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DIVISION II
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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 Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 3

I. The evidence was insufficient for conviction because Mr. Van Mieghem’s words and conduct did not cause serious alarm or substantial emotional distress. 3

II. The court’s instructions relieved the prosecution of its burden to prove all elements required for conviction, and violated Mr. Van Mieghem’s right to a unanimous jury. 5

A. The court’s “to convict” instruction was not manifestly clear, and relieved the state of proving the essential elements of Felony Stalking. 5

B. The record shows that the jurors were not unanimous in their verdict. 7

III. Respondent concedes that Mr. Van Mieghem’s case should be remanded for resentencing. 9

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986)..... 4

WASHINGTON STATE CASES

In re Pullman, 167 Wash.2d 205, 218 P.3d 913 (2009) 6

State v. Coleman, 159 Wash.2d 509, 150 P.3d 1126 (2007) 9

State v. Crane, 116 Wash.2d 315, 804 P.2d 10 (1991)..... 8

State v. Handran, 113 Wash.2d 11, 775 P.2d 453 (1989) 8

State v. Kyllo, 166 Wash.2d 856, 215 P.3d 177 (2009) 5

State v. Peterson, 168 Wash.2d 763, 230 P.3d 588 (2010)..... 7

State v. Toth, 152 Wash.App. 610, 217 P.3d 377 (2009)..... 6

WASHINGTON STATE STATUTES

RCW 10.14.020 2, 8

RCW 9A.46.110..... 2, 3, 4

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION BECAUSE MR. VAN MIEGHEM’S WORDS AND CONDUCT DID NOT CAUSE SERIOUS ALARM, SUBSTANTIAL EMOTIONAL DISTRESS, OR FEAR OF INJURY TO PERSONS OR PROPERTY.

A conviction for stalking requires proof that the accused person repeatedly harassed another, and thereby placed that person in fear of injury to persons or property. RCW 9A.46.110(1). Conduct qualifies as harassment if it (1) “seriously alarms, annoys, harasses, or is detrimental” to the targeted person, (2) “would cause a reasonable person to suffer substantial emotional distress,” and (3) “actually cause[s] substantial emotional distress.” RCW 10.14.020.

Here, the prosecution failed to show that Mr. Van Mieghem *seriously* alarmed, annoyed, harassed, or caused detriment to Deputy Hctor; nor did the prosecution prove that he caused her *substantial emotional distress*. RCW 9A.46.110; RCW 10.12.020. Even taking Deputy Hctor’s testimony in a light most favorable to the prosecution, Mr. Van Mieghem’s statements and actions never engendered the serious and substantial effects required for conviction. RP (2/1/10) 77–102.

Even if a reasonable person would (theoretically) have been seriously alarmed, and might (theoretically) have suffered the substantial emotional distress necessary for conviction, Deputy Hctor’s testimony

showed that she was not seriously alarmed and did not suffer substantial emotional distress. Respondent's assertions that Deputy Hctor "became scared" and "became afraid" do not establish *serious* alarm; nor do they establish that she suffered *substantial* emotional distress. Brief of Respondent, p. 15.

Furthermore, the prosecution failed to prove that Deputy Hctor feared injury to a person or property, as required under RCW 9A.46.110(1). *See* RP (2/1/10) 77-102. Deputy Hctor never testified that she was afraid Mr. Van Mieghem would actually attempt to "harm her, her partner, or her animals." Brief of Respondent, p. 17. Instead, she was concerned that he might show up at her house and "threaten my roommate or possibly threaten me..." RP (2/1/10) 85. But an intent to threaten is not the same as an intent to injure; proof of the latter is required under RCW 9A.46.110.¹ Had Mr. Van Mieghem showed up and made threats, he could have been prosecuted for harassment under RCW 9A.46.020, and might, at that point, have been guilty of the stalking charged in this case. However, Deputy Hctor's fear that he might come and make threats (rather than inflict injury) is insufficient to establish stalking.

¹ Deputy Hctor did testify "I was concerned that he would...do something to my dogs that I walk on a daily basis at a park that's very secluded." RP (2/1/10) 85. She did not testify to fear that he intended such action; nor did she clarify what she meant by "do something to my dogs." RP (2/1/10) 85.

In the absence of proof of these elements, the evidence was insufficient to prove Felony Stalking. RCW 9A.46.110. Accordingly, Mr. Van Mieghem's conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

II. THE COURT'S INSTRUCTIONS RELIEVED THE PROSECUTION OF ITS BURDEN TO PROVE ALL ELEMENTS REQUIRED FOR CONVICTION, AND VIOLATED MR. VAN MIEGHEM'S RIGHT TO A UNANIMOUS JURY.

A. The court's "to convict" instruction was not manifestly clear, and relieved the state of proving the essential elements of Felony Stalking.

Respondent apparently concedes that the court's written instructions were not manifestly clear. Brief of Respondent, p. 17-23. Respondent contends that the error was corrected by the court's oral instructions: "Based on the trial court's additional oral instructions, the State submits that the court's instructions did make the relevant standard manifestly apparent to the average juror." Brief of Respondent, pp. 19-20. Respondent is incorrect.

After reading Instruction No. 10 to the jury,² Judge Casey made the following additional remark:

² Including the erroneous language that the jury "need not be unanimous as to each of the alternatives, 3(a) or 3(b) or 5(a) or 5(b)" in order to convict, and that a guilty verdict

All 12 jurors must agree that either subsection (a) or subsection (b) of either of these instructions [sic] has been proved beyond a reasonable doubt, but all 12 need not agree in elements (3) and (5) that either (a) has been proved and all 12 need not agree that (b) has been proved, but all 12 must agree that either (a) or (b) has been proved.
RP (Instructions) 12.

The court's supplemental oral explanation did not correct the problem, because it did not make the relevant legal standard manifestly apparent to the average juror. *State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009). Judge Casey misstated the law, echoing the error in the written instruction, when she said that "All 12 must agree either subsection (a) or subsection (b) of either of these [elements] has been proved." RP (Instructions) 12. She further confused the issue by erroneously substituting the word "instructions" when she meant to say "elements." RP (Instructions) 12.

The court's instructions allowed the jury to convict without proof of all the elements of Felony Stalking. This violated Mr. Van Mieghem's Fourteenth Amendment right to due process; accordingly, Mr. Van Mieghem's conviction must be reversed and the case remanded for a new trial. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009).

was permitted "as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." RP (Instructions) 12.

B. The record shows that the jurors were not unanimous in their verdict.

Respondent has not addressed Mr. Van Mieghem's unanimity argument. This failure to argue the issue may be treated as a concession. *See, e.g., In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). In fact, as Respondent points out, the jurors were not unanimous in their decision regarding the third element of the offense.^{3,4} Brief of Respondent, pp. 10, 20, 21-22.

Five of the jurors did not believe the state had proved that Mr. Van Mieghem intended to frighten, intimidate or harass Deputy Hocter; two jurors did not believe the state had proved that he knew or reasonably should have known that she was afraid, intimidated, or harassed. RP (2/3/10) 3-9. Ordinarily, this would make no difference, since jurors need not be unanimous as to the means by which an offense is committed (so long as substantial evidence supports each alternative means). *See, e.g., State v. Peterson*, 168 Wash.2d 763, 769, 230 P.3d 588 (2010).

³ The third element required proof "That the defendant (a) intended to frighten, intimidate, or harass Joanie Hocter; or (b) knew or reasonably should have known that Joanie Hocter was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or intimidate or harass her." Instruction No. 10, CP 33.

⁴ Although the court's instructions also allowed conviction by a jury that was not unanimous as to the fifth element, the jury's special verdict established unanimity as to that element. *See* Special Verdict Form, CP 44.

However, this case involved multiple acts as well as alternative means: the prosecutor presented evidence of Mr. Van Mieghem's oral statements, kites, and demeanor while incarcerated, as well as letters he wrote after his release. RP (2/1/10) 11-102; RP (2/2/10) 105-121. It is this intersection of the "multiple acts" problem and the alternative means language in the court's instruction that creates the error here.

For example, some jurors may have believed that Mr. Van Mieghem's oral statements (including his expressed desire to have intercourse with Deputy Hocter) established element 3(a) (that he "intended to frighten, intimidate, or harass Joanie Hocter"); other jurors may have believed that he "knew or reasonably should have known that Joanie Hocter was afraid, intimidated, or harassed" by the letters sent to her home (establishing element 3(b)). Instruction No. 10, CP 33. The court's instructions allowed the jury to convict even if they were not unanimous as to which act had been proven.

Nor is this a "continuing course of conduct" case where the unanimity requirement can be dispensed with. *See, e.g., State v. Crane*, 116 Wash.2d 315, 326, 804 P.2d 10 (1991). The "continuing course of conduct" exception applies only to a series of acts occurring at

the same time and place (and with the same criminal purpose).⁵ *State v. Handran*, 113 Wash.2d 11, 17, 775 P.2d 453 (1989). As noted, Mr. Van Mieghem's conduct spanned a long period of time and occurred at different locations. RP (2/1/10) 11-102; RP (2/2/10) 105-121.

The trial court's error in this case was worse than the typical unanimity error. Rather than merely failing to give a unanimity instruction (or requiring the prosecutor to elect an act or series of acts constituting the crime), the court here explicitly instructed jurors that they need not be unanimous to convict Mr. Van Mieghem. Instruction No. 10 violated his state constitutional right to a unanimous jury; accordingly, his conviction must be reversed and the case remanded for a new trial. Wash. Const. Article I, Section 21; *State v. Coleman*, 159 Wash.2d 509, 511-512, 150 P.3d 1126 (2007).

III. RESPONDENT CONCEDES THAT MR. VAN MIEGHEM'S CASE SHOULD BE REMANDED FOR RESENTENCING.

In light of Respondent's concession, Mr. Van Mieghem relies on the argument set forth in his Opening Brief.

⁵ The "continuing course of conduct" exception to the unanimity requirement is, of course, analytically distinct from the "knowing and willful course of conduct" that is included in the definition of harassment under RCW 10.14.020.

CONCLUSION

Because the evidence was insufficient for conviction, Mr. Van Mieghem's case must be dismissed with prejudice. If the case is not dismissed, it must be remanded for a new trial or for a new sentencing hearing.

Respectfully submitted on October 20, 2010.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Michael Van Mieghem, DOC #759384
Monroe Corrections Center
P.O. Box 700
Monroe, WA 98272-0700

and to:

Thurston County Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

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

All postage prepaid, on October 20, 2010.

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 October 20, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant