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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 39813-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TODD WALTON,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process when it entered judgment against him for felony stalking because substantial evidence does not support this charge.

2. The trial court denied the defendant due process when it failed to instruct the jury that the state had the burden of proving that each element of the felony stalking charge occurred within the time period alleged in the information.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, if it enters judgment against that defendant for a crime unsupported by substantial evidence?

2. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it fails to instruct the jury that the state had the burden of proving that each element of the crime charged occurred within the time period alleged in the information?

STATEMENT OF THE CASE

On May 10, 2009, the defendant Todd Walton was arrested in Clark County on charges stemming from his contact that day and the previous day with his ex-girlfriend Charne Crandall in violation of a protection order dated on March 19, 2009. RP 129. That order had been issued following the defendant's guilty plea and sentencing on second degree and fourth degree assault charges against Ms Crandall. Exhibits 5, 9, and 11. Following his arrest, the defendant remained in custody at the Clark County jail up to the date of his sentencing in this case on September 16, 2009. RP 95-141. Based upon the defendant's conduct on May 10th and other days between April 12th and May 27th, the Clark County Prosecutor filed two further informations alleging burglary, unlawful imprisonment, witness tampering, and various violations of no contact orders against the defendant. Exhibits 7 and 8.

On June 24, 2009, the defendant appeared with counsel before the Clark County Superior Court, at which time the prosecutor filed amended informations in each of the two pending cause numbers. Exhibits 7 and 8. The defendant then pled guilty to the following charges:

09-1-00827-2

- I. Second Degree Burglary committed on 5/10/09
- II. Unlawful Imprisonment committed on 5/10/09
- III. Violation of a No Contact Order committed on 5/10/09
- IV. Violation of a No Contact Order committed on 4/27/09

09-1-00926-1

- I. Witness Tampering committed between 4/13/09 and 5/27/09
- II. Violation of a No Contact Order between 4/13/09 and 5/27/09
- III. Violation of a No Contact Order between 4/13/09 and 5/27/09

Exhibits 11 and 12.

Each of these charges arose out of the defendant's continued contact with Charmé Crandall. *Id.* However, while the court took the defendant's guilty pleas on these two informations on June 24th, the court put sentencing over to a later date. RP 260.

Unbeknownst to the prosecutor and the police, Charmé Crandall and the defendant continued a written correspondence both before and after his guilty plea on June 24th. Exhibits 13-17. They accomplished this in spite of the no contact orders through Charmé's use of a pseudonym. *Id.* For example, on June 11, 2009, she wrote the defendant a letter under her pseudonym of "Charlie Tavelde" and sent it to him in the jail. *See* Exhibit 13. She then wrote him letters on June 20th and June 27th using the same pseudonym. *See* Exhibit 16 and Exhibit 17. During this time she also wrote him poetry she included with the letters. *See* Exhibit 14 and Exhibit 15.

Eventually the police found out about the continuing correspondence and contacted Charmé, who provided them with two letters the defendant wrote her from the jail on June 17 and June 23, 2009. Exhibits 2 and 3. Based upon this continued contact, the Clark County Prosecutor charged the

defendant in the instant case with one count of felony stalking and one count of felony violation of a no contact order, alleging in an amended information that the defendant committed the crimes between June 10 and July 6, 2009. CP 26-27.

These new charges came on for trial before a jury on September 8, 2009, with the state calling three witnesses, including Charme Crandall. RP 70, 161, 177. At the end of her testimony on direct, the state elicited evidence from Ms Crandall that she “feared for her safety” based upon the defendant’s prior assaultive conduct toward her. RP 111. The defense then cross-examined her on this issue and elicited the fact that there were extended periods of time during which she did not fear for her safety. RP 140-141. On cross-examination, she stated the following on this point:

Q. So is it a fair statement to say, Charme, that during the course of your relationship with Mr. Walton you were afraid off and on?

A. That is true.

Q. Okay. And there could be long periods when you weren’t afraid and short or long periods when you were?

A. That is true.

Q. They’d be broken up?

A. True.

RP 140-141.

One of these time periods during which she stated that she did not fear the defendant was from the time he was incarcerated on May 10, 2010, to at least the time he was sentenced on September 16, 2009. RP 140-141. This was the time period during which she was actively maintaining a correspondence with him in the jail through the use of her pseudonym. Exhibits 13-17. Again, during the following portion of cross-examination, she admitted that she had concealed her continuing correspondence with the defendant from the police, and that she did not have any fear of him during this time period.

Q. Did you – when you got these letters or as you got one, did you call the police and say, hey, I got a letter from him in jail?

A. No, I did not.

Q. Okay. So then, as you got the second one, did you call the police and say, I got two letters here?

A. No, I did not.

Q. Is it a fact that the police somehow found out that you'd – were receiving letters and they called you and asked you?

A. I believe that is a fact, yes.

Q. And again, you get these letters, why didn't you call the police?

A. Uhm, I believe because he was incarcerated I didn't feel there was anything he could do further.

Q. You weren't afraid because he was incarcerated?

A. Yes.

RP 140-141.

Following the state's evidence in this case, the defendant took the stand on his own behalf, admitted to his correspondence with Ms Crandall while he was in custody, and denied that he had done anything to make her fear him. RP 191-210.

Following the reception of evidence, the court instructed the jury with the defense objecting to Instruction No. 5, the "to convict" instruction for the felony stalking charge. RP 213-214. This instruction read as follows:

INSTRUCTION NO. 5

To convict the defendant of the crime of Stalking, each of the following six elements must be proved beyond a reasonable doubt:

- (1) That on or between June 10, 2009 and July 6, 2009, the defendant intentionally and repeatedly harassed Charmae Crandall;
- (2) That Charmae Crandall reasonably feared that the defendant intended to injure her;
- (3) That the defendant
 - (a) intended to frighten, intimidate, or harass Charmae Crandall; or
 - (b) knew or reasonably should have known that Charmae Crandall was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her;
- (4) That the defendant acted without lawful authority;
- (5) That the defendant

- (a) had been previously convicted of the crimes of Assault in the Second Degree or Assault in the Fourth Degree or Unlawful Imprisonment or Domestic Violence Court Order Violation against Charme Crandall; or
- (b) That the defendant violated a protection order protecting Charme Crandall; and

(6) That any of the defendant's acts occurred in the State of Washington.

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

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

CP 36-37.

Following instruction by the court and argument by counsel, the jury retired for deliberations. RP 216-254. A little over an hour into deliberations, the jury sent out the following question concerning Instruction

No. 5:

INSTRUCTION #5

ITEM #1

Do the Dates in #1 Apply to Just #1 or to 1 through 6

(June 10 - July 6)

CP 53.

BRIEF OF APPELLANT - 7

After receiving this note, Judge Wulle refused to answer the jury's question. *Id.* Rather, he responded as follows: "Follow the jury instructions." After receiving this reply, the jury returned to deliberations and later returned verdicts of "guilty" on both counts. CP 54-55.

About a week after these verdicts, the court called this case for sentencing in conjunction with the sentencing hearings in cause numbers 09-1-00827-2 and 09-1-00926-1. CP 262. In the case at bar, the court determined the defendant's offender score to be five points on each count, yielding a standard range of 33 to 43 months in prison on each count. CP 72. The offender score of five points included one prior point from the defendant's January 15, 2009, conviction for second degree assault against Ms Crandall. CP 82. It also included two concurrent points for the defendant's burglary and unlawful imprisonment convictions in 09-1-00827-2, one concurrent point for the witness tampering conviction in 09-1-00926-1, and one concurrent point from the case at bar. CP 70-82. The court then sentenced the defendant to 43 months on each count, to run concurrent to each other and concurrent to the felony sentences in the other two cause numbers. *Id.* However, the court ordered the two sentences to run consecutive to the misdemeanor violation of no contact order convictions in the other two cause numbers. *Id.* The defendant thereafter filed timely notice of appeal. CP 85.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS WHEN IT ENTERED JUDGMENT AGAINST HIM FOR FELONY STALKING BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant’s right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla

of evidence is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). Since this denial of due process constitutes a “manifest error of constitutional magnitude” under RAP 2.5(a)(3), any conviction not supported by substantial evidence may be attacked for the first time on appeal. *Id.* “Substantial evidence” in this context means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the defendant was convicted of felony stalking and felony violation of a no contact order. The defendant argues that substantial evidence does not support the former charge because the fear of the complaining witness is an essential element of the felony stalking and substantial evidence does not support the conclusion that the complaining witness feared the defendant during the time period over which the crime was alleged. The following presents both of this argument.

The crime of felony stalking is defined under RCW 9A.46.110(1), which states as follows:

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

(a) He or she intentionally and repeatedly 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.

RCW 9A.46.110(1).

Under subpart (b), in order to be guilty of this crime, the defendant's conduct must place the "person being harassed" in fear that the defendant "intends to injure the person, another person, or property of the person or of another person." In addition, pursuant to this section, the "feeling of fear" must be "reasonable." This subpart creates two separate essential elements: the first is a subjective feeling of fear on the part of the complaining witness, and the second is that the subjective feeling of fear be reasonable.

In the case at bar, the complaining witness testified to her relationship with the defendant and stated that at different times his conduct placed her in

fear for her safety. She specifically identified time periods during January and April in which they had physical confrontations during which she feared for her safety. However, during her testimony, she did not claim that she was always in fear for her safety. Rather, there were lengthy periods of time in which she had no subjective fear of him. On cross-examination, she stated the following on this point:

Q. S is it a fair statement to say, Charme, that during the course of your relationship with Mr. Walton you were afraid off and on?

A. That is true.

Q. Okay. And there could be long periods when you weren't afraid and short or long periods when you were?

A. That is true.

Q. They'd be broken up?

A. True.

RP 140-141.

One of these time periods during which she stated that she did not fear the defendant was from the time he was incarcerated on June 10, 2010, to at least the time he was sentenced on September 16, 2009. Indeed, during this time period, she was actively maintaining a correspondence with him in the jail through the use of a pseudonym. For example, on June 11, 2009, she wrote the defendant a letter under her pseudonym and sent it to him in the jail. *See* Exhibit 13. She then wrote him letters on June 20th and June 27th.

See Exhibit 16 and Exhibit 17. During this time she also wrote him poetry she included with the letters. See Exhibit 14 and Exhibit 15. During cross-examination, she admitted that she had concealed her continuing correspondence with the defendant from the police, and that she did not have any fear of him during this time period. This testimony went as follows:

Q. Did you – when you got these letters or as you got one, did you call the police and say, hey, I got a letter from him in jail?

A. No, I did not.

Q. Okay. So then, as you got the second one, did you call the police and say, I got two letters here?

A. No, I did not.

Q. Is it a fact that the police somehow found out that you'd – were receiving letters and they called you and asked you?

A. I believe that is a fact, yes.

Q. And again, you get these letters, why didn't you call the police?

A. Uhm, I believe because he was incarcerated I didn't feel there was anything he could do further.

Q. You weren't afraid because he was incarcerated?

A. Yes.

RP 140-141.

The importance of this evidence becomes clear when reviewing the time period during which the state alleged that the defendant committed the

crime of felony harassment. This period of time alleged in the amended information was “on or between June 10, 2009 and July 6, 2009.” This allegation became an element of the offense and the law of the case when the state proposed, and the court employed, a “to convict” instruction for felony harassment that required the state to prove that the crime of felony harassment occurred during this time period. Part (1) of Instruction No. 5 stated:

(1) That on or between June 10, 2009 and July 6, 2009, the defendant intentionally and repeatedly harassed Charmé Crandall;

CP 36.

In *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998), the court explained the following concerning “law of the case” and how the state’s failure to object to a “to convict” instruction that adds an element to the offense then allows the defense to argue that a conviction should be vacated because the state failed to prove that added element. The court held:

On appeal, a defendant may assign error to elements added under the law of the case doctrine. *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) (because the State failed to object to the jury instructions they “are the law of the case and we will consider error predicated on them.”) Such assignment of error may include a challenge to the sufficiency of evidence of the added element. *Schatz v. Heimbigner*, 82 Wash. 589, 590, 144 P. 901 (1914) (“These alleged errors are not available to the appellants, because they are at cross purposes with the instructions of the court to which no error has been assigned. There is but one question open to them; that is, Is there sufficient evidence to sustain the verdict under the instructions of the court?”)

State v. Hickman, 135 Wn.2d at 102-103 (some citations omitted).

In the case at bar, the state's use of the June 10 to July 6 time period was no error or misstep on the part of the state. The reason is that this was the time period during which Charmé Crandall claimed she had told the defendant that she wanted no more contact with him. Thus, it was the two letters that the defendant sent her from the jail in June that the state alleged constituted the *actus reus* of the crime of felony stalking. However, as was pointed out from the testimony and actions of Charmé Crandall, she did not fear the defendant during this time period, and while the letters he sent her from the jail might have made her mad, they did not subjectively put her in fear. Thus, in the case at bar, the trial court erred when it entered judgment of conviction against the defendant for felony stalking, because substantial evidence does not support the essential element of subjective fear.

II. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS WHEN IT FAILED TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN OF PROVING THAT EACH ELEMENT OF THE FELONY STALKING CHARGE OCCURRED WITHIN THE TIME PERIOD ALLEGED IN THE INFORMATION.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza, supra; In re Winship, supra*. Under this rule, the court must correctly instruct the jury on all of the

elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). The failure to so instruct the jury constitutes constitutional error that may be raised for the first time on appeal. *Id.*

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove (1) that the defendant drove while intoxicated, and (2) that the defendant's driving caused the death of another person. The court's instruction did not include the judicially created element that intoxication be a proximate cause of the accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

As was explained in the previous argument, in the case at bar, the state charged the defendant with felony stalking under RCW 9A.46.110. This statute states:

(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.

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

In order to obtain a conviction for stalking under this statute, the state has the burden of proving the following elements of the offense: (1) that the defendant repeatedly harassed or followed another person, (2) that the defendant thereby placed that person in fear that the defendant would injure that person, another person, or property, (3) that the fear was reasonable, and (4) that the defendant either intended to frighten, intimidate or harass the other person, or acted such that a reasonable person would know that the other person would feel frightened, intimidated or harassed.

In order to sustain a conviction for this crime, the state must prove that all of these elements occurred, not just some of them. In addition, as was mentioned in the previous argument, the state must prove that these elements occurred during the time period alleged in the information. This is particularly true in cases such as the one at bar, because going outside the time period alleged in the information to satisfy any element of the offense not only violates the defendant's right to notice of the charges, but it would violate the limitation in the statute that only allows conviction "under circumstances not amounting to a felony attempt of another crime." In this case, the state alleged that the defendant committed the felony stalking between June 10th and July 9th, because this was the time outside the time periods for which the state had based the other charges against him.

In spite of the timing requirement for the elements of the offense in this case, the court gave the following "to convict" instruction that failed to set out this requirement:

INSTRUCTION NO. 5

To convict the defendant of the crime of Stalking, each of the following six elements must be proved beyond a reasonable doubt:

- (1) That on or between June 10, 2009 and July 6, 2009, the defendant intentionally and repeatedly harassed Charmé Crandall;
- (2) That Charmé Crandall reasonably feared that the defendant intended to injure her;

- (3) That the defendant
 - (a) intended to frighten, intimidate, or harass Charme Crandall; or
 - (b) knew or reasonably should have known that Charme Crandall was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her;
- (4) That the defendant acted without lawful authority;
- (5) That the defendant
 - (a) had been previously convicted of the crimes of Assault in the Second Degree or Assault in the Fourth Degree or Unlawful Imprisonment or Domestic Violence Court Order Violation against Charmae Crandall; or
 - (b) That the defendant violated a protection order protecting Charmae Crandall; and
- (6) That any of the defendant's acts occurred in the State of Washington.

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

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

CP 36-37.

The problem with this instruction is that it fails to inform the jury that the state had the burden of proving that the second, third, and fourth elements

also occurred between June 10th and July 7th. This fact was not lost on the jury, who read the instruction and read it to mean one of two things. The first was that the timing requirement only applied to the first listed element. The second was that the timing requirement applied to all of the listed elements. This is reflected in the jury's question, which read as follows:

INSTRUCTION #5
ITEM #1
Do the Dates in #1 Apply to Just #1 or to 1 through 6
(June 10 - July 6)

CP 53.

In spite of the jury's obvious and understandable confusion, the court refused to answer the question. Indeed, by responding with "follow the jury instructions," the court in essence told the jury that the state only had to prove that the first listed element occurred between June 10th and July 6th because that was the only element that included the time limitation. The problem reflected by the jury's question is that the court failed to properly instruct the jury that neither of the two alternatives the jury contemplated was the correct answer to the question, even though the instruction appeared to so indicate. The reason is that the time limitation did apply to elements 1, 2, 3, 4, 5(b), and 6, but it did not apply to element 5(a). Thus, in this case, the trial court failed to properly instruct the jury on all of the elements of the charge of felony stalking.

Since Instruction No. 5 constituted an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not “harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

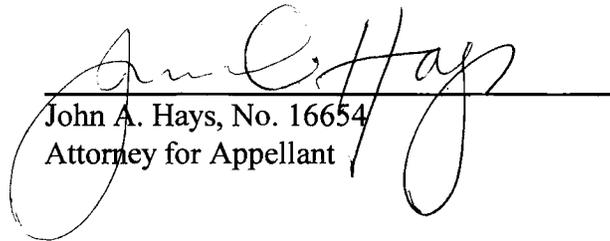
In the case at bar, the error found in Instruction No. 5 was far from harmless beyond a reasonable doubt. As reference to Charne Crandall’s testimony reveals, she repeatedly testified that for the time period charged in the information, while the defendant was in custody, she did not fear any harm from him. Thus, it is highly likely that had the court properly instructed the jury that the state had to prove that Ms Crandall reasonably feared the defendant between June 10th and July 6th, the jury would have returned a verdict of acquittal. As a result, the defendant is entitled to a new trial on the felony stalking charge.

CONCLUSION

The court should vacate the defendant's conviction for felony stalking and remand with instructions to dismiss and to resentence the defendant in this cause number as well as the other two cause numbers for which he was sentenced. In the alternative, this court should vacate the defendant's conviction for felony stalking and remand with instructions to grant him a new trial on this charge.

DATED this 4th day of June, 2010.

Respectfully submitted,


John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 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)(A) the stalker's victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections' officer; an employee, contract staff person, or volunteer of a correctional agency; or an employee of the child protective, child welfare, or adult protective services division within the department of social and health services; and (B) 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) "Correctional agency" means a person working for the department of natural resources in a correctional setting or any state, county, or municipally operated agency with the authority to direct the release of a person serving a sentence or term of confinement and includes but is not limited to the department of corrections, the indeterminate sentence review board, and the department of social and health services.

(b) "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.

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

(d) "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.

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

INSTRUCTION NO. 5

To convict the defendant of the crime of Stalking, each of the following six elements must be proved beyond a reasonable doubt:

- (1) That on or between June 10, 2009 and July 6, 2009, the defendant intentionally and repeatedly harassed Charmae Crandall;
- (2) That Charmae Crandall reasonable feared that the defendant intended to injure her;
- (3) that the defendant
 - (a) intended to frighten, intimidate, or harass Charmae Crandall; or
 - (b) knew or reasonably should have known that Charmae Crandall was afraid, intimidated, or harassed even if the defendant did not intent to place her in fear or to intimidate or harass her;
- (4) That the defendant acted without lawful authority;
- (5) That the defendant
 - (a) had been previously convicted of the crimes of Assault in the Second Degree or Assault in the Fourth Degree or Unlawful Imprisonment or Domestic Violence Court Order Violation against Charmae Crandall; or
 - (b) That the defendant violated a protection order protecting Charmae Crandall; and
- (6) that any of the defendant's acts occurred in the State of Washington.



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

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

