

FILED  
June 29, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 72140-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DEREK WHITTAKER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Dean S. Lum, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. INSUFFICIENT EVIDENCE SUPPORTS THE FELONY STALKING CONVICTION.

In his opening brief, Whittaker argues there is insufficient evidence to support the stalking conviction because the State failed to prove he repeatedly followed Spalding. Br. of Appellant, 7-16. One of the alleged following incidents occurred when Whittaker called Spalding sometime between December 18 and January 3 to tell her he knew where her new salon was and it looked good. 3RP 95, 166. But Spalding testified she was not present at the salon between December 10 and January 3. 3RP 97-98. It is factually impossible, then, that Whittaker was in visual or physical proximity to Spalding during that time.

In response, the State argues although Spalding “claimed that she was not in the shop in late December, she also repeatedly emphasized that she was bad with dates.” Br. of Resp’t, 11. The State therefore asserts the “only reasonable inference for the jury to make was that Whittaker established visual contact with Spalding at her salon sometime before January 3.” Br. of Resp’t, 11.

The State essentially asks this Court to determine Spalding was not credible when she said she not present at the salon between December 10 and January 3. But credibility determinations are solely for the jury and

cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The State's argument is also tantamount to saying the jury had to disbelieve Spalding's testimony in order to convict. This is an impermissible inference. Indeed, it constitutes prosecutorial misconduct to argue in closing that the only way to acquit or convict would be to disbelieve the State's witnesses. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) ("This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken.").

The only other following incident was on January 3 when Whittaker walked by Spalding's salon. Citing State v. Kintz, 169 Wn.2d 537, 238 P.3d 470 (2010), the State argues the jury could have concluded this actually constituted two following incidents because Whittaker walked past the salon twice in the span of a few minutes. Br. of Resp't, 11.

In that case, the court held Kintz repeatedly followed Theresa Westfall by driving past her six times over a short period of time, with each episode leaving Westfall more frightened and angry. 169 Wn.2d at 555. The court held that each time Kintz drove past Westfall constituted a separate following incident because "the repetition of contacts alerts the victim (and the trier of fact) to the stalker's criminal intent, i.e., that he is purposefully targeting the victim." Id. at 560. Kintz's repeated contacts

“engendered progressively greater fear . . . with each encounter.” Id. This, in turn, made it “more apparent that the contacts were not accidental and innocent, but intentional and malevolent.” Id.

Kintz is distinguishable on this basis. Eyewitnesses saw Whittaker walk past Spalding’s salon and look in the salon window on January 3. 3RP 19-20, 48-50. He proceeded to the end of the hall and entered the bathroom, where he remained for a few moments.<sup>1</sup> 3RP 20, 30-35. He then exited the bathroom and walked past Spalding’s salon again, briefly looking in the window without stopping. 3RP 32-35, 48-50. Unlike Kintz, however, Spalding had her back to the salon window and never saw Whittaker that day. 3RP 111, 114. Although Whittaker walked past the salon twice in a brief period, he did not “engender[] progressively greater fear,” Kintz, 169 Wn.2d at 560, because Spalding was unaware he did so until after the fact. Therefore, Kintz is inapplicable.

Lastly, the State argues that under State v. Askham, 120 Wn. App. 872, 86 P.3d 1224 (2004), Spalding’s numbness to Whittaker’s contact was sufficient emotional distress to establish repeated harassment. Br. of Resp’t, 14. The State points out that the complainant witness in Askham found the repeated contact embarrassing and irritating. Br. of Resp’t, 14. But

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<sup>1</sup> The testimony was that Whittaker spent “less than ten minutes [in the bathroom]; it wasn’t long.” 3RP 31.

harassment includes conduct that annoys the individual. RCW 10.14.020(2). Furthermore, the State ignores the fact that the complainant in Askham also said he “felt threatened” by the contact. 120 Wn. App. at 884. This, combined with the embarrassment and irritation, rose to the level of substantial emotional distress. By contrast, Spalding testified she was only numb to Whittaker’s contact. This is a fry cry from saying his contact *during the charging period* made her feel threatened, embarrassed, and irritated.

Because there is insufficient evidence of both alternative means of stalking, this Court should reverse the stalking conviction and dismiss the charge with prejudice.

2. WHITTAKER’S CONVICTION FOR VIOLATION OF A NO-CONTACT ORDER MERGES INTO HIS FELONY STALKING CONVICTION.

In his opening brief, Whittaker argues his conviction for felony violation of a no-contact order merged into his stalking conviction, because the no-contact order violation elevated stalking to a felony. Br. of Appellant, 17-20. The State responds that the conviction does not merge “because the State proved more than two contacts between Whittaker and Spalding.” Br. of Resp’t, 15-16. The State points to several instances where Whittaker violated the no-contact order by texting and calling Spalding between December 17 and January 3. Br. of Resp’t, 17. The State asserts that “[a]ny

two of these violations would have been sufficient to prove felony stalking.” Br. of Resp’t, 17. In other words, the State argues multiple acts constituted violation of the no-contact order, any one of which could have elevated stalking to felony.

The State is correct there were multiple possible violations of the no-contact order between December 17 and January 3. Nevertheless, the State’s argument must be rejected.

In Washington, an accused has the constitutional right to a unanimous verdict by a 12-person jury. WASH. CONST. art. 1, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Therefore, when the State presents evidence of multiple acts, any one of which could constitute the charged crime, the jury must unanimously agree on which incident constitutes the crime. Petrich, 101 Wn.2d at 569; Kitchen, 110 Wn.2d at 411. This means either the State must elect the act on which it relies, or the trial court must instruct the jury to unanimously agree the State proved the same criminal act beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411.

The trial court did not instruct the jury to unanimously agree on which act constituted violation of the no-contact order for the purposes of the stalking conviction. See CP 35-59. Nor did the State elect which no-contact

order violation it wanted the jury to rely on for the stalking conviction.<sup>2</sup> See CP 18-19 (first amended information); 1RP 123-30 (State's opening statement); 4RP 48-65 (State's closing argument); 4RP 89-99 (State's rebuttal). Hence, this Court cannot be certain which no-contact order violation the jury relied on for the stalking conviction.

Washington courts hold that in such situations, the verdict is ambiguous and the rule of lenity requires merger. State v. Kier, 164 Wn.2d 798, 808-14, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002), aff'd on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003). For example, DeRyke was convicted of first degree kidnapping and first degree attempted rape. DeRyke, 110 Wn. App. at 818. Two circumstances could elevate rape to first degree: (1) use of a deadly weapon or (2) kidnapping the victim. Id. at 823. If the jury used the kidnapping to elevate the rape offense, DeRyke could not also be separately convicted of kidnapping; that offense would merge with the rape. Id. at 823-224. DeRyke could only be convicted of both kidnapping and rape if the jury used the deadly weapon to elevate rape to the first degree. Id.

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<sup>2</sup> In regards to the no-contact order violation charge, the State acknowledged other incidents could constitute violations. 4RP 56. But the State asked the jury to look solely to the January 3rd incident. 4RP 56-57. This election relates only to the no-contact order violation charge, and does not constitute an election for the felony stalking charge. Lack of election on the stalking charge is also consistent with the State's argument on appeal.

There was no doubt the jury concluded DeRyke was armed with a deadly weapon for both offenses because it returned special verdicts to that effect. Id. at 818, 824. However, this Court was unwilling to assume the jury relied on use of a deadly weapon, because the State did not submit jury instructions or special verdicts requiring the jury to specify which act it relied on in reaching its verdict on the rape charge. Id. at 824. This Court instead applied the general rule that ambiguous verdicts are interpreted in the defendant's favor and assumed the jury relied only on the kidnapping to elevate the rape to first degree. Id. The kidnapping conviction therefore merged into the attempted rape conviction. Id.

The Washington Supreme Court cited DeRyke with approval and reached the same conclusion in Kier, 164 Wn.2d at 811-12. There, the State argued Kier's second degree assault and first degree robbery convictions did not merge because they were committed against different victims. Id. at 808. Noting the case before it was "somewhat analogous to a multiple acts case," the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. Because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdict was ambiguous. Id. at 814. The rule of lenity therefore required the assault conviction to merge into the robbery conviction. Id.

DeRyke and Kier control here. The jury unanimously concluded Whittaker violated the no-contact order on January 3 by convicting him of that offense. CP 22, 46. However, neither the jury instructions nor the verdict form required the jury to specify which no-contact order violation it relied on to reach its verdict on the stalking charge. CP 22-26 (verdict forms), 35-59 (jury instructions). The State could have submitted a proposed instruction that did not include the January 3 no-contact order violation as a basis for finding Whittaker guilty of stalking, but chose not to. Hence, the jury verdict was ambiguous as to which no-contact order violation the jury relied on to convict Whittaker of felony stalking. Under the rule of lenity, then, this Court must assume the jury based its stalking verdict on Whittaker's January 3 no-contact order violation. Kier, 164 Wn.2d at 814; DeRyke, 110 Wn. App. at 823-24. Whittaker's conviction for violation of a no-contact order therefore merges into his felony stalking conviction. State v. Parmelee, 108 Wn. App. 702, 711, 32 P.3d 1029 (2001).

The no-contact order violation conviction merges into the stalking conviction for an additional reason. The State needed to prove at least two following incidents to convict Whittaker of stalking. CP 50. If this Court holds that Kintz means the January 3 incident at Spalding's salon constituted two following incidents, then there were a total of three possible following incidents. The first was the phone call where Whittaker told Spalding her

salon looked good.<sup>3</sup> 4RP 52. The second and third were when Whittaker walked by the salon on January 3.<sup>4</sup> 4RP 53. No other following incidents were alleged. Thus, even if this Court holds there were three following incidents, two of those incidents occurred on January 3. But the January 3 contact was the same conduct that resulted in the no-contact order violation conviction. Either way, then, the State relied on the January 3 contact to convict Whittaker of stalking.

This is just like Parmelee, discussed in the opening brief, where Parmelee was convicted of three protective order violations, and two of those violations were necessary to prove felony stalking.<sup>5</sup> 108 Wn. App. at 711. Therefore, two of his three protective order violations merged into his stalking conviction:

We hold that two of Parmelee's three convictions for protection order violations merge into the felony stalking conviction because the State was required to prove facts to support at least two of the protection order violation convictions in order to establish facts sufficient for a felony stalking conviction under RCW 9A.46.110(5)(b). Stalking requires a finding of repeated harassment or repeated following, i.e., repeated events constitute the crime of stalking. Two harassing events would be sufficient to satisfy

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<sup>3</sup> Whittaker maintains there is insufficient evidence that this constituted a following event, because Spalding was not physically present at the salon.

<sup>4</sup> Likewise, Whittaker does not concede this constitutes two following incidents.

<sup>5</sup> Parmelee's stalking conviction was based solely on repeated harassment, not repeated following. 108 Wn. App. at 709. Here, by contrast, the State needed to prove both repeated harassment and repeated following.

the requirement that the behavior be repeated. Thus, with respect to at least two of the three protection order violations, the State was required to prove that those violations occurred in order to secure convictions for both felony stalking and the protection order violations. As such, two of Parmelee's protection order violations are essential elements of the crime of felony stalking and, because they are acts defined elsewhere in the criminal statutes as crimes, they merge into the stalking conviction.

Id. at 711 (footnote omitted). Parmelee is precisely on point. For this additional reason, this Court should hold that Whittaker's conviction for violation of a no-contact order merges into his stalking conviction, and remand for resentencing. Id.; State v. Chesnokov, 175 Wn. App. 345, 356, 305 P.3d 1103 (2013).

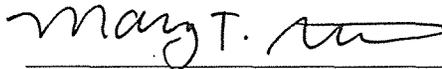
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse and dismiss Whittaker's felony stalking conviction for insufficient evidence. In the alternative, this Court should vacate Whittaker's conviction for felony violation of a no-contact order because it merges into his stalking conviction, and remand for resentencing.

DATED this 29<sup>th</sup> day of June, 2015.

Respectfully submitted,

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STATE OF WASHINGTON, )

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COA NO. 72140-2-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF JUNE 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DEREK WHITTAKER  
234 12<sup>TH</sup> STREET SE  
AUBURN, WA 98002

SIGNED IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF JUNE 2015.

x Patrick Mayovsky