

65566-3

65566-3

NO. 65566-3-I

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

CITY OF SEATTLE,

Respondent,

v.

AKBAR MEAH,

Appellant.

BRIEF OF APPELLANT

KRISTEN V. MURRAY
WSBA No. 36008
Attorney for Appellant

The Defender Association
810 Third Avenue, Suite 800
Seattle, WA 98104
(206) 447-3900, ext. 720
kristen.murray@defender.org

TABLE OF CONTENTS

I. INTRODUCTION	4
II. ASSIGNMENT OF ERROR	5
III. ISSUE PRESENTED.....	5
IV. STATEMENT OF THE CASE.....	6
V. ARGUMENT.....	10
VI. CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES

<i>Burks v. United States</i> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).....	11
<i>Hudson v. Louisiana</i> , 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).....	10
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781 (1979).....	10
<i>State v. Anderson</i> , 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).....	10
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	10
<i>State v. Hickman</i> , 135 Wn.2d 97, 103, 954 P.2d 900 (1998).....	10
<i>State v. Kintz</i> , 169 Wn.2d 537, 238 P.3d 470 (2010)	4, 5, 11, 12
<i>State v. Kintz</i> , 144 Wn.App. 515, 191 P.3d 62 (2008).....	4, 5, 11, 12

STATUTES AND OTHER AUTHORITIES

SMC 12A.06.010.....	6
SMC 12A.06.020.....	6
SMC 12A.06.035	6, 11
RCW 9A.46.110	11

I. INTRODUCTION

The superior court's ruling that sufficient evidence supports Meah's conviction directly conflicts with this Court's decision in *State v. Kintz*, 144 Wn.App. 515, 191 P.3d 62 (2008) and the Washington Supreme Court's ruling in *State v. Kintz*, 169 Wn.2d 537, 238 P.3d 470 (2010). In this case, Meah was convicted of one count of stalking violation of SMC 12A.06.035. In order to prove that Meah was guilty of the crime of stalking, the prosecution was required to prove beyond a reasonable doubt that he repeatedly harassed or followed the complainant, Ms. Galbreath.

The superior court affirmed the conviction and rejected Meah's contention that insufficient evidence was presented to support a finding that he repeatedly harassed or repeatedly followed the complainant. Because the evidence at trial established that the contact between Meah and Ms. Galbreath was one ongoing, continuous encounter that cannot be separable into at least two separate occasions of following or harassment, insufficient evidence exists to sustain his conviction. Additionally, the prosecution failed to present any evidence that the complainant subjectively feared Meah intended to injure her person or property. Because insufficient evidence was presented to prove Meah committed the

crime of stalking, it is respectfully requested that this court reverse his conviction and dismiss with prejudice.

II. ASSIGNMENT OF ERROR

The superior court erred in finding sufficient evidence existed to sustain Meah's conviction for stalking. Additionally, the superior court's affirmance of Meah's conviction for stalking conflicts with this Court's decision in *State v. Kintz*, 144 Wn.App. 515, 191 P.3d 62 (2008) and the Washington Supreme Court's decision in *State v. Kintz*, 169 Wn.2d 537, 238 P.3d 470 (2010) because the evidence presented at trial failed to establish two or more distinct, individual, noncontinuous occurrences of following or harassment.

III. ISSUE PRESENTED

Did sufficient evidence support Meah's conviction for stalking? Was there sufficient evidence that Meah repeatedly harassed or followed the complaining witness? Is the incident somehow separable into two or more "separate occasions"? Was there sufficient evidence that the complainant was placed in fear that Meah intended to injure her person, another person, or property?

IV. STATEMENT OF THE CASE

Meah was charged in Seattle Municipal Court Case No. 534957 with one count of attempted assault contrary to SMC 12A.06.010 and 12A.06.020 and one count of stalking contrary to SMC 12A.06.035, alleged to have occurred on March 6, 2009. CP 71. The case was tried to a jury. Meah was convicted of stalking but acquitted of attempted assault. CP 9.

During the prosecution's case-in-chief, the City called two witnesses. Collin Ballard testified as the first witness. CP 130. Mr. Ballard testified that on March 6th, 2009, at approximately 11:30 p.m., he was driving on Aurora Avenue when he saw an elderly woman – the complaining witness, Vera Galbreath – crossing the street. CP 131. Ms. Galbreath, who appeared to be in her late eighties, was walking with her head down and pulling a rolling cart behind her. CP 132. Mr. Ballard thought Ms. Galbreath looked distressed and noticed Meah following her. *Id.* According to Mr. Ballard, Meah was trying to talk with her, at first walking behind her but then moving in front of her. *Id.* According to Mr. Ballard, Ms. Galbreath looked frightened and appeared to be trying to walk away from Mr. Meah, shaking her head and making a shooping motion with her hand. CP 134-35. Over defense objection, Mr. Ballard testified that “it was obvious” that she was trying to avoid Mr. Meah. CP

135-36. After following the two for approximately two blocks, Mr. Ballard pulled over and offered Ms. Galbreath a ride, which she did not accept. CP 137-38; 169. At that point, Meah walked approximately ten feet away and stood on the corner. CP 169-70.

Mr. Ballard contacted 9-1-1. CP 171. When the operator asked whether Ms. Galbreath wanted dispatch to send an officer, she stated that she did not want to bother them. CP 172. The operator nevertheless contacted an officer who arrived approximately three minutes later. *Id.* During this time, Meah walked to a nearby hotel parking lot. On cross-examination, Mr. Ballard acknowledged that while he could see the interaction between Meah and Ms. Galbreath, he could not hear what either of them said. CP 181.

The prosecution next called the complaining witness, Vera Galbreath. CP 183. Ms. Galbreath testified that she was 87-years old. CP 184. On March 6th, 2008, at approximately 11:30 p.m., she took the number 358 bus from the grocery store to her home. *Id.* Ms. Galbreath sat directly behind the driver and put her grocery cart on the seat next to her. After she sat down, Meah asked whether he could sit next to her, to which she responded “no”. CP 187. When Meah continued to try and talk to her, Ms. Galbreath closed her eyes in an effort to ignore him. *Id.* Ms. Galbreath described Meah as “mumbling” but stated that she did not pay

attention to him. CP 188. Meah did not talk to Ms. Galbreath while her eyes were closed, but would try to engage her again when she opened her eyes and looked in his direction. CP 189. Ms. Galbreath testified that Meah then “slapped” her on the leg, trying to get her attention. *Id.* Ms. Galbreath felt “annoyed,” simply wanting him to leave her alone. *Id.* Worried about Meah’s persistence, Ms. Galbreath contemplated getting off the bus at 85th street where there were more people and stores but ultimately decided to get off at her usual stop. CP 190. Meah followed her off the bus and continued to try and talk with her. CP 190-91. Ms. Galbreath didn’t know what he was saying, but described him as coming within seven-to-eight inches of her while she was waiting at the crosswalk. CP 191. Ms. Galbreath testified that she felt nervous and began to make shooing motions towards Meah to get him to go away. CP 192-93. Mr. Meah continued to follow her for two blocks, walking both behind and in front of her, stating “I want to get to know you.” CP 193. Ms. Galbreath responded “[w]ell, I don’t want to know you,” and continued to wave him away. *Id.* Ms. Galbreath testified that a car was waiting for them at 82nd street. When the driver got out, Ms. Galbreath became nervous because he was a man, although he seemed to want to help her. CP 194. The driver, Mr. Ballard, called the police while Meah stood on a nearby corner. CP 195. Ms. Galbreath testified that she did not want the police to come;

she just wanted to get rid of Meah. CP 196. Ms. Galbreath testified that, while on the bus, she “wasn’t quite nervous and worried,” but that once he began to follow her on the street she became increasingly “nervous.” *Id.*

On cross-examination, Ms. Galbreath testified that Meah was already on the bus when she boarded. CP 198. At no point did she ask the driver or anyone else for help. *Id.* Ms. Galbreath acknowledged that Meah never threatened her and guessed that he just wanted to “pick her up.” CP 202.

The prosecution rested at the conclusion of Ms. Galbreath’s testimony. CP 203. The defense then moved to dismiss the stalking charge due to insufficiency of the evidence. *Id.* Defense counsel argued that the SMC definition of “stalking” required an individual to “repeatedly” harass or follow another, and, in this case, the prosecution failed to establish two or more separate incidents. CP 204. The prosecution responded that the witness testimony established that Meah “continually followed Ms. Galbreath over the course of two city blocks,” and that a separate incident occurred each time Meah made an unwanted overture towards Ms. Galbreath. CP 204-205. Defense counsel responded that the evidence established a continuous course of conduct with no definite point in which the conduct ended and recommenced. *Id.* The court denied the motion, ruling that “without a definition that clearly states

that a separate occasion is a separate date this is an issue that would get to the jury.” CP 206.

Meah appealed his stalking conviction to King County Superior Court. CP 10. On May 24, 2010, the superior court affirmed Meah’s conviction. CP 326-328. A Notice of Discretionary Review was filed on June 15, 2010. CP 329. Review was granted on October 27, 2010.

V. ARGUMENT AND AUTHORITIES

Insufficient evidence was presented at trial to prove that Meah *repeatedly* followed or harassed the complaining witness, Ms. Galbreath. When reviewing a challenge to the sufficiency of evidence, the relevant test is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979)). If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). An accused whose conviction had been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30

(1981); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

In order to commit the crime of stalking, a person must repeatedly harass or follow another person. SMC 12A.06.035 (A)(1)¹. “Repeatedly” is defined as “on two (2) or more separate occasions”. SMC 12A.06.035 (E)(3). This Court analyzed what is meant by “separate occasions” in *State v. Kintz*, 144 Wn.App. 515, 191 P.3d 62 (2008)².

Webster’s Third New International Dictionary 1560 and 2069-70 (1969) defines “occasion” as “a particular occurrence: happening, incident.” “Separate” is defined as “set or kept apart,” “not shared with another: individual, single,” autonomous, independent, distinct and different. Based on these definitions, a “separate occasion” is a distinct, individual, non-continuous occurrence or incident.

¹ SMC 12A.06.035 provides in relevant part:

- A. A person is guilty of stalking when, without lawful authority:
1. He or she intentionally and repeatedly harasses or follows another person; and
 2. the person being harassed or followed is placed in fear that the stalked intends to injure that person, another person, or property of the person or of another person; and
 3. A reasonable person in the same situation and under the same circumstances as the person being harassed or followed would feel fear that the stalked intends to injure the person, another person, or property of that person or of another person; and
 4. the stalker either:
 - a. Intends to intimidate, harass or frighten the person, or
 - b. Knows or reasonably should know that the person is intimidated, harassed or afraid.

² In *Kintz*, this Court analyzed RCW 9A.46.110. Meah was charged with stalking under the Seattle Municipal Code (SMC 12A.06.035). Under both statutes, a person is guilty of stalking when, without lawful authority, the person intentionally and repeatedly harasses or follows another person. SMC 12A.06.035(A)(1); RCW 9A.46.110(1)(a). Both statutes define repeatedly as two or more separate occasions. RCW 9A.46.110(6)(e); SMC 12A.06.035(E)(3).

Id. at 522. In finding separate occasions of harassment or following, this Court focused on the breaks in contact between Kintz and his victims, both in time and distance. *Id.* at 523. The Washington Supreme Court affirmed this Court’s interpretation of the term “separate occasions” in *State v. Kintz*, 169 Wn.2d 537, 238 P.3d 470 (2010).

[A] stalking conviction requires evidence of ***two or more distinct, individual, noncontinuous occurrences of following or harassment***, and no minimum amount of time must elapse between the occurrences, ***provided they are somehow separable***.

State v. Kintz, 169 Wn.2d at 552. “[S]talking requires two separate acts of harassment or two separate acts of following.” *Id.* at 554-55.

While a lapse in time between occasions of harassment or following is not required in order to constitute “separate occasions”, there must be an identifiable point at which the harassment or following ends and recommences in order to separate an incident into “separate occasions”. “. . . it is *repetition*, not duration, that the legislature has made the sine qua non of stalking.” *Id.* at 559-60 (Emphasis in original).

Here, there was no evidence of any break in Meah’s encounter with the complaining witness – in time, distance or otherwise. During the incident, Meah *continuously* maintained both physical and visual proximity with the complaining witness. The incident began when he attempted to speak with Ms. Galbreath on the bus and ended when Collin

Ballard intervened. The contact between Meah and Ms. Galbreath was *one ongoing, continuous encounter*. Even considering the evidence in the light most favorable to the prosecution, no reasonable juror could have found Meah's conduct constituted two separate occasions of following or harassment. Because there was no evidence that Meah *repeatedly* followed or harassed Ms. Galbreath, his conduct did not constitute the crime of stalking.

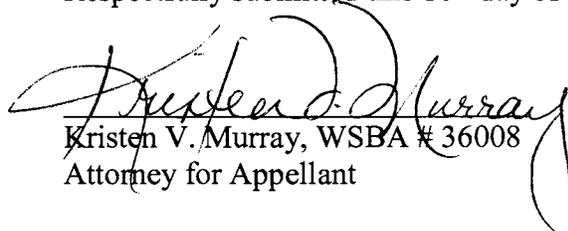
Further, insufficient evidence was presented to establish that the complainant subjectively feared that Meah intended to injure her, another person or property – a required element of the offense³. While Ms. Galbreath testified that she felt “annoyed” and “nervous”, there was no evidence presented that she feared Meah would cause her bodily injury or damage her property. CP 189, 196. To the contrary, she testified that she just wanted him to go away. CP 189, 196. During cross-examination, Ms. Galbreath acknowledged that Meah never threatened her and speculated that he just wanted to “pick her up”. CP 202. Because the prosecution failed to present any evidence that Ms. Galbreath actually feared Meah intended to injure her or cause damage to her property, there was insufficient evidence to support his conviction for stalking.

³ SMC 12A.06.035(A)(2) requires that “[t]he person being harassed or followed is placed in fear that the stalker intends to injure that person, another person, or property of the person or of another person[.]”

VI. CONCLUSION

The prosecution failed to present sufficient evidence to sustain Meah's conviction for stalking. For these reasons, the conviction should be reversed and dismissed with prejudice.

Respectfully submitted this 10th day of January, 2011.


Kristen V. Murray, WSBA # 36008
Attorney for Appellant