) with Rico, 741 So.2d at 777 ("Louisiana Revised Statutes 14:40.2 does not define the term 'repeated'"). The Louisiana Court of Appeals interpreted a dictionary definition – renewed or recurring again and again – rather than the statutory definition at issue here.

Second, the two cases differ on their facts. The Louisiana Court concluded that “the evidence supports the conclusion that the conduct was a continuous following which occurred once.” Rico 741 So.2d at 777. The case involved a continuous car chase between the defendant and his victim. In contrast, defendant Kintz did not follow Ms. Gudaz or Ms. Westfall continuously, breaking off contact and then returning. The Jury could appropriately consider these contacts separate occasions under the Washington statute.

B. Defendant Kintz Was The Person Following Ms. Westfall and Her Children

Defendant also challenges the sufficiency of the evidence identifying him as the man who stalked Theresa Westfall.

Ms. Westfall testified unequivocally that she could not identify Defendant as the person she encountered at Lake Padden Park. Officer Crawford’s testimony at best places Defendant **near** the scene of the contact between Ms. Westfall and Defendant, but no admissions or testimony was elicited from Officer Crawford identifying Defendant as the person contacting Ms. Westfall.

(Opening Brief at 32-33). Sufficient evidence identifies defendant Kintz as the man who repeatedly followed Westfall.

First, Ms. Westfall had no trouble identifying defendant’s white van during her 911 call.

The person that I talked to told me to stop and stay where I was, and that there was an officer in the area, and they were going to try to apprehend the person in the van, and I stayed on the line until they had, had stopped him and told, sort of told me, you know, what was happening, and it was okay to go home.

(VRP 223). She made her call while officers were responding to Elizabeth Page's complaint, which included defendant Kintz's license plate number. (VRP 65) ("two separate reporting parties call and said this gentleman was following them or scaring them"); (VRP 68) ("we knew the van and the license plate").

Second, Bellingham police officers pulled defendant Kintz over only *five minutes* after Ms. Westfall called 911. Defendant was less than a mile from where she last saw him. As Officer Brock Crawford testified,

Q. ...[Y]ou said that you contacted [Kintz] at what time or did you tell us that?

A. Let's see. I think it may show here about 12:01.

Q. Okay. Now, I asked you about when you were first dispatched, and that was 11:42; is that correct?

A. Correct.

Q. Can you tell a specific phone call, a phone call from Theresa Westfall, does the cad report show that?

A. Are you referring to the first or second one?

Q. The second phone call?

A. The second phone call, it looks like it was at 11:56.

(VRP 251).

Finally, when the officers pulled him over, defendant Kintz did not deny contacting Ms. Westfall. “We advised [Kintz] that a couple separate women had called, and whatever he was doing in the park was scaring them.” (VRP 252). Defendant’s response was that he was lost, and then that “he’d gone to the park to hangout.” (VRP 253). Not until months later would Kintz claim that he did not remember whether he contacted Ms. Page or Ms. Westfall in the Park.

The Jury had sufficient evidence to convict defendant Kintz for stalking Ms. Westfall. He was in the white van, with the same license plate, as that identified by Ms. Page and Ms. Westfall.

V. THE TRIAL COURT APPROPRIATELY CONSOLIDATED THE TWO CASES

The State charged defendant Kintz in two separate informations. (CP 103). The State moved to consolidate the cases for trial, and on May 30, 2006, the trial court granted the motion.

[F]or purposes of joinder, it strikes me that these cases should be joined, and the reason I think so is even if we're looking at issues of whether these are cross-admissible, the two incidents...it strikes me that they could be, first of all, for the proof of intent, but more likely because they involve a very similar set of behavior here, stopping someone, driving the same vehicle, stopping a young woman near a rural park where there's not a lot of folks around, asking for directions, having a clipboard, asking them to come over to the van and show him something on a clipboard.

(5/30/06 VRP 20). The court began "with the presumption that joinder will be granted if it's going to lead to judicial economy and an efficiency trying of the cases." (5/30/06 VRP 22).

The court then weighed the probative value of the evidence against the danger of unfair prejudice.

Since the behavior is not, it's not criminal, the question is what's the probative value? Does it show his intent? Yes, it does, and that's where it's relevant, and it's much less prejudicial, because it's not criminal behavior in itself. It's just behavior. It could or could not be criminal. It's only criminal if it's linked to the other elements that the prosecutor has to prove, and for that reason, I think it's less prejudicial than probative, and I think the balancing under 404(b) would say that yes, each of these are admissions in the other case are cross-admissible to prove intent, because I think that the 404 analysis would indicate

that they're quite probative and less prejudicial than if they were criminal behaviors, and secondly, it strikes me that we've got a modus operandi situation, and they would be cross-admissible in that case, and I think that allows for joinder...

(5/30/06 VRP 24).

The trial court's consolidation was appropriate as a matter of law. Under CrR 4.3.1, "offenses or defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4." Criminal Rule 4.3(a)(2) in turn states, "two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both...(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." As the trial court found, defendant Kintz followed women using the same plan – asking for directions with a clipboard and then repeatedly contacting them.

To decide on review whether consolidation is appropriate, this Court looks at four factors.

When considering whether different counts are properly joined for trial, we look to (1) the jury's ability to compartmentalize the evidence, (2) the strength of the State's evidence on each count, (3) the cross admissibility of evidence between the various counts,

and (4) whether the trial court can successfully instruct the jury to decide each count separately.

State v. MacDonald 122 Wn. App. 804, 815, 95 P.3d 1248 (2004).

All four factors support consolidation here.

First, the Jury had no trouble compartmentalizing evidence in the two cases. The incidents happened on different dates at different locations. Ms. Gudaz was jogging alone, while Ms. Westfall was walking with her three children and two dogs. The police investigated the events separately, and at trial, the deputy prosecutor presented evidence of each crime with different witnesses. The only overlapping evidence was defendant's common scheme for contacting and following these women.

Second, the State had strong evidence of each count. Multiple witnesses saw defendant in the white van on both days, and the witnesses each time had the license plate number. Defendant did not try to conceal his identity; the only issue for the Jury was whether his behavior satisfied the statutory requirements for stalking. The Jury found the evidence sufficient beyond a reasonable doubt.

Third, the evidence was cross-admissible between the two counts. The trial court examined this factor in detail on the record

and found each incident admissible for proof of intent and common scheme or plan (which the trial court labeled a “modus operandi situation”). (5/30/06 VRP 24). Defendant used a white van, clipboard and story about being lost as a plan to contact women in remote areas. As detailed below, this is archetypal evidence of a common scheme or plan, admissible under ER 404(b).

Fourth, the court had no trouble instructing the Jury separately on each count. Because the counts involved different women on different dates, no confusion existed on which evidence applied to which count. Jury Instruction 21, the “to convict” instruction for Theresa Westfall, underlined Ms. Westfall’s name and the date of the incident. (CP 46). The “to convict” instruction for Jennifer Gudaz, Instruction 22, does the same for her name and the date of the incident. (CP 47). No confusion existed over the instructions or the Jury’s responsibility to view each case separately. (Jury Instruction 15; CP 40) (“you must decide each count separately”).

The trial court correctly consolidated these cases for trial.

VI. DEFENDANT'S OTHER ACTS OF FOLLOWING WERE ADMISSIBLE EVIDENCE OF HIS COMMON SCHEME OR PLAN

The trial court admitted testimony of three women, Bridgid Vonk, Nancy Nelson, and in rebuttal, Elizabeth Page. The court ruled the evidence was relevant and admissible under ER 404(b) as proof of intent and modus operandi.

[T]he February 23rd incident regarding Miss Nelson and the March 30th incident regarding Miss Vonk are 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, either asking – with a clipboard asking somebody to read a map, asking somebody to read a piece of paper, or stopping them and asking for directions, all the same set of circumstances.

(VRP 12). The court allowed Ms. Page's testimony as evidence of defendant's intent.

[I]nsofar as it is the same day, and he was asking directions and then did not leave the park area, that that would also be something that could come in with regard to rebuttal, with regards to intent. His intent was to find directions to someplace, and he remained where he was or the same vicinity where he was. I think that goes to whether he had the intent to actually go somewhere or whether he actually had some other intent that day, so I would let that in.

(VRP 16-17).

The trial court did not abuse its discretion by admitting this evidence. Although the trial court labeled the evidence "modus

operandi”, it is more appropriately considered proof of a common scheme or plan. Modus operandi proves a perpetrator’s identity.

The modus operandi must be so unusual and distinctive as to be like a signature. The more distinctive the defendant's prior acts, the higher the probability that the defendant committed the crime, and thus the greater the relevance.

State v. Foxhoven, __ Wn.2d __, 163 P.3d 786, 790 (2007)
(quotations omitted).

In contrast, common scheme or plan proves intent or the commission of a crime.

That exception is generally used when the occurrence of the crime or intent are at issue, not when identity is the issue. It requires a slightly lower level of similarity, inconsistent with that required to show identity. The existence of a common scheme or plan, for ER 404(b) purposes, is relevant only to the extent that it shows the charged crime happened.

Foxhoven, 163 P.3d at 791.

Kintz’s defense was that he was lost and asking directions of the women, not that he was stalking them. His intent was therefore at issue, as well as whether he had committed the crime charged – stalking – rather than simply being lost. The trial court identified the issue for the jury – whether defendant’s behavior was innocent or criminal. Kintz’s intent in repeatedly following the women was the critical issue of fact.

The testimony from Vonk, Nelson, and Page satisfies the common plan exception under ER 404(b).

The prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.

State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The four factors support the trial court's decision to admit the testimony.

First, the State proved the three similar events with testimony from the women defendant contacted and followed. Although defendant told investigators he could not remember contacting Ms. Page, no reasonable dispute existed at trial to the women's testimony.

Second, the State offered the evidence to show defendant using the same pretext to stop women for directions and then following and harassing them. The Supreme Court identified evidence like this as proof of defendant repeatedly completing a criminal plan.

There are two different situations wherein the "plan" exception to the general ban on prior bad acts evidence may arise. One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan...*The other situation arises when an individual devises a plan and*

uses it repeatedly to perpetrate separate but very similar crimes.

State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995) (emphasis added). This second situation applies here. Defendant Kintz had a technique for contacting women in remote areas, a technique that involved his white van, a clipboard, and pretending to be lost. Under Lough, the State could offer the testimony of Vonk, Nelson, and Page, to show that defendant Kintz was not lost, but rather using a tested plan.

Third, the evidence is relevant to prove the elements of intent, following and harassment. Defendant argues that the facts are not at issue – he contacted the women to ask directions. (Opening Brief at 37) (“the fact that Defendant contacted Ms. Gudaz and/or Ms. Westfall was not a disputed fact”) This undermines defendant’s earlier argument that Ms. Westfall could not identify him as her stalker. The contested issue, however, is whether defendant Kintz intended to follow and harass Ms. Gudaz and Ms. Westfall. Because other women complained to the police about defendant’s behavior – and defendant knew about it – his repeated contact with Gudaz and Westfall was no mistake or coincidence. It was according to plan.

Finally, the evidence must be more probative than prejudicial. Quoted above, the trial court carefully examined the evidence and concluded the balance tipped strongly in favor of admission. "The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the state of relevant evidence necessary to establish an essential element of its case." Lough 125 Wn.2d at 859. In isolation, defendant's contact with Ms. Gudaz or Ms. Westfall might appear innocent or misguided. Viewed as a whole, defendant Kintz's encounters with Gudaz, Westfall, Nelson, Vonk and Page show a clear, disturbing plan to harass women in remote areas. The probative value of this evidence outweighs any danger of unfair prejudice.

The Jury is entitled to hear all relevant admissible evidence before deciding whether the State has met its burden. The trial court did not abuse its discretion by admitting highly probative evidence of defendant's plan.

VII. No Grounds Exist For A Mistrial

Defendant presented one witness at trial, Elizabeth Nyblade, Ph.D., a clinical and forensic psychologist. (VRP 299). At the close of Dr. Nybade's testimony, defense counsel moved for a mistrial,

arguing that the deputy prosecutor improperly introduced evidence of defendant's criminal record and history of masturbation. (VRP 426). The trial court denied counsel's motion.

We did what we could do in terms of telling the jury to totally disregard the one question, and there was no answer given to that question, and then the other time that it was raised there was an immediate objection, and the objection was sustained, and there was no further answer. I understand what you're saying that that just makes the jury think that something is back there, and I think that, you know, having been told to disregard, given the instructions that they were given both before trial, and they will be given at the end is that you're not to consider remarks of counsel, I think we're going to go forward.

As to the issue of masturbation, I'm a little more troubled than that, but I think Mr. Richey got Dr. Nyblade to talk about what the term self-gratification generally meant. When she told, finished up here, the last few questions were that he really didn't give her any sexual connotation at the time, and I think that come 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.

(VRP 428-29). There was no other mention of these topics during trial.

This court does not double guess the trial court's ruling in hindsight; it reviews the decision for an abuse of discretion.

Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. In making such a challenge the defendant bears the burden of

establishing that the prosecutor's conduct was both improper and prejudicial. If the prosecutor's conduct is improper it does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict.

State v. Finch 137 Wn.2d 792, 839, 975 P.2d 967 (1999) (citations omitted). Defendant fails to satisfy this high standard for reversal.

The trial court appropriately instructed the Jury to disregard questions when the court sustained objections. It also did not consider any implications from the questions so prejudicial as to require a mistrial. Finally, given the breadth of evidence on defendant's actions, it is hard to imagine limited questions in cross-examination having a 'substantial likelihood' of affecting the jury's verdict. The trial court did not abuse its discretion by denying defendant's motion for a mistrial.

VIII. DEFENDANT'S CONSECUTIVE SENTENCE WAS FAIR

The trial court sentenced defendant Kintz to 275 days incarceration on each count of stalking, to run consecutively. (Judgment and Sentence at 2; CP 16). Defendant did not order transcription of the August 9, 2006 sentencing hearing, but in the September 7, 2006, hearing on defendant's motion to stay his sentence, the trial court explained why he imposed the term.

[T]here has been no expression by Mr. Kintz at any point in time that he did anything wrong. He's maintained all along that he's done nothing wrong, and yet the jury found, I think pretty convincingly, that he had done things within the statute...The community is at risk if somebody is out there stalking them, following them, making contacts with them in circumstances where they're in these kind of remote areas, and there aren't other people around, and particularly, since it all seems to be aimed at younger and single women who are by themselves.

(9/7/06 VRP 10).

Defendant argues his sentence is unconstitutional under Article I section 14. That section states, "excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Wash. Const. Art. 1, § 14. Defendant's sentence is not cruel punishment.

Recently, this court rejected a similar challenge to consecutive misdemeanor sentences. Wahleithner v. Thompson 134 Wn. App. 931, 143 P.3d 321 (2006). In Wahleithner, the trial court imposed consecutive sentences after defendant violated the conditions of three DUI convictions. Wahleithner, 134 Wn. App. at 934. For reasons relevant here, the Court rejected defendant's constitutional challenge to his consecutive sentences.

First, the Court reviews sentences individually, not cumulatively.

Wahleithner does not contend that any single sentence imposed for his various offenses was unauthorized or disproportionate. Rather, he argues that his sentences become disproportionate in the aggregate—that imposing the sentences consecutively resulted in cruel punishment. He also argues his sentences are disproportionate because they are not typical of sentences imposed for similar crimes by other judges in the same district.

Wahleithner has erred in framing the issues. Except in extremely rare cases, proportionality review for constitutional purposes is a review of each individual sentence, not their cumulative effect. Nor does the constitutional analysis include a comparison of relative leniency among different judges in the same district.

Wahleithner, 134 Wn. App. at 936-937. Defendant makes the same mistake here. He does not contend the individual sentences are disproportionate. Both are well within the statutory range for gross misdemeanors.

Second, defendant's is not the extremely rare case that justifies proportionality review.

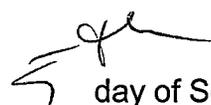
The statutes give judges broad authority to suspend jail time in misdemeanor cases, to impose conditions upon suspended sentences, and to revoke the suspension in whole or in part upon violation of a condition of probation. RCW 3.66.068, .069; RCW 46.61.5055. Sentences for these offenses may be imposed concurrently or consecutively. Courts have discretion to impose misdemeanor sentences consecutively. Mortell v. State, 118 Wn. App. 846, 851-52, 78 P.3d 197 (2003).

Wahleithner, 134 Wn. App. at 939. Defendant's consecutive sentence was well within the statutory range.

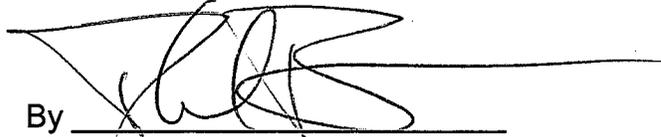
Finally, defendant's sentence was not "clearly arbitrary and shocking to the sense of justice." State v. Smith, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980). As the trial court found, defendant has refused to accept responsibility for the harassment and fear he caused many women. His pattern of following single women deprives them of the right to walk, run, and enjoy the solitude of nature. His incarceration ensures that women can use Bellingham's parks unmolested. Less than two years in jail is a fair price for defendant's stalking women over many years.

CONCLUSION

The Jury convicted defendant Clarence Kintz after hearing compelling evidence of his stalking Jennifer Gudaz and Theresa Westfall. Because he received a fair trial, the State of Washington respectfully requests this Court to affirm his conviction and dismiss this appeal.

DATED this  5 day of September, 2007.

DAVID S. McEACHRAN
Whatcom County Prosecuting Attorney



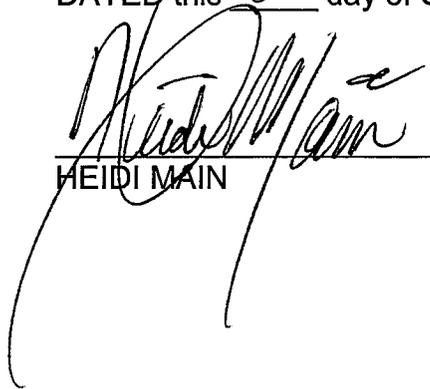
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

Thomas Dunn
Law Offices of Michael K. Tasker
510 E. Holly Street
Bellingham, WA 98225

DATED this 5th day of September 2007.



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