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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 40318-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Van Mieghem,

Appellant.

Thurston County Superior Court Cause No. 09-1-01722-4

The Honorable Judge Paula Casey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Van Mieghem's stalking conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the charged crime.
2. The prosecution did not prove beyond a reasonable doubt that Mr. Van Mieghem "harassed" Deputy Hoctor within the meaning of the stalking statute.
3. The prosecution did not prove beyond a reasonable doubt that Mr. Van Mieghem placed Deputy Hoctor in fear that he intended to injure a person or damage property.
4. Mr. Van Mieghem's conviction infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove all the essential elements of Felony Stalking.
5. Mr. Van Mieghem's conviction violated his state constitutional right to a unanimous jury, because the court's instructions allowed the jury to convict even if they were not unanimous.
6. The trial court erred by giving Instruction No. 9.
7. The trial court erred by giving Instruction No. 10.
8. The trial court failed to properly determine Mr. Van Mieghem's criminal history and offender score.
9. The sentencing court erroneously included in the offender score offenses that had "washed out."
10. The trial court erred by sentencing Mr. Van Mieghem with an offender score of two.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for Felony Stalking requires proof that the accused intentionally and repeatedly "harassed" another person. Here, the prosecution failed to prove that Mr. Van Mieghem "harassed" anyone within the meaning of the statute. Did his

conviction for Felony Stalking violate his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense?

2. To obtain a conviction for Felony Stalking, the prosecution must establish that the accused placed another in fear that the accused intended injury to a person or property. In this case, the alleged victim did not fear that Mr. Van Mieghem intended to injure a person or to damage property. Was the evidence insufficient to prove that Mr. Van Mieghem was guilty of Felony Stalking?

3. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions allowed the jury to convict even if it did not find unanimously find all the essential elements required for conviction. Did the trial court's instructions relieve the state of its burden to prove the elements of Felony Stalking, in violation of Mr. Van Mieghem's Fourteenth Amendment right to due process?

4. Class C felonies are excluded from the offender score if the defendant spent five years in the community without committing additional offenses. The trial court's criminal history finding included a five-year period with no criminal convictions. Should the sentencing court have excluded Mr. Van Mieghem's 1997 conviction for Felony Stalking because it had washed out prior to the current offense date?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Michael Van Mieghem was in custody in the Thurston County jail from October of 2008 until June of 2009. RP (2/1/10) 78, 92. He fell in love with one of the correction officers, Joanie Hocter. RP (2/1/10) 80. She did not return his feelings. RP (2/1/10) 79.

Mr. Van Mieghem saw Deputy Hocter as a hero at her work, and made it clear to staff that he was in love with her. RP (2/1/10) 79-80. Deputy Hocter felt “weird” walking by his cell at times. RP(2/1/10) 75. At one point, Mr. Van Mieghem stated that he wanted to have sexual relations with Deputy Hocter, using crude language. RP (2/1/10) 92. His interest in her built, and by July she asked to have her responsibilities changed, to limit her exposure to Mr. Van Meagham. RP (2/1/10) 64, 80-82; Exhibits 11-24, 26, Supp. CP. Deputy Hocter’s ability to perform her job was not impacted by this change. RP (2/1/10) 82.

Starting in June of 2009, Deputy Hocter sought and obtained anti-harassment orders against Mr. Van Mieghem. RP (2/1/10) 17-24; Exhibits 3-6, Supp. CP. She said that while she was not afraid, she was concerned that he might stalk her when he was released. RP (2/1/10) 84-85. The investigating officer prepared a stalking warning for Mr. Van Mieghem, to

notify him that his attentions were not wanted. RP (2/1/10) 24-27; Exhibit 7, Supp. CP.

All of Mr. Van Mieghem's communications to Deputy Hoctor expressed affection and appreciation, as well as pain that the feelings were not mutual. Exhibits 11-24, 26, 49, Supp. CP. The messages did not convey any threats. RP (2/1/10) 57, 67-68, 74. Mr. Van Mieghem sent two letters to Deputy Hoctor's home in October of 2009. RP (2/1/10) 88; Exhibit 28, Supp. CP. In one of the letters, Mr. Van Mieghem wrote that if she wanted to see him, she should write him. Deputy Hoctor did not write him. RP (2/1/10) 99. The letters caused her to believe that Mr. Van Mieghem might try to track her down at home. RP (2/1/10) 90.

Mr. Van Mieghem was charged with Felony Stalking, based on an allegation that he had been convicted of stalking before. CP 2. At trial, Deputy Hoctor testified that she was not afraid for herself, since she was trained and could protect herself with or without a weapon. RP (2/1/10) 96, 97, 100. She indicated that she was afraid for her roommate and dogs, and that she just wanted Mr. Van mieghem to stop. RP (2/1/10) 96, 98, 101. She did not specify what action she thought Mr. Van mieghem might take against her roommate and dogs.

At the conclusion of the evidence, the court gave the following instructions to the jury:

A person commits the crime of stalking when, without lawful authority, he intentionally and repeatedly harasses a second person, placing that person in reasonable fear that the first person intends to injure her or a third party or the second person's property, either with the intent to frighten, intimidate, or harass, or under circumstances where the first person knows or reasonably should know that the second person is afraid, intimidated, or harassed; and the first person violated a protective order protecting the second person; or the first person had been previously convicted of the crime of stalking.

Instruction No. 9, Court's Instructions to the Jury, Supp. CP.

To convict the defendant of the crime of stalking as charged in Count I, each of the following six elements must be proved beyond a reasonable doubt:

(1) That on or about on or between January 1, 2009 and October 21, 2009, the defendant intentionally and repeatedly harassed Joanie Hctor;

(2) That Joanie Hctor reasonably feared that the defendant intended to injure her or another person or the property of Joanie Hctor;

(3) That the defendant

(a) intended to frighten, intimidate, or harass Joanie Hctor; or

(b) knew or reasonably should have known that Joanie Hctor was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or intimidate or harass her;

(4) That the defendant acted without lawful authority;

(5) That the defendant

(a) had been previously convicted of the crime of stalking; or

(b) violated a protective order protecting Joanie Hctor;
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), (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 alternatives (3)(a) or (3)(b), or (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.

Instruction No. 10, Court's Instructions to the Jury, Supp. CP.

Mr. Van Mieghem was convicted. CP 6. At sentencing, the court found that he had two prior felony convictions for stalking, one from 1997 and the other from 2009. CP 7. The court did not find that Mr. Van mieghem had any convictions between 1997 and 2009. RP (2/8/10) 6-7. The court found that he was on community custody at the time of his current offense, calculated the offender score as three, and sentenced him to 20 months in prison. CP 7, 10.

Mr. Van Mieghem timely appealed. CP 3.

ARGUMENT

I. MR. VAN MIEGHEM'S FELONY STALKING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009). A conviction based on insufficient evidence raises a manifest error affecting a constitutional right, which may be argued for the first time on review.

RAP 2.5(a)(3); *State v. Colquitt*, 133 Wn. App. 789, 795-796, 137 P.3d 892 (2006). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

B. Conviction of Felony Stalking requires proof that the accused intentionally and repeatedly harassed another and placed that person in fear that the stalker intended injury to a person or property.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

RCW 9A.46.110 criminalizes stalking, and provides (in relevant part) that:

A person commits the crime of stalking if, without lawful authority... (a) He or she intentionally and repeatedly harasses... another person; and (b) The person being harassed... is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person.

RCW 9A.46.110(1). Under RCW 9A.46.110(6)(c), the word “[h]arasses” means “unlawful harassment” as defined in RCW 10.14.020:

[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... “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.”

RCW 10.14.020.

C. The prosecution failed to prove that Mr. Van Mieghem repeatedly “harassed” Deputy Hocter within the meaning of the statute.

In order to prove that Mr. Van Mieghem harassed Deputy Hocter, the prosecution was required to establish that he “seriously” alarmed, annoyed, or harassed her, or that his conduct caused serious detriment to her. The prosecution was also required to show that he caused Deputy Hocter “substantial emotional distress.” RCW 10.14.020; Instruction No. 12, Court’s Instructions to the Jury, Supp. CP.

Deputy Hocter testified that Mr. Van Mieghem’s unwanted attention caused her concern (and later scared her); however, even taking this evidence in a light most favorable to the prosecution, she did not indicate that she felt seriously alarmed, seriously annoyed, or seriously harassed, or that his conduct caused her serious detriment. RP (2/1/10)

77-102. She instead used the words “concerned” and “concerns” to describe her reaction. RP (2/1/10) 77-102.

Furthermore, Deputy Hocter never testified that she suffered anything approaching “substantial emotional distress.” RP (2/1/10) 77-102.

Under these circumstances, the prosecution failed to establish that Mr. Van Mieghem repeatedly “harassed” Deputy Hocter within the meaning of the statute. RCW 10.14.020. Accordingly, the conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

D. The prosecution failed to prove that Mr. Van Mieghem placed Deputy Hocter in fear that he intended to injure a person or property.

Conviction in this case required proof that Mr. Van Mieghem placed Deputy Hocter in fear that he intended to injure a person or property. Deputy Hocter testified that she was concerned (and later scared), but did not testify that she thought Mr. Van Mieghem intended to injure anyone or damage property. RP (2/1/10) 77-102.

In the absence of proof that Deputy Hocter feared that Mr. Van Mieghem intended to injure a person or damage property, the evidence was insufficient to prove the elements of the Felony Stalking. RCW 9A.46.110. Accordingly, Mr. Van Mieghem’s conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

II. MR. VAN MIEGHEM’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *State v. Drum*, 168 Wn.2d 23, 31, 225 P.3d 237 (2010). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant “must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant’s] rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).¹

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). The court’s instructions must

¹ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

make the relevant legal standard manifestly apparent to the average juror; this is so because juries lack the tools of statutory construction available to judges. *See, e.g., State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. Mr. Van Mieghem's conviction violates his Fourteenth Amendment right to due process because the court's instructions relieved the prosecution of its obligation to prove all the essential elements of Felony Stalking.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the "to convict" instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

A Felony Stalking conviction requires proof that the accused person either (a) intended to frighten, intimidate, or harass the alleged victim, or (b) knew (or reasonably should have known) that the alleged

victim was afraid, intimidated, or harassed. RCW 9A.46.110(1)(c). A separate element requires proof that the accused had either (a) previously been convicted of stalking, or (b) violated a protection order naming the alleged stalking victim. RCW 9A.46.110(5)(b).

Here, the trial court's instructions did not make the relevant standard "manifestly apparent to the average juror." *Kyllo*, at 864 (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). The "to convict" instruction required the prosecution to prove "each of the following six elements," but then instructed the jury that it "need not be unanimous as to which of alternatives (3)(a) or (3)(b), or (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.*" Instruction No. 10, Court's Instructions to the Jury, Supp. CP (emphasis added). In other words, jurors were told that they could vote to convict by finding that Mr. Van Mieghem (1) intended to frighten, intimidate, etc., or (2) knew (or reasonably should have known) that Deputy Hocter was afraid, intimidated, etc., or (3) had previously been convicted of stalking, or (4) violated a protective order naming Deputy Hocter as the protected party. Instruction No. 10, Court's Instructions to the Jury, Supp. CP.

The problem was not solved by Instruction No. 9, which defined the crime of Felony Stalking by means of a single labyrinthine sentence

with numerous subordinate clauses connected by a string of commas and a pair of semi-colons. Instruction No. 9, Court's Instructions to the Jury, Supp. CP. The instruction does little (if anything) to clarify the "to convict" instruction, and cannot be described as "manifestly" clear. *Kyllo, supra.*

Because the court's instructions allowed the jury to convict without proof of all the elements of Felony Stalking, the prosecution was relieved of its burden of proof. *Smith, supra.* This created a manifest error affecting Mr. Van Mieghem's Fourteenth Amendment right to due process, and thus can be argued for the first time on appeal, pursuant to RAP 2.5(a)(3). *Kirwin, supra.* Prejudice is presumed; accordingly, Mr. Van Mieghem's conviction must be reversed and the case remanded for a new trial. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009).

C. The conviction violates Mr. Van Mieghem's state constitutional right to a unanimous jury, because the court's instructions allowed conviction even if jurors were not unanimous as to all the essential elements of Felony Stalking.

An accused person has a state constitutional right to a unanimous jury verdict.² Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a criminal defendant can

² The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511-512, 150 P.3d 1126 (2007).

In this case, the court's instructions excused the jurors from reaching a unanimous verdict as to two elements of Felony Stalking. Jurors were told that "[t]o return a verdict of guilty, *the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b), or (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.*" Instruction No. 10, Court's Instructions to the Jury, Supp. CP (emphasis added). Under this instruction, the jury was permitted to return a guilty verdict even if some jurors believed the state had not proved that Mr. Van Mieghem either (1) frightened, intimidated etc. Deputy Huctor or (2) knew (or reasonably should have known) she was afraid, intimidated, etc. Instruction No. 10, Court's Instructions to the Jury, Supp. CP. Similarly, a guilty verdict was allowed even if some jurors believed the state had not proved that Mr. Van Mieghem either (1) had previously been convicted of stalking or (2) violated a protective order naming Deputy Huctor as the protected party. Instruction No. 10, Court's Instructions to the Jury, Supp. CP.

Instruction No. 10 created a manifest error affecting Mr. Van Mieghem's state constitutional right to juror unanimity, and thus can be raised for the first time on review. RAP 2.5(a)(3); *Kirwin, supra*; Wash. Const. Article I, Section 21; *Coleman, supra*. The error is presumed prejudicial; accordingly, Mr. Van Mieghem's conviction must be reversed and the case remanded for a new trial. *Id.*; *Toth, supra*.

III. THE TRIAL JUDGE FAILED TO PROPERLY DETERMINE MR. VAN MIEGHEM'S CRIMINAL HISTORY AND OFFENDER SCORE.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record...” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Prior offenses that are Class C felonies “wash out” of the offender score after the offender has spent five years in the community “without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c).

An offender “cannot agree to a sentence in excess of that which is statutorily authorized.” *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d

456 (2005). In particular, an offender “cannot waive a challenge to a miscalculated offender score.” *In re Goodwin*, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002).

In this case, the sentencing court found that Mr. Van Mieghem had two prior convictions for Felony Stalking: one from 1997, and one from 2009.³ CP 7. The sentencing court did not list any intervening convictions. CP 7. Under these circumstances, the 1997 conviction should have washed out under RCW 9.94A.525(2)(c). Accordingly, the trial court should have sentenced Mr. VanMieghem with an offender score of two and a standard range of 13-17 months. Mr. Van Mieghem’s sentence must be vacated, and the case remanded for resentencing with an offender score of two.

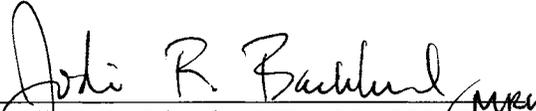
CONCLUSION

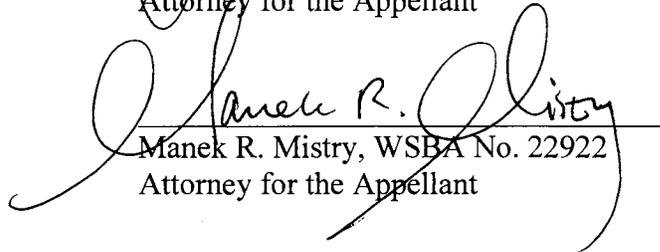
Mr. Van Mieghem’s conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for resentencing with an offender score of two.

Respectfully submitted on June 25, 2010.

³ The sentencing court also found that he was on community placement at the time of the offense, adding one point to his offender score. CP 7.

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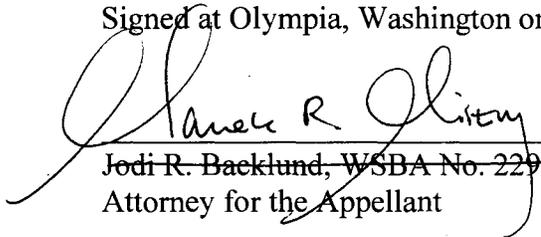
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 25, 2010.


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