60082-6

60082-6

81688-3

ORIGINAL

WCSC Case No. 06-1-00324-4
Appellant Cause No.: 60082-6-1

Link with:
WCSC Case No: 06-1-00190-0
Appellant Cause No.: 58717-0-1

IN THE APPELLATE COURT OF THE STATE OF WASHINGTON DIVISION 1

STATE OF WASHINGTON,

Respondent,

vs.

CLARENCE ANDREW KINTZ,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2007 JUN -7 AM 10: 20

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

APPELLANT'S OPENING BRIEF

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

TABLE OF AUTHORITIES

Authority Page
Cases

In re Post Sentencing Review of Charles,
135 Wash.2d 239, 249, 955 P.2d 798 (1998) 29

State v.Ainslie, 103 Wash.App. 1, 11 P.3d 318 (2000) 24

State v. Alexander, 64 Wash.App. 147, 158, 822 P.2d 1250 (1992) 47

State v. Askham, 120 Wash.App. 872, 86 P.3d 1224 (2004),
review denied, 120 Wash.App. 872, 86 P.3d 1224 (2004) 24

State v. Avendano-Lopez, 79 Wash.App. 706, 904 P.2d 324 (1995),
review denied 129 Wash.2d 1007, 917 P.2d 129 (1996), 42

State v. Badda, 63 Wash.2d 176, 183, 385 P.2d 859 (1963) 47

State v. Benn, 120 Wash.2d 631, 653, 845 P.2d 289,
cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993) 34

State v. Bythrow, 114 Wash.2d 713, 719, 790 P.2d 154 (1990) 34

State v. Charlton, 90 Wash.2d 657, 663-64, 585 P.2d 142 (1978) 40

State v. Coe, 101 Wash.2d 772, 789, 684 P.2d 668 (1984) 47

State .v Coles, 28 Wash.App. 563, 625 P.2d 713 (1981),
review denied 95 Wash.2d 1024 (1981) 41

State v. Dennison, 115 Wash.2d 609, 628, 801 P.2d 193 (1990) 34

State v. Fain, 94 Wash.2d 387, 392, 617 P.2d 720 (1980) 44

State v. Gimarelli, 105 Wash.App. 370, 381-82, 20 P.3d 430, review denied, 144 Wash.2d 1014, 31 P.3d 1185 (2001) 45

State v. Goebel, 36 Wash.2d 367, 218 P.2d 300 (1950) 33

State v. Goebel, 40 Wash.2d 18, 21, 240 P.2d 251 (1952) 33

State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980) 21

State v. Harris, 36 Wash.App. 746, 749, 677 P.2d 202 (1984) 33

State v.Hendrix, 50 Wash. App. 510, 516-7, 749 P.2d 210 (1988), review den'd 110 Wash.2d 1029 (1988) 31

State v. Jacobs, 154 Wash. 2d 596, 600-1, 115 P.3d 281 (2005) 28

State v. Johnson, 12 Wash.App. 40, 44, 527 P.2d 1324 (1974), review den'd, 85 Wash.2d 1001 (1975) 31

State v. Lane, 125 Wash.2d 825, 831, 889 P.2d 929 (1995) 34

State v. Lee, 82 Wash.App. 298, 917 P.2d 159 (1996), aff'd 135 Wash.2d. 369 (1998) 23, 24

State v.Lough, 125 Wash.2d 847, 853, 889 P.2d 487 (1995) 33, 37

State v. Morin, 100 Wash.App. 25, 29, 995 P.2d 113, review denied, 142 Wash.2d 1010, 16 P.3d 1264 (2000) 44

State v. Mak, 105 Wash.2d 692, 701, 718 P.2d 407 (1986) cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), and habeas corpus granted in part, denied in part sub nom., Mak v. Blodgett, 754 F.Supp. 1490 (1991). 41

State v. Ramirez, 46 Wash.App. 223, 226, 730 P.2d 98 (1986) 33

State v. Roberts, 117 Wash.2d 576, 585, 817 P.2d 855 (1991) 29

State v. Redd, 51 Wash.App. 597, 603, 754 P.2d 1041, review denied, 111 Wash.2d 1008 (1988). 96 Wash.2d 1009 (1981) 38

State v. Padilla, 69 Wash.App. 295, 301, 846 P.2d 564 (1993) 41

State v. Partin, 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977) 21

State v.Saltarelli, 98 Wash.2d 358, 364, 655 P.2d 697 (1982) 35

State v. Smith, 103 Wash. 267, 268, 174 P. 9, 9 (1918) 36

State v. Smith, 74 Wash.2d 744, 754-55, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), overruled on other grounds, 85 Wash.2d 758, 539 P.2d 680 (1975) 38

State v. Smith, 93 Wash.2d 329, 344-45, 610 P.2d 869, cert denied , 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980) 44

State v. Smith, 104 Wash.2d 497, 510, 707 P.2d 1306 (1985) 41

State v. Smith, 106 Wash.2d 772, 776, 725 P.2d 951 (1986) 34

State v. Suarez-Bravo, 72 Wash.App. 359, 366, 864 P.2d 426 (1994) 41

State v. Tharp, 96 Wash.2d 591, 593-94, 637 P.2d 961 (1981) 34

State v. Wade, 98 Wash.App. 328, 335, 989 P.2d 576 (1999) 35

State v. Weddel, 29 Wash. App. 461, 467, 629 P.2d 912, review denied, 96 Wash.2d 1009 (1981) 39

State v. Whalon, 1 Wash.App. 785, 464 P.2d 730 (1970) 33, 47

State v. Zatkovich, 113 Wash.App. 70, 52 P.3d 36 (2002) 24

Commonwealth v. Tsouprakakis, 267 Mass. 496 (1929) 29

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61L.Ed.2d 560 (1979) 21

People v. Kelly, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr363 (1967) 36

State v. Rico, 741 So.2d 774 (1999) 25

United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir.1974). 35

United States v. Musquiz, 445 F.2d 963, 965 (5th Cir.1971) 31

United States v. Johnson, 427 F.2d 957, 961 (5th Cir.1970) 31

Constitutional Provisions

Article I, section 14 of the Washington Constitution 44

Statutes

LRS 14:40.2, the Louisiana State Stalking Statute 25

RCW 9A.46.110, the Stalking Statute 21, 24, 28

RCW 10.14.020, the Harassment Statute 22

Court Rules

ER 404(b) 34

Other Authorities

Black's Law Dictionary, Fourth Revised Edition, 1229 (1968) 29

5 Karl B. Tegland, Wash.Prac., *Evidence* § § 114, 117, at 383, 404 (3d ed. 1989) 37

II J. WIGMORE, EVIDENCE § 357 (Chadbourn rev. 1979) 36

John H. Wigmore, *Evidence* § 304, at 249 (James H. Chadbourn rev. ed. 1979) 37

TABLE OF CONTENTS

Headings Page

I. ASSIGNMENT OF ERRORS 7

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS 7

III. STATEMENT OF THE CASE 9
A. Pretrial proceedings 9
B. Other Important Trial Court Rulings 10
C. The Gudaz Incident 12
D. The Westfall Incident 13

E. Prior/Subsequent Bad Acts 15
1. Brigid Vonk 15
2. Nancy Nelson 15
3. Elizabeth Page 16
F. Elizabeth Nyblade 17

IV. SUMMARY OF AGRUMENT 18

V. AGRUMENT 20

A. The Trial Court erred in denying Appellant's motion to dismiss because there was insufficient evidence to prove that Appellant "repeatedly" followed or harassed either complaining Witness 20

B. The Trial Court erred in denying Appellant's motion for a directed verdict with regard to the Westfall incident because Appellant was not identified as the person following or harassing her 31

C. The Trial Court erred in joining and consolidating for one trial the two Stalking matters 33
1. 404(b) Analysis 34
2. Evidence of Other Offense Necessary and Relevant 36
3. Probative Value Versus Prejudicial Effect 38

D. The Trial Court erred in admitting evidence of prior/subsequent bad acts 39

E. The Trial Court erred in denying Appellant's motion for a mistrial due to prosecutorial misconduct 40

F. The Trial Court erred in imposing a sentence grossly disproportionate in light of Appellant's criminal history and the severity of the crimes 43

G. The Trial Court erred in denying Appellant's motion for a directed verdict based on Cumulative Error 46

VI. CONCLUSION 48

VII. APPENDIX 49

I.

1. **The Trial Court erred in denying Appellant's motion to dismiss because there was insufficient evidence to prove that Appellant "repeatedly" followed or harassed either complaining witness;**

2. **The Trial Court erred in denying Appellant's motion for a directed verdict with regard to the Theresa Westfall incident because Appellant was not identified as the person following or harassing her;**

3. **The Trial Court erred in joining and consolidating for one trial the two Stalking matters;**

4. **The Trial Court erred in admitting evidence of prior/subsequent bad acts;**

5. **The Trial Court erred in denying Appellant's motion for a mistrial due to prosecutorial misconduct**

6. **The Trial Court erred in imposing a sentence grossly disproportionate in light of Appellant's criminal history and the severity of the crimes**

7. **The Trial Court erred in not granting Appellant's motion for a directed verdict on the bases of Cumulative Error**

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

A. For the State to convict Defendant under Washington's Stalking Statutes it must be prove that Defendant repeatedly harassed or followed the

defines repeatedly as two or more separate occasions. However, the statute does not define "separate occasion." The issue before this Court regarding this assignment of error is: what constitutes a "separate occasion," and was there sufficient evidence to prove the element of repeated harassment or following of the respective victims. (Assignment of Error 1.)

B. Ms. Westfall failed to identify Defendant as the person harassing or following her during her Stalking incident and there was little or no evidence from other witnesses so identifying Defendant. The issue before this Court regarding this assignment of error is whether the Westfall Incident charge should be dismissed notwithstanding the jury guilty verdict because there was insufficient evidence identifying Defendant has the person stalking Ms. Westfall. (Assignment of Error 2.)

C. The two Stalking charges were joined and consolidated for trial. The trial court ruled that evidence of the respective charges were cross-admissible for the purpose of proving intent and *modus operandi.* Among the issues before this Court regarding this assignment of error is: was said evidence necessary and relevant for said purposes and whether if said evidence was so necessary and relevant was its probative value outweighed by its prejudicial effect? (Assignment of Error 3.)

D. Evidence of three collateral incidents regarding Defendant and other women was admitted to prove intent and *modus operandi*. The issue before this Court regarding this assignment of error is similar to the foregoing assignment. (Assignment of Error 4.)

E. During the course of cross-examination and recross-examination of Defendant's expert witness, the Prosecutor alluded to and attempted to elicit testimony highly prejudicial to Defendant. The issue for this Court regarding this assignment of error is: whether there is a substantial likelihood that prosecutorial misconduct affected the jury

verdict, thereby denying Defendant a fair trial. (Assignment of Error 5.)

F. Defendant was sentenced to serve a total of 550 days under both Cause Numbers. The issue before this Court is: whether the sentence was grossly disproportionate given Defendant's prior criminal history and the severity of the crimes. (Assignment of Error 6.)

G. The issue before this Court is whether the trial court should have dismissed the charges herein on the bases of cumulative error. If this Court determines that any one of the foregoing assignments of errors alone may not amount to reversible error, this Court is asked to consider whether the cumulative effect of the assignment of errors resulted in an unfair trial requiring reversal. (Assignment of Error 7.)

III. STATEMENT OF THE CASE

A. Pretrial Proceedings

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

It was stipulated at this hearing that both Stalking charges were erroneously filed as Felony Stalking and accordingly both charges were

amended to Misdemeanor Stalking. Verbatim Report of the Proceedings [hereinafter "RP"] May 16, 2006.

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

B. Other Important Trial Court Rulings

During a 404(b) preliminary hearing just prior to trial, the State moved to admit evidence of prior/subsequent acts involving Defendant's contact with women, as well as Defendant' s prior Luring conviction. Defendant opposed said motion. The trial court ruled that, for the purpose of proving knowledge, intent, and modus operandi, an incident on February 22, 2006, regarding Nancy Nelson and an incident on March 30, 2006, regarding Brigid Vonk, would be admissible in the State's case in chief. RP page 12. For the same purposes, an incident on December 21,

2005 regarding Elizabeth Page would be admissible in the State's rebuttal only. RP page 17. The trial court ruled that Defendant's prior Luring conviction would not be admitted. RP page 14.

During a break in cross-examination of Ms. Nyblade, the Prosecutor reiterated his motion to introduce evidence of Defendant's prior Luring Conviction through Ms. Nyblade's testimony. The trial court again denied the State's motion. RP pages 259-366.

After cross-examination of Defendant's only witness, Elizabeth Nyblade, Defendant moved the trial court for a mistrial based on *inter alia* the Prosecutor's elicitation of testimony from Ms. Nyblade regarding *being told clearly in the past not to do this to women*; regarding if Ms. Nyblade was aware that Defendant had any problems in the past with regard to drug use; and repeated questions regarding whether Defendant's comment regarding self-gratification meant masturbation. The trial court denied Defendant's motion. RP page 429.

After the close of testimony, the trial court declined to give to the jury the diminished capacity instruction regarding intent over Defendant's exception. RP page 458.

On August 9, 2006, Defendant was sentenced under cause number 06-1-00190-0 to serve 365 in the Whatcom County Jail with 90 days suspended; Defendant was sentenced under cause number 06-1-00324-4 to

serve 365 in the Whatcom County Jail with 90 days suspended. The sentences were to be served consecutively. Judgment and Sentencing number 06-1-00190-0 and Judgment and Sentencing number 06-1-00324-4.

C. The Gudaz Incident

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

The van drove past Ms. Gudaz and stopped again on the side of the road. Ms. Gudaz ran past the white van and turned left onto North Lake Samish. The white van pulled up next to Ms. Gudaz into the oncoming traffic lane facing the wrong way. The driver then said *do you need a ride*.

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

The white van continued traveling in the same direction as Ms. Gudaz was running until it was out of her sight. Ms Gudaz ran down a road that goes down to the lake and hid between a fence and a shed there. RP pages 92. 10 to 15 minutes later Ms Gudaz encountered bicyclists who accompanied Ms. Gudaz toward a county park. Ms. Gudaz and the bicyclists saw the white van again before they reached the park, but there was no further contact between Ms. Gudaz and the driver of the white van. RP pages 92-94.

D. The Westfall Incident

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

As Ms. Westfall left the park and came out to 40th Street, the van drove slowly by her at a walking pace, and then drove out of visual field. Before too long, the van came up from behind Ms. Westfall. Apparently, the van made a right onto Samish Way and made a triangular loop to come

up behind Ms. Westfall. RP pages 217-218. The van passed Ms. Westfall, pulled into the trailer court parking lot to turn around, and came back directly toward Ms. Westfall. RP page 219. The van turned around behind Ms. Westfall and passed her again. The van continued to the stop sign at the intersection of 40th Street and Samish Way. The van was sitting there as Ms. Westfall crossed Samish Way. Soon after crossing Samish Way, after passing Harrison Street, Ms. Westfall called 911. RP pages 221-222. The van drove up by Ms. Westfall again on 40th Street and continued passed her straight up 40th. Ms. Westfall didn't see the van again. RP page 223.

When asked to so testify, Ms. Westfall was unable to identify Defendant in court as the person referenced parking the van. RP page 216. The only colorable evidence identifying Defendant as the person contacting Ms. Westfall on December 21, 2006 came through the testimony of Officer Brock Crawford. Officer Crawford testified that he and another police officer contacted Defendant near Lake Padden Park and advised him that a couple of women had called and whatever he was doing in the park was scaring them. PR page 252. Defendant responded that he was lost and looking for a friend's house, but Officer Crawford did not testify that Defendant admitted to contacting either woman. RP 252-153.

E. Prior/Subsequent Bad Acts

1. Brigid Vonk

Brigid Vonk testified that on March 30, 2006, in an area known as Mud bay, seconds after she came home from grocery shopping, a man in a white van pulled into her driveway. The man called Ms. Vonk over to help him find an address. Ms. Vonk advised that she wasn't sure where the address was. RP pages 279-280. The man asked if Ms. Vonk would come with him to help look for the address. Ms. Vonk replied no and went into her house. She left her house again very shortly thereafter, and when she was pulling out of her driveway, she saw that the van had been driven some distance away. RP page 80.

2. Nancy Nelson

Nancy Nelson testified that on February 23, 2006, on Cedar Street near Western Washington University where she works, Defendant was sitting in his parked van and said *Excuse me* to Ms. Nelson. RP 290. Defendant asked Ms. Nelson if she would write down directions to 1340 Lakeway Drive on a clipboard Defendant had in his hand. Defendant pushed his arm out the window of the van six or seven times apparently gesturing for her to take the clipboard to write down the address. Ms. Nelson declined to write down the directions, but told Defendant that she would tell him the directions. Defendant told Ms. Nelson that he would

pull over and write down the directions himself, but he left immediately without doing so. RP page 291.

3. Elizabeth Page

In rebuttal, Elizabeth Page testified that on the morning of December 21, 2005, at a parking lot at Lake Padden Park, she saw a white van pull in the parking lot, where she was standing with her dog, and park next to her vehicle. The van stayed there for about one minute and then pulled out. RP page 438. The van pulled through into a gravel lot where Ms. Page lost sight of the van. Ms. Page put her dog in her vehicle and closed the door when the van pulled up behind her. RP page 440. The man in the van waved at Ms. Page to come around to the driver's side of the van. Ms. Page came about eight to ten feet away from Defendant. Defendant asked Ms. Page where the other lake was. Ms. Page replied that there was no other lake but there are two entrances. She described how to get to the other entrance. RP page 441-442.

The van backed out of the parking space and drove to another parking lot and parked. Ms. Page pulled out of her parking space and parked at the entrance to the Park and waited there for about five minutes to see if Defendant would come out. Defendant did not come out within five minutes, so Ms. Page called the police and then left. RP page 443-444.

F. Elizabeth Nyblade

Elizabeth Nyblade is Defendant's expert witness whose testimony on direct regarded Defendant's Diminish Capacity defense. Ms. Nyblade testified that Defendant suffered from cognitive disorders such as Attention Deficit Hyperactivity Disorder. RP pages 299-341.

Later in cross-examination, when asked if Defendant had told Ms. Nyblade why Defendant was contacting *these women*, she testified that Defendant said *I was on drugs when I did this. My reason was self-gratification.* The Prosecutor then asked questions to the effect regarding whether Ms. Nyblade understood self-gratification to mean masturbation. RP page 401.

The same line of inquiry was reiterated by the Prosecutor on recross-examination. Defendant objected for lack of foundation and the objection was sustained. Without laying further foundation, the prosecutor continued to ask questions to the same effect: as to whether Ms. Nyblade previously conveyed to the Prosecutor that self-gratification meant masturbation. Defendant again objected and the trial court sustained the objection. RP pages 424-425.

The Prosecutor later in cross-examination asked Ms. Nyblade questions to the effect regarding his ability to form intent regarding

something that is defined as a crime on the 21st of December 2005. Ms. Nyblade answered: *according to his words, yes.* RP page 403.

The Prosecutor later asked Ms. Nyblade a question to the effect regarding if she knew that Defendant has been told very clearly in the past not to do what he did to these women. Defendant objected, the trial court sustained Defendant's objection, RP page 405, and instructed the jury to disregard the question. RP page 410.

The Prosecutor later asked Ms. Nyblade if she was aware that Defendant had any problems in the past with regard to drug use. The Court sustained Defendant's objection. RP page 415.

Ms. Nyblade later testified on cross-examination that Defendant was capable of making decisions about his behavior on the basis of his knowledge and intent. RP page 418.

IV. SUMMARY OF ARGUMENT

Assignment of Error 1 regarding whether there was sufficient evidence to sustain either of the Stalking Convictions is perhaps the most salient. The contacts between Defendant and the respective complaining witnesses occurred over a period of time of approximately twenty minutes. It is Defendant's position that such contact does not constitute "more than one occasion" and accordingly there was insufficient evidence to sustain either Stalking convictions.

Assignment of Error 2 addresses whether the Stalking conviction regarding the Westfall Incident should have been dismissed because the complaining witness failed to identify Defendant as the person she had contact with on the date charged and there was not sufficient evidence from other witnesses so identifying Defendant.

Assignments of Error 3 and 4 regard joinder and admission of prior/subsequent bad acts. The legal analysis regarding these issues overlaps. The issues addressed in the following section is whether evidence of the two Stalking convictions are cross-admissible and/or whether evidence of the prior/subsequent bad acts were necessary to prove intent and/or *modus operandi* when balanced against its obvious prejudicial effect.

Assignment of Error 5 regards whether the cumulative effect of Prosecutor's elicitation of testimony from Defendant's expert witness regarding *being told clearly in the past not to do this to women*; regarding if the witness was aware that Defendant had any problems in the past with regard to drug use; and repeated questions regarding whether Defendant's comment regarding self-gratification meant masturbation constituted prosecutorial misconduct that denied Defendant a fair trial.

Assignment of Error 6 regards whether a sentence of 550 days under both Cause Numbers was grossly disproportionate given Defendant's prior criminal history and the severity of the crimes.

Assignment of Error 7 regards whether the cumulative effect of some or all of the foregoing errors resulted in an unfair trial requiring reversal or remand. In considering this assignment of error, Defendant urges this Court to consider whether Defendant was unduly prejudiced by the aggregate of errors such that the jury's attention was diverted by the errors from considering whether the State had proved every element of the crimes beyond a reasonable doubt and especially whether Defendant "repeatedly" followed or harassed the respective victims. Defendant submits that the jury's attention was so diverted and that instead of considering the elements, the jury convicted Defendant due to the bootstrapping of highly prejudicial testimony and because, in the words of the Prosecutor during closing argument Defendant's conduct *felt like a crime.* RP page 491.

V. ARGUMENT

A. The Trial Court erred in denying Appellant's motion to dismiss because there was insufficient evidence to prove that Appellant "repeatedly" followed or harassed either complaining witness

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

> The Stalking Statute, RCW 9A.46.110 provides in pertinent part:
>
> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
>
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not

intend to place the person in fear or intimidate or harass the person....

(6) As used in this section:

(a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time....

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

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

The Harassment Statute, RCW 10.14.020 provides in pertinent part:

(1) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a **reasonable person to suffer substantial emotional distress**, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child. [My emphasis]

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

Additionally, "following" has been judicially defined as deliberately and **repeatedly** correlating one's movements or appearances with those of another person to establish contact with that person. State v.

Lee, 82 Wash.App. 298, 306, 917 P.2d 159 (1996), aff'd, 135 Wash.2d 369, 957 P.2d 741 (1998) [my emphasis].

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

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

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

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

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

In State v. Lee, 82 Wash.App. 298, 917 P.2d 159 (1996), aff'd 135 Wash.2d. 369 (1998), was a consolidated case. The court there found that in both matters there was sufficient evidence to sustain the following element based on *numerous unwanted contacts* between the defendants and the victims during numerous *dates.*In State v. Zatkovich, 113 Wash.App. 70, 52 P.3d 36 (2002), the Appellate Court upheld the trial

courts ruling that defendant was subject to an exceptional sentenced because there was sufficient evidence in the record to support the State's contention that the defendant had violated the Stalking Statute by **repeatedly** harassing the victim and her family. The trial court's oral ruling stated:

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

Id at 78. [My emphasis.]

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

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

> A. Stalking is the willful, malicious, and repeated following or harassing of another person with the intent to place that person in fear of death or bodily injury....

> C. For the purposes of this Section, the following words shall have the following meanings:
>
> (1) "Harassing" means engaging in a knowing and willful pattern of conduct directed at a specific person which seriously alarms, annoys, or distresses the person, and which serves no legitimate purpose. The conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the person.
>
> (2) "Pattern of conduct" means a series of acts over a period of time, however short, evidencing an intent to inflict a continuity of emotional distress upon the person.

The facts in State v. Rico are as follows:

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

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

following her.

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

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

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

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

LRS 14:40.2 does not define the term "repeated...." Webster's Dictionary defines "repeated" as "renewed or recurring again and again."

The defendant's conduct, although improper, was not a renewed or recurring following. The evidence supports the conclusion that the conduct was a continuous following which occurred once. Thus, viewing the word "repeated" in its usual sense and resolving any doubt or ambiguity of the statute in favor of the defendant, the State failed to prove the defendant's conduct was a "repeated" following. State v. Rico, 741 So.2d at 777 (1999).

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

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

Sentencing Review of Charles, 135 Wash.2d 239, 249, 955 P.2d 798 (1998); State v. Roberts, 117 Wash.2d 576, 585, 817 P.2d 855 (1991)).

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

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

It is submitted that Black's Dictionary definition of "occasion" further supports Defendant's position that he did not repeatedly follow or harass the respective victims. Black's Dictionary defines "occasion" as carrying idea of opportunity, necessity, or even cause in a limited sense. Black's Law Dictionary, Fourth Revised Edition, 1229 (1968) (Citing Commonwealth v. Tsouprakakis, 267 Mass. 496 (1929)). Defendant

submits the connotation of said definition suggests that "occasion" means an event or series of events having some identified cohesive meaning or purpose. Both the Westfall Incident and the Gudaz Incident were continuous single events, constituting only one occasion, because each incident, though briefly interrupted by the Defendant breaking off contact with the respective victims and then re-contacting them again moments later, possessed an idea of one single opportunity, having one single identified cohesive meaning, when considered in light of the entire respective incident.

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

Likewise, the record does not support sufficient evidence that Defendant deliberately maintained visual or physical proximity to either Ms. Gudaz or Ms. Westfall **over a period of time** or deliberately and

repeatedly correlated his movements or appearances with those of the respective victims to establish contact with them as a result of one of the contacts. If there was any such visual or physical proximity maintained or **repeated** correlation of Defendant's movements or appearances with those of the respective victims, it was as a result of the entire continuous event. Accordingly, the entire respective incidents can only be deemed one single respective "following" and/or one single respective "harassment."

B. The Trial Court erred in denying Appellant's motion for a directed verdict with regard to the Westfall incident because Appellant was not identified as the person following or harassing her

Although questions of identification are for the trier of fact, State v. Johnson, 12 Wash.App. 40, 44, 527 P.2d 1324 (1974), review den'd, 85 Wash.2d 1001 (1975), when there are no other connecting or corroborating facts or circumstances, the identification becomes critical and, notwithstanding a jury verdict of guilty, when the identifying witness is unsure, the conviction must be reversed. State v.Hendrix, 50 Wash. App. 510, 516-7, 749 P.2d 210 (1988), review den'd 110 Wash.2d 1029 (1988) (Citing United States v. Musquiz, 445 F.2d 963, 965 (5th Cir.1971); United States v. Johnson, 427 F.2d 957, 961 (5th Cir.1970)).

In Musquiz the court reversed the defendant's Counterfeiting conviction because the testimony purporting to identify the defendant as the man passing counterfeit money was held to be insufficient. One

witness testified that she could not identify the appellant, and a second identified him in one breath, but stated in the next breath that the man who allegedly passed him the counterfeit bills had a bump on his head, which 'bump' was absent from the defendant's head. United States v. Musquiz, 445 F.2d at 966 (5th Cir.1971)

In Johnson the court held there was insufficient evidence to support conviction for Robbery. The only substantive evidence was testimony of an eye witness to the robbery plus the discovery of a pistol, a pair of shoes, and be-bop hat in the defendant's apartment, two months after the robbery. The eye witness repeatedly declined affirmatively to identify the defendant as the culprit. None of the others in the bank at the commission of the offense identified him. The eye witness repeatedly said that she saw only the muzzle of the pistol and could not identify it beyond 'being similar.' She said the shoes and the be-bop hat resembled those worn by the robber but she could go no further than that. United States v. Johnson, 427 F.2d at 961 (5th Cir.1970). The facts in Musquiz or Johnson with regard to sufficient evidence of identification of the defendants are indistinguishable from those herein. 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 contact between Ms. Westfall and Defendant, but no admissions or other testimony was elicited from Officer

Crawford identifying Defendant as the person contacting Ms. Westfall.

Indeed, in Musquiz there was even more evidence of identification of the defendant than there is herein because in Musquiz the eye witness at least made equivocal identification; here Ms. Westfall testified unequivocally that she could not identify Defendant.

C. The Trial Court erred in joining and consolidating for one trial the two Stalking matters

The appropriate method for analyzing the State's Motion to join Defendant's two Stalking matters is to first conduct the four prong 404(b) analysis for both matters to determine if evidence is cross-admissible. State v. Ramirez, 46 Wash.App. 223, 226, 730 P.2d 98 (1986); State v. Harris, 36 Wash.App. 746, 749, 677 P.2d 202 (1984) (where evidence of one count would not be admissible in a separate trial on the other count, denial of a defendant's motion to sever not only constituted an abuse of discretion, but also required reversal). If this hurdle is met by the State, the Court should only then conduct the two prong Joinder analysis: the Court should determine whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged. State v. Goebel, 40 Wash.2d 18, 21, 240 P.2d 251 (1952). Second, if the evidence is relevant, its probative value must be shown to outweigh its potential for prejudice. State v. Goebel, 36 Wash.2d 367, 218 P.2d 300 (1950),(overruled on other grounds by State v.Lough, 125 Wash.2d 847, 853, 889 P.2d 487 (1995)); State v. Whalon, 1 Wash.App.

785, 464 P.2d 730 (1970).

1. **404(b) Analysis**

In determining whether prior bad acts are admissible under ER 404(b), the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. State v. Dennison, 115 Wash.2d 609, 628, 801 P.2d 193 (1990); State v. Smith, 106 Wash.2d 772, 776, 725 P.2d 951 (1986); State v. Lane, 125 Wash.2d 825, 831, 889 P.2d 929 (1995). Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. State v. Benn, 120 Wash.2d 631, 653, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993); State v. Tharp, 96 Wash.2d 591, 593-94, 637 P.2d 961 (1981); State v. Bythrow, 114 Wash.2d 713, 719, 790 P.2d 154 (1990). Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wash.2d 772, 776, 725 P.2d 951 (1986). The second and third elements of the 404(b) analysis are essentially the same as the Goebel test

The trial court ruled that evidence of each Stalking charge was admissible in the other Stalking charge to show **intent and *modus operandi***. When the State offers evidence of prior acts to demonstrate

intent, there must be a logical theory, *other than propensity,* demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act "goes to intent" is not a magic password whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in its name." State v.Saltarelli, 98 Wash.2d 358, 364, 655 P.2d 697 (1982) (Citing United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir.1974)).

When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact-finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case. State v. Wade, 98 Wash.App. 328, 335, 989 P.2d 576 (1999).

Accordingly, Defendant submits that this Court should use caution in finding that the prior bad acts are ***necessary*** for the State to prove intent. Though there may be some similarity in the purported prior acts herein, an act is not evidential of another act: there must be an **intermediate step in the inference** process that does not turn on

propensity. Id. at 335 [My emphasis].

2. **Evidence of the Other Offence Necessary and Relevant**

When the mere doing of the act demonstrates criminal intent, evidence of other misconduct offered to prove general or specific intent is immaterial. State v. Smith, 103 Wash. 267, 268, 174 P. 9, 9 (1918) (where the act charged against the defendant itself characterizes the offense, the guilty intent is proven by proving the act). See also State v. Saltarelli, 98 Wn. 2d at 366, 655 P.2d at 701 (citing People v. Kelley, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967) (in some cases, if the act is proven, no real question as to intent arises, thus the intent principle has no necessary application); II J. WIGMORE, EVIDENCE § 357 (Chadbourn rev. 1979). Defendant submits that the offenses herein are not the kind that requires prior bad acts to prove intent; the jury can infer intent from the acts themselves.

Defendants who deny participation in the act do not raise the issue of intent, thereby exposing themselves to evidence of other misconduct. State v. Saltarelli, 98 Wash.2d 358, 363 (1982). Defendant did not testify, so obviously he could not have denied that he intended to follow or harass either Ms. Gudaz or Ms. Westfall. More importantly, Defendant's only witness, Elizabeth Nyblade testified that Defendant told her he had the

ability to form intent regarding *something that is defined as a crime on the 21st of December 2005*, RP page 403, and that Defendant was capable of making decisions about his behavior on the basis of his knowledge and intent. VRP page 418. Further, the trial court denied Defendant's request for the Diminished Capacity Jury Instruction regarding intent, RP page 458, which suggest that intent was not a salient issue for the jury.

By reason of the foregoing points and authorities, evidence of the one Stalking charges was neither necessary nor relevant to show intent for the other Stalking charge and vice versa. Accordingly, the evidence was not cross-admissible.

The trial court also ruled *sua sponte* that evidence of each Stalking charge was cross-admissible to show *modus operandi* in the other Stalking charge. Crimes or misconduct other than the acts charged may be admitted to prove scheme or plan of which the offense charged is a manifestation, State v.Lough, 125 Wash.2d 847, 853, 889 P.2d 487 (1995) (Citing 5 Karl B. Tegland, Wash.Prac., *Evidence* § § 114, 117, at 383, 404 (3d ed. 1989)) **when the very doing of the act charged is still to be proved**. Id (Citing 2 John H. Wigmore, *Evidence* § 304, at 249 (James H. Chadbourn rev. ed. 1979). (My emphasis.)

The fact that Defendant contacted Ms. Gudaz and/or Ms. Westfall was not a disputed fact. As previously emphasized, Defendant never

testified. More importantly, there was more than amble evidence from the complaining witnesses that Defendant had contact with them on the respective dates. Accordingly, *modus operandi* evidence was not necessary to prove Defendant committed the act of contacting the respective complaining witnesses. The salient question for the jury was: did those contacts constitute repeated following or harassment? Modus operandi evidence did little to assist the jury in determining that question.

3. **Probative Value Versus Prejudicial Effect**

Prejudice may result if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. State v. Smith, 74 Wash.2d 744, 754-55, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), overruled on other grounds, 85 Wash.2d 758, 539 P.2d 680 (1975); State v. Redd, 51 Wash.App. 597, 603, 754 P.2d 1041, review denied, 111 Wash.2d 1008 (1988). 96 Wash.2d 1009 (1981). Obviously, Defendant will be embarrassed by admission of the other offense and there is a strong possibility that the jury will be invited to cumulate evidence to find him guilty.

Severance is required if a defendant makes a convincing showing that he has important testimony to give concerning one count and

a strong need to refrain from testifying about another. State v. Weddel, 29 Wash. App. 461, 467, 629 P.2d 912, review denied, 96 Wash.2d 1009 (1981). Defendant submits that he has a strong need to testify in one matter and not the other because Defendant made verbal contact with the complaining witness in the Gudaz Incident, but did not do so with the Westfall Incident. Accordingly, though Defendant submits that neither incident amounted to a repeated following or harassment, Defendant had a more compelling reason to testify in the Gudaz Incident than in the Westfall Incident.

D. The Trial Court erred in admitting evidence of prior/subsequent bad acts

The points and authorities relied upon in the foregoing section regarding joinder are applicable and incorporated by reference in this section regarding the evidence of purported misconduct between Defendant and Ms. Page, Ms. Vonk, and Ms. Nelson.

The trial court ruled that said evidence was admissible for purposes of intent and *modus operandi*. As previously stated, these acts were not necessary to prove intent because: Defendant did not testify; Elizabeth Nyblade testified that Defendant told her he had the ability to form intent regarding *something that is defined as a crime on the 21st of December 2005*, RP page 403, and that Defendant was capable of making decisions

about his behavior on the basis of his knowledge and intent, RP page 418; and the trial court denied Defendant's request for the Diminished Capacity Jury Instruction regarding intent. RP page 458. These acts were also not admissible under the *modus operandi* exception to ER 404(b) exception because Defendant's contact with the respective victims was not disputed by Defendant, and there was ample other evidence regarding said contact provided through the complaining witnesses.

Further, the evidence of purported misconduct between Defendant and Ms. Page, Ms. Vonk, and Ms. Nelson was highly prejudicial and cumulative. The jury was invited to convict Defendant on the basis of these acts rather than on the merits of the respective charges. In short, said evidence, especially taking into account its cumulative effect on the jury, amounted to precisely the kind of evidenced prohibited under ER 404(b): propensity evidence.

E. The Trial Court erred in denying Appellant's motion for a mistrial due to prosecutorial misconduct

In deciding whether prosecutorial misconduct requires a new trial, the Court must determine whether the prosecutor's questions constituted misconduct and, if so, whether there is a substantial likelihood that the misconduct affected the jury verdict, thereby denying Defendant a fair trial. State v. Charlton, 90 Wash.2d 657, 663-64, 585 P.2d 142 (1978);

State v. Smith, 104 Wash.2d 497, 510, 707 P.2d 1306 (1985); State v. Mak, 105 Wash.2d 692, 701, 718 P.2d 407 (1986) cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), and habeas corpus granted in part, denied in part sub nom., Mak v. Blodgett, 754 F.Supp. 1490 (1991).

The Court determines the effect on the verdict by considering whether the testimony by the State's witnesses and by defense witnesses was believable or corroborated. State v. Padilla, 69 Wash.App. 295, 301, 846 P.2d 564 (1993). The Court will reverse if there is a substantial likelihood that the misconduct affected the jury verdict. State v. Suarez-Bravo, 72 Wash.App. 359, 366, 864 P.2d 426 (1994).

Defendant submits that when the Prosecutor asked Ms. Nyblade a question regarding if she knew that Defendant has been told very clearly in the past not to do what he did to these women, he was making a covert reference to Defendant's prior Luring Conviction, which the trial court had ruled inadmissible.

In State .v Coles, 28 Wash.App. 563, 625 P.2d 713 (1981), review denied 95 Wash.2d 1024 (1981), the Court stated that the prosecutor' inquiry into the details of the defendant's prior conviction constituted misconduct, but did not reach the issue,as to whether the misconduct rose to the level of reversible error because the conviction was already reversed on other grounds. State .v Coles, 28 Wash.App at 573-4, 625 P.2d 713

(1981). Defendant urges this Court to take guidance from Coles in determining whether the Prosecutor's aforementioned inquiry constituted misconduct.

In State v. Avendano-Lopez, 79 Wash.App. 706, 904 P.2d 324 (1995), review den'd 129 Wash.2d 1007, 917 P.2d 129 (1996), the Court held that the prosecutor's inquiry into the details of a prior drug conviction, the defendant had already admitted, constituted prosecutorial misconduct, but the inquiry was not prejudicial because it was unlikely that the inquiry affected the verdict. The defendant denied that he ever sold drugs, and therefore the overall effect of the inquiry was likely exculpatory; inference that the defendant was involved with drugs was cumulative since the defendant had already admitted a prior conviction for a drug offense; and there was substantial evidence of guilt. Avendano-Lopez, 79 Wash.App. at 717, 904 P.2d 324 (1995).

Defendant submits that Avendano is distinguishable from the matter herein because Defendant did not take the stand to explain the Prosecutor's covert allusion regarding his prior Luring conviction and more importantly the Court had already ruled twice that the Luring Conviction was highly prejudicial and is not admissible.

Defendant further submits that in considering the Prosecutor's cross-examination and recross of Ms. Nyblade in its totality, the Court

should find misconduct arising to reversible error. The Prosecutor's elicitation of testimony from Ms. Nyblade regarding *being told clearly in the past not to do this to women*; regarding if Ms. Nyblade was aware that Defendant had any problems in the past with regard to drug use; and repeated questions regarding whether Defendant's comment regarding self-gratification meant masturbation may not separately arise to reversible error, but viewed as a whole clearly constitutes conduct for which the trial court should have granted Defendant's motion for a new trial.

F. The Trial Court erred in imposing a sentence grossly disproportionate in light of Appellant's criminal history and the severity of the crimes

As previously stated, On August 9, 2006, Defendant was sentenced under cause number 06-1-00190-0 to serve 365 in the Whatcom County Jail with 90 days suspended; Defendant was sentenced under cause number 06-1-00324-4 to serve 365 in the Whatcom County Jail with 90 days suspended. The sentences were to be served consecutively. Judgment and Sentencing number 06-1-00190-0 and Judgment and Sentencing number 06-1-00324-4. Accordingly, Defendant was sentenced to 550 days in total under both cause numbers. Defendant's prior criminal convictions consisted of one Felony Luring Conviction in Skagit County Superior Court, Cause Number 02-1-00453-8, judgment entered on August 27, 2003. Defendant submits that his sentence was grossly disproportionate in

light of his prior criminal history, the severity of the crimes, and the facts of the crimes, and accordingly his sentence constitutes cruel punishment in violation of Article I, section 14 of the Washington Constitution. Defendant is sentenced to 550 days incarceration for two incidents each consisting of contact with a women over the course of 20 minutes. In neither case did the Defendant touch the complaining witness, and in one case there was not even words exchanged.

Article I, section 14 of the Washington Constitution prohibits cruel and unusual punishment and provides more protection than its federal counterpart. State v. Fain, 94 Wash.2d 387, 392, 617 P.2d 720 (1980). Article I, section 14 protects against sentences that are grossly disproportionate to the crime committed. State v. Morin, 100 Wash.App. 25, 29, 995 P.2d 113, review denied, 142 Wash.2d 1010, 16 P.3d 1264 (2000). "A punishment is grossly disproportionate if ... the punishment is clearly arbitrary and shocking to the sense of justice." State v. Smith, 93 Wash.2d 329, 344-45, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). To determine whether a sentence is grossly disproportionate, we consider the four Fain factors: (1) the nature of the crime, (2) the legislative purpose behind the sentence, (3) the sentence the defendant would receive for the same crime in other jurisdictions, and (4) the sentence the defendant would receive for other similar crimes in

Washington. State v. Morin, 100 Wash.App. at 29, 995 P.2d 113. These are merely factors to consider and no one factor is dispositive. State v. Gimarelli, 105 Wash.App. 370, 381-82, 20 P.3d 430, review denied, 144 Wash.2d 1014, 31 P.3d 1185 (2001).Under the first Fain factor, we consider whether the crime is a violent one and whether it is a crime against a person or property. State v. Morin, 100 Wash.App. at 30, 995 P.2d 113.

In considering the nature of the Stalking charges, Defendant urges this Court to consider that Gross Misdemeanor Stalking does not require proof of a violent act or even any touching. The harm inflicted by stalking is of an emotional or psychological nature, which is more nebulous and is generally not as offensive. Defendant submits that had he been convicted of two counts of Felony Second Degree Assault, for example, his standard range would have been six to twelve months for each count, which is approximates the sentenced he received for the two Gross Misdemeanor Stalking charges.

In considering the legislative purpose behind the sentence, Defendant urges this Court to consider that the crime of Stalking is a generally a misdemeanor unless the facts of the particular matter fall into one of six exceptions mandated by the legislature. Obviously, the legislative intent behind carving out six exceptions for Felony status under

the Stalking statute was to increase punishment for defendant's who have committed Stalking accordingly. Had Defendant been convicted of Felony Stalking his standard range would have been a twelve to 14 month sentence for each Stalking charge. Accordingly, Defendant submits that the punishment of 9 months for each count of Misdemeanor Stalking is not consistent with the legislative purpose behind the sentencing.

In considering the sentence Defendant would receive for other similar crimes in Washington Defendant urges this Court to consider that Gross Misdemeanor Stalking is similar to Gross Misdemeanor Harassment. Typically defendants with prior criminal history such as Defendant's will not receive nine month sentences for Gross Misdemeanor Harassment. Indeed, had Defendant been convicted of Felony Harassment, his standard range would have been three to eight months for each count.

By reason of the foregoing, Defendant submits that the punishment he received is clearly arbitrary and shocking to the sense of justice, and accordingly disproportional to the crimes committed.

G. The Trial Court erred in not granting Appellant's motion for a directed verdict on the bases of Cumulative Error

The application of the doctrine of Cumulative Error applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a

fair trial. State v. Coe, 101 Wash.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wash.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wash.App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wash.App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

Defendant submits that this Court could and should find reversible error on any one of the foregoing assignments of errors. However, if this Court declines to do so, this Court should hold that the cumulative effect of some or all of the foregoing assignments of error may have resulted in an unfair trial requiring reversal.

Defendant submits that this Court should be particularly concerned by the combination of joining the two Stalking matters; the admission of the acts regarding Ms. Page, Ms. Nelson, and Ms. Vonk; and then the

Prosecutor's covert elicitations of testimony regarding Defendants prior Luring Charge along with the inquiry regarding masturbation and problems with drug use. Each error bootstrapped on the others, having the cumulative effect of focusing the jury's attentions onto Defendant's character and away from the elements of the Stalking charges, in particular the element Defendant believes most salient: did the respective brief encounters with the complaining witnesses constitute "repeated" following or harassment?

VI. CONCLUSION

By reason of the foregoing points and authorities, Appellant respectively requests this Court to reverse one or both of the Stalking convictions herein. Alternatively, Appellant respectively requests this Court to remand one or both of the Stalking convictions herein with remedial instructions to the trial court addressing any or all of the foregoing assignments of errors.

Dated this 5th day of June 2007

Respectfully Submitted

Thomas Dunn; WSBA #35279
Attorney for Appellant

VII. APPENDIX

LRS 14:40.2, the Louisiana State Stalking Statute	XXX
RCW 9A.46.110, the Stalking Statute	XXX
RCW 10.14.020, the Harassment Statute	XXX

West's Louisiana Statutes Annotated Currentness
Louisiana Revised Statutes
Title 14. Criminal Law
Chapter 1. Criminal Code (Refs & Annos)
Part II. Offenses Against The Person
Subpart B. Assault and Battery (with Related Offenses) (Refs & Annos)

§ 40.2. Stalking

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) "Family member" includes:

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

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

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

(b) "Nonconsensual contact" includes:

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

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

(iii) Appearing at the residence of that child.

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

(v) Contacting that child by telephone.

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

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

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

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

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

F. The provisions of this Section shall not apply to a private investigator licensed pursuant to the provisions of Chapter 56 of Title 37 of the Louisiana Revised Statutes of 1950, acting during the course and scope of his employment and performing his duties relative to the conducting of an investigation.

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

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

9A.46.110. Stalking

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

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

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

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

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

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

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

(b) A person who stalks another is guilty of a class C felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.602, while stalking the person; (v) the stalker's victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, legislator, community correction's officer, or an employee of the child protective, child welfare, or adult protective services division within the department of social and health services, and the stalker

stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

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

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

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

INSTRUCTION NO. _____

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent.

WPIC 18.20
Diminished Capacity – Defense (Intent)