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

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2007 SEP 28 AM 11:14

IN THE APPELLATE COURT OF THE STATE OF WASHINGTON DIVISION 1

STATE OF WASHINGTON,

Respondent,

vs.

CLARENCE ANDREW KINTZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. RESPONDENT'S PURPORTED DEFINITION OF "SEPARATE OCCASION" IS NOT SUPPORTED BY AUTHORITY NOR IS IT OF ASSISTANCE TO THE COURT IN DETERMINING WHETHER THE CONTACT BETWEEN DEFENDANT AND THE RESPECTIVE VICTIMS CONSTITUES TWO OR MORE SEPARATE OCCASIONS

Respondent avers that "separate occasion means discrete contact, divided by time or physical space," [Respondent's Brief, page 19] but cites no authority for said averment. Indeed, Respondent concedes that no reported decision in Washington discusses the meaning of "separate occasion." Instead, Respondent cites to Washington cases dealing with different challenges to the Stalking Statute as support for Respondent's purported definition of "separate occasion." A cursory review of said cases reveals that said cases do not support Respondent's definition of "separate occasion:"

State v. Lee, 135 Wash.2d 369, 957 P.2d 741(1998) consolidated two cases: State v. Brian Edward Yates and State v. Olsen Henry Lee. The case of Brian Edward Yates involved **numerous** unwanted contacts with his former girlfriend over the course of months, from

September 1992 though April 1993. Petitioner Yates challenged the Stalking Statute as overboard.

The case of Olsen Henry Lee involved unwanted contact with the victim from September 1, 1993 to October 30, 1993. Petitioner Lee went to the victim's place of employment **almost every other day** and stared at the victim for hours. The victim warned Lee not to contact her but he continued to do so. Lee challenged the Stalking as overbroad and argued that there were insufficient facts to prove that he followed the victim because he was merely sitting in a public place.

Appellant Kintz submits that Lee does not support the State's definition of "separate occasion." The Lee Court was not asked to interpreted "separate occasion" in the context of the Stalking Statute, nor was the issue even remotely addressed.

The issue before the Court in State v. Askham, 120 Wash. App.872, 86 P.3d 1224 (2004) was whether there was sufficient evidence to prove that Askham was the person who sent e-mails to the victim therein. The Court found compelling evidence that someone had used Mr. Askham's home, identity, and computer to wage an electronic campaign to destroy the victim. The court found no evidence supporting the existence of a third party with a motive or opportunity to do this. Askham, 120 Wash at 877 (2004). The Askham

Court was not asked to interpreted "separate occasion" in the context of the Stalking Statute, nor was the issue even remotely addressed.

In State v. Ainslie, 103 Wash.App. 1, 11 P.3d 318 (2000), this Court denied a sufficiency challenge because the defendant **regularly** parked in front of the mailboxes near the victim's house during times when the victim was in the neighborhood, he got out of his car just as the victim was walking toward him, and he was seen in the victim's yard. Ainslie, 103 Wash.App. at 7 (2000) [my emphasis]. The Ainsle Court was not asked to interpreted "separate occasion" in the context of the Stalking Statute, nor was the issue even remotely addressed.

The State further apparently argues that the length of contact between a defendant and victim is immaterial in deciding whether there were separate occasions because a statutory distinction already exists obviating the question: "the length and severity of contact in violation of the court orders distinguishes felony stalking from its misdemeanor counterpart. RCW 9A.46.110(5)(b)" [Respondent's Brief, page 20] RCW 9A.46.110(5)(b) states the following:

> 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, or community correction's officer, 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.

RCW 9A.46.110(5)(b) sets forth six aggravated circumstances that elevate Stalking from a misdemeanor to a felony. None of them elevate Stalking by reason of the length of contact between the victim and defendant.

In summary, none of the aforementioned authorities support the State's definition of "separate occasion," nor are they of assistance to the Court in deciding the salient question propounded by Defendant Kintz, to wit, *as a matter of law, does the contact between Defendant and the respective victims lasting approximately 20 minutes constitute two separate occasions such that a convictions under the Stalking Statute can be sustained?*

As previously argued in Defendant's Opening Brief, the definition

of "repeated" as applied to Defendant is at best ambiguous and must be construed in his favor pursuant to the Rule of Lenity. 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)).

It is further submitted that even if the Court were to accept the State's definition of "separate occasion:" discrete contact, divided by time or physical space, the Court would still be left with the same query: **how much time and physical space** constitutes a discrete contact?

B. STATE V. RICO PROVIDES THIS COURT ASSISTANCE IN DETERMINING WHETHER THERE WAS "REPEATED" CONTACT BETWEEN DEFENDANT AND THE RESPECTIVE VICTIMS

The State advances two arguments as to why State v. Rico, 741 So.2d 774 (1999) does not require a different result with respect to the State's purported definition of "separate occasion:" 1) Washington has a statutory definition of "repeatedly," and Louisiana has a judicially determined definition of "repeatedly;" and 2) Rico can be factually distinguished. [Respondent's Brief, page 23-4]

Defendant Kintz submits that the State's first argument is without merit because it asks the Court to consider a distinction without significance. Whether it is the Court or Legislature that defines "repeatedly" is not a significant distinction and has no moment herein. The Louisiana Court defined "repeatedly" as "renewed or recurring again and again." It is submitted that Louisiana's definition is substantially similar to Washington's: a "separate occasion." Indeed, the Louisiana definition is more favorable to the State because it is possible for an event to "recur or be renewed" within a "separate occasion." Yet the Rico Court found that an event occurring over the period of only several minutes did not constitute repeated contact even under Louisiana's more relaxed definition.

The States second argument is also without merit. The State avers that Rico is distinguishable because Rico *involved a continuous car chase between the defendant and his victim...in contrast defendant Kintz did not follow Ms. Gudaz or Ms. Westfall continuously, breaking off contact and then returning* [Respondent's Brief, page 24] It is submitted that the State's reading of the facts in Rico is inaccurate. Contact there between the defendant and victim in Rico was also broken off:

> 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...
>
> 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.

Rico, 741 So.2d at 775-6 (1999).

In attempting to distinguish Rico on the bases that Rico involved a continuing car chase, the State apparently concedes that the salient inquiry is: did the contact between defendant and victim possess sufficient continuity such that the contact constitutes a separate occasion? Defendant submits that the contact between Defendant and the respective victims herein possessed as much continuity as the contact between the defendant and the victim in Rico.

C. THERE WAS INSUFFICIENT EVIDENCE IDENTIFYING DEFNDANT AS THE PERSON FOLLOWING MS. WESTFALL

The State argues that, notwithstanding that Ms. Westfall was unable to identify Defendant as the person following her, there was enough circumstantial evidence to so identify him. [Respondent's Brief, pages 26-24] Yet as previously argued in Defendant's Opening Brief, such circumstantial evidence is akin to the evidence offered by the State in United States v. Musquiz, 445 F.2d 963, 965 (5th Cir.1971) and United States v. Johnson, 427 F.2d 957, 961 (5th Cir.1970). In both those cases, the defendant was not positively identified and circumstantial evidence was not enough to overcome such lack of identifying evidence. Defendant submits that this Court should accordingly reach that same result.

The State further argues that the fact that Defendant did not deny contacting Ms. Westfall when question by law enforcement officers is proof of identification. [Respondent's Brief, page 26] Defendant submits that this argument reverses the burden of proof. It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. State v. Hill, 83 Wash.2d 558, 560, 520 P.2d 618 (1974).

D. THE TRIAL COURT ERRED IN COLSOLIDATING THE TWO CASES AND IN ADMITTING EVIDENCE OF OTHER ACTS

The State relies on State v. Foxhoven, 163 P.3d 786 (2007) in support of its position that the evidence of the two cases is cross-admissible under the 404(b) exceptions of intent and common scheme or plan (mislabeled "modus operandi" by the Trial Court) and that the other evidence of contact between Defendant and Brigid Vonk, Nancy Nelson, and Elizabeth Page was properly admitted [Respondent's Brief, page 30].

But existence of a common scheme or plan, for ER 404(b) purposes, is relevant **only** to the extent that it shows the charged crime happened. Foxhoven, 163 P.3d at 791 (2007)(Citing State v. Lough, 125 Wash.2d 847, 861-62, 889 P.2d 487(1995)) [my emphasis]. If there is no dispute that the crime occurred or that the defendant possessed the requisite intent, it is an abuse of discretion to admit such evidence. Id at 791.

Defendant never disputed contacting the respective victims, and as previously stated in his opening brief: 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.

Rather, the gravemen of Defendant's defense is that he did not repeatedly contact the respective victims.

By reason of the foregoing, evidence of the two cases is not relevant, and, accordingly not cross-admissible. Further, such evidence is highly prejudicial. Therefore, after conducting ER 403 balancing, the Trial Court should have denied the State's motion to consolidate the two matters. Even if the evidence is relevant, its probative value must be shown to outweigh its potential for prejudice before cases may be joined. 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))

Under the same analysis, collateral evidence of contact between Defendant and Brigid Vonk, Nancy Nelson, and Elizabeth Page should not have been admitted.

The State argues that because Defendant submits the element of

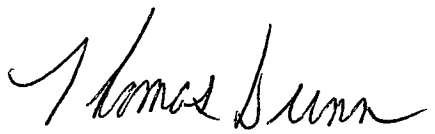
intent is not in dispute, Defendant undermines his assignment of error regarding the State's failure to produce sufficient evidence regarding identity of Defendant in Ms. Westfall's matter in the State's case-in-chief. [Respondent's Brief, page 34] This argument is misplaced. In order to survive a motion for judgment of acquittal after the State rests, the State must produced enough evidence to prove every element of the crime. As previously stated, the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. State v. Hill, 83 Wash.2d 558, 560, 520 P.2d 618 (1974). Merely because Defendant demurs to the issues of intent and whether Defendant contacted the respective victims does not relieve the State from proving the identity of Defendant.

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. Alternatively, Appellant respectfully requests this Court to order some combination of the foregoing requests.

Dated: this 25th day of September 2007

Respectfully Submitted By:



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, **Plaintiff,** **vs.** **CLARENCE ANDREW KINTZ,** **Defendant**	**WCSC Cause No. 06-1-00190-0** **Appellant Cause No.: 58717-0-1** **Linked with:** **WCSC Cause No: 06-1-00324-4** **Appellant Cause No.: 60082-6-1** **DECLARATION OF MAILING**

Jane Parsons, Legal Assistant, hereby declares as follows:

That on the 26th day of September 2007, I enclosed in an envelope the following material(s):

Appellant's Reply Brief

Addressed to the following person (s):

Court of Appeals of the State of Washington
Seattle - Division 1
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And on said day I have the same deposited, first class mail with postage thereon prepaid, in the United States Post Office in Bellingham, Washington.

Dated this 26th day of September, 2007, at Bellingham, Washington.

Jane Parsons, Legal Assistant
Law offices of Michael K. Tasker

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