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Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL GREGORY MONTOYA, Appellant.	No. 49249-1-II UNPUBLISHED OPINION

MELNICK, J. — Michael Gregory Montoya appeals his stalking conviction. He argues the trial court should not have admitted evidence of a prior stalking conviction and that sufficient evidence does not support his conviction. We affirm.

FACTS

In December 2012 and in January of 2013, Amy Stormo received text messages from Montoya; she did not know how he got her number. Amy reported the text messages to the police. Montoya had been convicted of stalking Amy's[1] cousin, Rebecca "Becky" Stormo in June 2010. Amy and her mother, Arlene Stormo, had a security system installed at their coffee shop, Stormy Espresso, based on their fear of Montoya. Amy told Montoya to leave her and her family alone.

On February 15, 2013, Amy received a one-year protection order against Montoya because of her fear of him. He did not contact her during this time period.

[1] Since several of the parties have the same last name, we use their first names for identification purposes and intend no disrespect.

On August 13, 2015, Montoya made two posts to the coffee shop's public Facebook page. The first stated, "Mike Montoya wants to talk to Beckies his godsister 425 236 [****] jesus forward to my sister the billionaire am loved her." Ex. The second read, "I wanna talk to Becki stormo or Amy stormo 425 236 [****] its Beckies famous rapper godbrother please jesus." Ex. 2. These posts made Amy feel "scared and worried" and fear that Montoya would not leave the family alone. Report of Proceedings (RP) (July 6, 2016) at 181.

In February 2016, Montoya visited the coffee shop and on the merchant's copy of the credit card receipt, Montoya put his name and phone number on the back. He also posted on Facebook, stating:

> Yesterday I went to port orchard and stopped by at stormy espresso to give this lady my number to give to Amy stormo to call me and I know she got it an [sic] tried to call me but I'm not getting any calls or texts because the illuminati has my phone tapped and they block my phone calls cause they don't want me to have any friends.

Ex. 4. In another post, Montoya stated:

> I got 25 million dollars to give to every stormo family member if amy calls me and takes me to get my money with none of the illuminati initiation bullshit envolved [sic] to all you non believers or people that don't cooperate with me and think I'm crazy may you remain oblivious to the truth and live like sheep montoya over and out.

Ex. 5.

Arlene called the police. Amy felt "scared and worried" and "wondered when—if he was going to stop or if he's going to keep escalating." RP (July 6, 2016) at 183. Amy obtained another protection order against Montoya based on her fear of him. She could not, however, locate Montoya to serve the protection order.

On April 9, 2016, Montoya drove from his residence in Lynnwood to Stormy Espresso. Montoya later told police he was on his way to Mason County. Stormy Espresso is not on the way to Mason County.

Arlene waited on Montoya who told her that he "wanted to be with them, the girls, Becky." RP (July 6, 2016) at 171. Montoya was "looking around wildly. His eyes were darting different places." RP (July 6, 2016) at 171. Montoya was agitated. Arlene hit the panic button inside the coffee stand to call law enforcement.

Arlene called Amy and "hysterically" told Amy of the visit. RP (July 6, 2016) at 184. Amy felt "scared" of Montoya's repeated contacts. RP (July 6, 2016) at 184.

The State charged Montoya with felony stalking. He stipulated to a prior stalking conviction involving Amy's cousin as predicate for the felony charge.

Montoya filed a motion to bifurcate Montoya's prior stalking conviction from the remaining stalking elements, so that the jury would not hear about his prior conviction. Montoya also filed a motion in limine to exclude any reference to the underlying facts of his 2010 stalking conviction. Montoya was concerned about the prejudicial effect on the jury. The State objected, arguing that the prior stalking behavior was relevant to prove the element of Amy's fear of Montoya which was based on her knowledge of his prior stalking behavior toward her cousin.

The trial court balanced the interests of both parties and ruled that testimony that Montoya had engaged in stalking behavior against Amy's family member would be allowed on the issue of the reasonableness of Amy's fear. The trial court bifurcated evidence of the actual conviction from the prior conviction which enhanced it to a felony. The trial court stated:

> Well, I want to—the victim to be allowed to testify that—because it goes directly to her reasonable fear. She reasonably feared the defendant's text because of the prior behavior he engaged with the cousin. But I don't want the jury at that time to know it was a prior felony stalking conviction.

RP (June 27, 2016) at 31.

During trial, Amy testified she was familiar with Montoya because he previously exhibited "[s]talking behavior" toward her cousin, Becky. RP (July 6, 2016) at 175. The trial court

instructed the jury that to convict Montoya of stalking it must find, among other elements, "That Amy Stormo reasonably feared that the defendant intended to injure her or another person." Clerk's Papers (CP) at 48.

The jury found Montoya guilty of the stalking elements submitted to the jury. By special verdict, the jury also found that Montoya knew or should have known "that Amy Stormo was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her." CP at 53. Because of Montoya's stipulation as to the prior conviction, the judge entered judgment and sentence on a felony. Montoya appealed.

ANALYSIS

I. PRIOR STALKING CONVICTION

Montoya first argues the trial court erred by allowing evidence that Montoya previously engaged in stalking behavior towards Amy's cousin, Becky. Montoya argues that since the prior conviction was bifurcated from the other stalking elements, the jury should not have heard any evidence regarding the prior stalking conviction. We disagree.

Under ER 404(b), evidence of prior misconduct is not admissible to show that it is likely the defendant committed the alleged crime, acted in conformity with the prior bad acts when committing the alleged crime, or had a propensity to commit the alleged crime. Before admitting evidence of prior misconduct under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for admitting the evidence; (3) determine the relevance of the evidence to prove an element of the charged crime; and (4) weigh the probative value against its prejudicial effect on the record. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). We review the trial court's decision to admit or exclude evidence under ER 404(b) for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *Fisher*, 165 Wn.2d at 745.

A person commits the crime of stalking if he or she "intentionally and repeatedly harasses or repeatedly follows another person" and that person "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." RCW 9A.46.110(1)(a)-(b). Additionally, there must be evidence that 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." RCW 9A.46.110(1)(c)(i)-(ii).

A person who stalks another is guilty of a gross misdemeanor, unless that person has previously been convicted of stalking, in which case the person is guilty of a class B felony. RCW 9A.46.110(5)(a)-(b). The State must prove all of the elements of the crime beyond a reasonable doubt, including that the defendant has been previously convicted under this same section. *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

Prior convictions that elevate a crime from a gross misdemeanor to a felony need to be proved to a jury. *State v. Roswell*, 165 Wn.2d 186, 197-98, 196 P.3d 705 (2008) (where prior conviction is an element of the crime charged, it is not error to allow jury to hear evidence on that issue). To avoid the details of the prior offense being placed before the jury, a defendant may stipulate to the predicate offense. *State v. Gladden*, 116 Wn. App. 561, 565-66, 66 P.3d 1095 (2003). The trial court, however, retains wide latitude in evidentiary matters and may still allow evidence for other purposes, even following a stipulation. *See State v. Rafay*, 168 Wn. App. 734,

794, 285 P.3d 83 (2012) (citing *Crane v. Kentucky*, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)) (trial court retains wide latitude in discretionary matters).

Here, the trial court admitted evidence of Montoya's behavior toward Amy's cousin on the issue of whether Amy's fear was reasonable. The trial court limited the evidence to this purpose and stated on the record, "I don't want the jury at that time to know it was a prior felony stalking conviction." RP (June 27, 2016) at 31. Amy testified that she was aware of Montoya's previous "[s]talking behavior" toward her cousin, Becky. RP (July 6, 2016) at 175.

Because the trial court allowed Amy to testify to Montoya's previous behavior toward her cousin to show her reasonable fear, an element of stalking, tenable grounds exist for the trial court's ruling. Thus, the trial court did not abuse its discretion in allowing the evidence.

II. SUFFICIENCY OF THE EVIDENCE

Montoya next contends the evidence is insufficient to support the stalking conviction because there was no evidence that a reasonable person would fear injury from Montoya. We disagree.

Where the sufficiency of evidence is challenged, we review whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Rich*, 184 Wn.2d at 903.

As set forth above, under RCW 9A.46.110(1)(a)-(b), a person commits stalking if he or she "intentionally and repeatedly harasses or repeatedly follows another person" and that person "is placed in fear that the stalker intends to injure the person, [or] another person. . . . The feeling of fear must be one that a reasonable person in the same situation would experience." Additionally,

the stalker must either intend to frighten, intimidate, or harass the person or the stalker must know or reasonably know that the person is afraid, intimidated, or harassed. RCW 9A.46.110(1)(c).[2] The jury was instructed accordingly.

RCW 9A.46.110(6)(c) states that "harass" is defined in RCW 10.14.020. RCW 10.14.020(2) defines "unlawful harassment" as a "course of conduct" that "would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress." See *State v. Kintz*, 169 Wn.2d 537, 556, 238 P.3d 470 (2010).

Montoya argues sufficient evidence does not support the element that Amy was placed in fear that he intended to injure her.[3]

Here, the evidence before the jury was that Montoya exhibited stalking behavior in the past to Amy's cousin. Montoya later texted Amy. Amy was unaware how he got her number. Amy reported the text messages to the police. Amy and her mother installed a security system at their business. Amy told Montoya to leave her and her family alone. She obtained two protective orders against him.

Montoya made social media posts, expressing his desire to talk to Amy or her cousin. These posts made Amy feel "[s]cared and worried" that Montoya would not leave her family alone. RP (July 6, 2016) at 181.

[2] The jury found Montoya knew or should have known that Amy was afraid, intimidated, or harassed.

[3] Montoya occasionally uses the words "physical injury" and "bodily injury" in describing the elements of stalking. Br. of Appellant at 14-17. But, RCW 9A.46.110(1) and the to-convict jury instruction do not limit the fear of injury to physical or bodily; they both only use the word "injure." RCW 9A.46.110(1)(b).

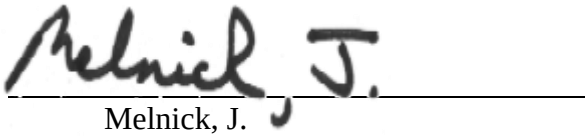
In February 2016, Montoya visited Amy's place of work and left his name and number on the merchant's copy of a receipt. He then posted on social media that he "went to port orchard and stopped by at stormy espresso to give this lady my number to give to Amy stormo to call me . . . I'm not getting any calls or texts because the illuminati has my phone tapped and they block my phone calls cause they don't want me to have any friends." Ex. 4. In another post, Montoya stated, "I got 25 million dollars to give to every stormo family member if amy calls me and takes me to get my money with none of the illuminati initiation bullshit envolved [sic] to all you non believers or people that don't cooperate with me and think I'm crazy may you remain oblivious to the truth and live like sheep montoya over and out." Ex. 5. Amy testified she again felt "scared and worried" and "wondered when—if he was going to stop or if he's going to keep escalating." RP (July 6, 2016) at 183.

On April 9, 2016, Montoya again went to Amy's place of work. He claimed he was on his way to Mason County, but the coffee shop was not on the way to Mason County. Arlene waited on Montoya who told her that he "wanted to be with them, the girls." RP (July 6, 2016) at 171. Montoya was "looking around wildly. His eyes were darting different places." RP (July 6, 2016) at 171. Montoya was agitated. Arlene hit the panic button inside the coffee stand to call law enforcement. Arlene called Amy and "hysterically" told Amy of the visit. RP (July 6, 2016) at 184. Amy felt "scared" of Montoya's repeated contacts. RP (July 6, 2016) at 184.

Based on Montoya's prior stalking behavior against Amy's cousin, his repeated erratic behavior, Amy's testimony that she feared Montoya, and the record as a whole, a rational trier of fact could have found that Amy was placed in fear that Montoya intended to injure her. Accordingly, we conclude sufficient evidence supports Montoya's stalking conviction.

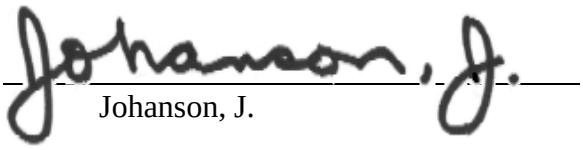
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

We concur:



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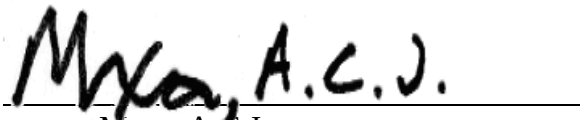

Maxa, A.C.J.