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COURT OF APPEALS
DIVISION ONE

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NO. 65566-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,

Respondent,

v.

AKBAR MEAH,

Petitioner/Appellant.

APPELLANT'S REPLY BRIEF

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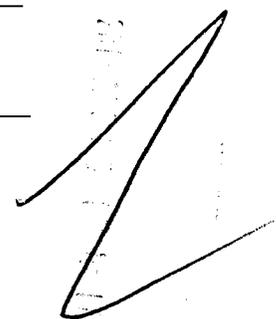


TABLE OF CONTENTS

I. Meah’s conduct constituted a single, continuous incident with no identifiable interruption in his contact with or visual or physical proximity to Galbreath. 1

II. Merely being rebuffed does not create separate occasions absent a break in contact..... 3

III. Sufficiency of the evidence may be raised on appeal after review is granted because it is a manifest error affecting constitutional right.....5

IV. Ballard’s speculation, absent Galbreath’s testimony that she was subjectively fearful, is not sufficient evidence to support the stalking conviction.....6

TABLE OF AUTHORITIES

CASES

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 5

State v. Colquitt, 133 Wn. App. 789, 137 P.3d 892 (2006) 6-7

State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1999) 6

State v. Kintz, 114 Wn. App. 515, 191 P.3d 62 (2008).....1

State v. Kintz, 169 Wn.2d 537, 238 P.3d 470 (2010).1-4, 6

State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006) 6

STATUTES, ORDINANCES, COURT RULES, ETC.

RAP 2.5 5

RAP 13.7 6

RALJ 9.15

RCW 9A.46.1101

SMC 12A.06.035 1, 5

I. Meah’s conduct constituted a single, continuous incident with no identifiable interruption in his contact with or visual or physical proximity to Galbreath.

The gravamen of the City’s argument is, “Defendant is suggesting that this court interpret the statute to require a break in physical proximity or visual contact.” Brief of Respondent at 8. But the legislature, this court, and the Washington Supreme Court have already done so. “Follows” is expressly defined as “deliberately maintaining visual or physical proximity to a specific person over a period of time.” SMC 12A.06.035(E)(2); RCW 9A.46.110(6)(b). In *Kintz*, this court affirmed the trial court ruling that the “separate occasions” element in the stalking statutes requires time and space between incidents. State v. Kintz, 114 Wn. App. 515, 522, 191 P.3d 62 (2008) (“There’s time, space between those incidents, not a lot, obviously but time, space.... They’re separated both physically by sight and over time, and he comes back and makes contact again.”) Washington Supreme Court affirmed this ruling, finding each episode was “separated by a break in Kintz’s contact with this target.” State v. Kintz, 169 Wn.2d 537, 556, 238 P.3d 470 (2010).

In *Kintz*, a “break” only occurred when the defendant physically and visually left his targets. Kintz, 169 Wn.2d at 546. With Westfall, each episode began when Kintz significantly interrupted her. Id. at 555 (“four

distinct episodes, each separated by significant interruption of Kintz's contact with Westfall.") Each episode only ended when Kintz physically and visually exited the area: in the first, "Westfall walked down the trail," the second, "Kintz drove out of Westfall's view," and the third, "Kintz again drove away." Similarly, the court separates Kintz's contact with Gudaz based on whenever he broke physical proximity and visual contact by driving away. *Id.* at 556-557, 543 ("These four episodes are again separated by a break in Kintz's contact with his target": the first ended "at the point Kintz drove away," the second, "when Kintz again drove away," the third, "Kintz finally drove away," and the fourth when "the van drove by.")

In contrast, Meah was in visual and physical proximity to Galbreath throughout the incident. Meah began to engage Galbreath when she arrived on the bus. CP, 190. When Galbreath exited at her stop at 80th Street, there was not a break in proximity, rather she said "he followed me. He got off the bus too." CP, 190. From 80th to 82nd, Galbreath was continuously aware of Meah's presence. CP 193 ("he just kept hanging around. He kept saying 'I want to know you.' I said, well I don't want to know you.' And I'd keep waving him away.") When Ballard arrived, Galbreath stated that Meah was still close by, "he stood on the corner, right where we were, waiting around and loitering." CP 195. Galbreath

concludes the incident by testifying that she “finally got rid of him because this car [Ballard] was sitting there parked.” CP 194.

In addition, there was no break in time or space existed between Meah and Galbreath from the bus to the street. Meah stepped off the bus behind Galbreath and continued trying to engage her in conversation over the short course of two blocks. Up until Ballard’s arrival, she was continuously aware of Meah’s presence. CP 194. When asked on direct about his “persistence,” Galbreath response that “he just wouldn’t give up... he was just trying to talk to me.” CP 191.

II. Merely being rebuffed does not create separate occasions absent a break in contact.

The City argues that “each time the Defendant was rebuffed by Galbreath... can be delineated as a separated occurrence.” Brief of Respondent at 7. However, Galbreath’s actions did not create a break in contact with Meah. The court addressed this issue in Kintz when analyzing nearly identical conduct as one distinct, continuous, occasion. 169 Wn.2d 537. In Kintz, the majority separated Kintz’s acts based on “one crucial respect: they are divided one from the other by periods of time in which Kintz was out of contact with his victims.” Id. at 481. In Kintz’s third interaction with Gudaz, she repeatedly expressed her disinterest in speaking with Kintz, and was followed by Kintz when she

ran away. Id. at 557. The court did not find any breaks in time or space in the third episode.

The driver [Kintz] said, “Do you need a ride?” Gudaz answered “No.” The driver then asked, “You don’t need money?” Gudaz responded by pointing up the road saying, “No. Maybe your road is up there.” She then started running again. The van continued traveling in the same direction as Gudaz until it *left her sight*. Id. at 542. (Emphasis added)

The court in Kintz did not find a break each time Gudaz said “no” or when she ran away. Rather, the third episode only ended when Kintz broke physical proximity and visual contact by driving away. Id. at 557.

Similarly, Galbreath rebuffing Meah did not create a break in time or space. Galbreath saying “I don’t want to know you,” and waving Meah away, is analogous to Gudaz telling Kintz “No.” CP 193. Like the defendant in *Kintz*, Meah continued to engage the complainant so this court will analyze the event as a whole. When Galbreath walked off the bus, onto the street, and down two blocks, her actions did not create a break in time or space because Meah followed her. CP 193 (When asked on direct “did he ever get out of your way or go away,” Galbreath affirmatively answered “No, he just kept hanging around”). This is a single incident of following as defined by the ordinance. Much like Galbreath’s attempts to rebuff Meah, Gudaz’s act of running away from

Kintz did not constitute a “separate occasion” because Kintz followed her. Thus, Kintz does not support the City’s theory that merely rebuffing another’s presence will not create a separate occasion absent any break in contact. Rather, Kintz settles this question in Meah’s favor.

III. Sufficiency of the evidence may be raised on appeal after review is granted because it is a manifest error affecting constitutional right.

A party may raise a “manifest error affecting a constitutional right” for the first time in the appellate court pursuant to RAP 2.5(a). “Sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal” because due process requires the State (or City) to prove its case beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Therefore, whether the evidence is sufficient to establish that Galbreath subjectively feared that Meah intended to injure her, another person, or property, was properly raised at this stage of the litigation. SMC 12A.06.035(A)(2)(“The person being harassed or followed is place in fear that the stalker intends to injure that person, another person, or property of the person or of another person”).

The Court of Appeals reviews municipal decisions in the same manner as superior court: whether the factual findings and legal rulings are supported with substantial evidence and comport with the law. RALJ 9.1;

State v. Ford, 110 Wn.2d 827, 829, 755 P.2d 806 (1999). The court decides which issue(s) it will address. RAP 2.3(e). The Court granted discretionary review of this case based on sufficiency of the evidence in light of Kintz, which evaluated whether the complainant experienced fear. Kintz, 169 Wn.2d at 560-561. Therefore, Galbreath's fear was properly raised on appeal.

The City incorrectly applies State v. Leyda, which cites RAP 13.7(b) governing Petitions for Review in the Washington Supreme Court, a different appellate proceeding. Brief of Respondent at 10; State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006). The appropriate rule for review is RAP 2.5, which is not as restrictive as RAP 13.7. RAP 2.5 permits issues to be raised for the first time on appeal that were not expressly excluded by the court. Because a sufficiency of the evidence claim was not excluded from this case, Meah can still raise this issue now.

IV. Ballard's speculation, absent Galbreath's testimony that she was subjectively fearful, is not sufficient evidence to support the stalking conviction.

Sufficiency of the evidence is not met by speculative testimony. A challenge of sufficiency of the evidence is by definition fact sensitive. State v. Colquitt, 133 Wn. App. 789, 802, 137 P.3d 892 (2006). "The existence of a fact cannot rest upon guess, speculation or conjecture." Id.

at 796. In Colquitt, the State failed to prove that white rock-like items were cocaine when the evidence “only demonstrate[d] that the officer’s visual identification of the items [were] based on his conjecture.” Id. A conviction based an opinion alone without “significant, sufficient corroborating evidence, must be reversed and the matter remanded to vacate judgment.” Id. at 802.

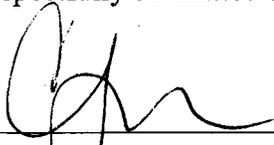
Galbreath never testified that she felt fearful in her interaction with Meah. The only testimony that used the word “fear” was Ballard’s speculation that Galbreath’s facial expressions conveyed fear and distress. CP 189. Like in Colquitt, Ballard’s speculative opinion did not prove the factual element of subjective fear because his fact was not corroborated by Galbreath’s testimony. Rather, Galbreath testified that she thought Meah was just wanted to “pick her up.” CP 202. Furthermore, the facial expressions that Ballard interpreted are consistent with Galbreath’s testimony that she felt “annoyance” and was “nervous.” CP 196.

Galbreath’s descriptions throughout the incident do not corroborate Ballard’s speculation. On the bus, Galbreath stated that she “was just annoyed and wanted him to leave her alone.” CP 189. Then, with full knowledge that she could ask for help at the next stop, Galbreath chose to exit the bus anyways. CP 190. Even when Ballard exited, Galbreath did

not express fear that Meah would harm her person or property. Although Galbreath claims she felt “really scared” when Meah was standing close to her on the street, she also testified that she did not want the police to come. CP 191, 196. Galbreath explained that “I didn’t want to bother them [the police]... all I wanted to do was [to] get rid of him” because he made her feel “nervous.” CP 196.

The City’s speculative testimony fails to meet the sufficiency of the evidence requirement. Galbreath’s comments that she was “nervous,” “annoyed,” and that she believed Meah was just trying to “pick her up,” do not corroborate Ballard’s speculation. Therefore, because the City relies on uncorroborated speculative testimony to prove an essential element of the crime, the Court should reverse and remand the trial court decision.

Respectfully submitted this 26th day of April, 2011,



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