IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL GEORGE VAN MIEGHEM, Appellant.	No. 40318-8-II UNPUBLISHED OPINION

Penoyar, C.J. — Michael Van Mieghem appeals his felony stalking conviction. He argues that (1) insufficient evidence supported his conviction, (2) the trial court's jury instructions relieved the State of its burden to prove all the elements of felony stalking and violated his right to a unanimous verdict, and (3) the trial court incorrectly calculated his offender score at sentencing. We affirm his conviction, but remand for resentencing.

FACTS

Van Mieghem was incarcerated at the Thurston County Jail between October 2008 and July 2009. During his incarceration, he met Deputy Joanie Hoctor, who worked as a corrections deputy at the jail. Van Mieghem developed an interest in Hoctor and began sending her notes in January 2009. Van Mieghem used these notes[1] to tell Hoctor that he loved her. A fellow corrections officer testified that Van Mieghem behaved oddly whenever Hoctor was near; he would walk to the door of his cell and stare at her until she passed beyond his field of vision. On one occasion, Van Mieghem shouted a crude comment at Hoctor about his desire to have sex with her. Hoctor testified that this comment made her feel "[c]oncerned, alarmed, afraid."

[1] Van Mieghem wrote several of these notes on pre-printed inmate request forms called "kites." The record contains several "kites" that Van Mieghem addressed to Hoctor.

Report of Proceedings (RP) (Feb. 1 & 2, 2010) at 92.

Hoctor expressed concern about Van Mieghem's behavior to her supervisor, who intervened and told Van Mieghem to cease his inappropriate behavior. When this failed, Hoctor's supervisor—out of fear for her safety—assigned her to a different post in order to minimize Van Mieghem's contact with her.

Hoctor testified that, as Van Mieghem's release date neared, she feared for her safety:

> Q: What did you think might occur when he got out of jail?
> A: I was afraid that he would possibly stalk me, that he might show up at my residence, that I could meet him at the park, that I could see him in the area that I reside in.
> Q: Did that cause you fear to think that that could happen?
> A: It did.
> Q: And did you have concern regarding your family?
> A: I did.
> Q: Did you have concern regarding your roommate?
> A: I did.
> . . . .
> Q: And what were those concerns?
> A: I was concerned that he would show up at my residence in Puyallup and threaten my roommate or possibly threaten me or do something to my dogs that I walk on a daily basis at a park that's very secluded.

RP (Feb. 1 & 2, 2010) at 85.

On June 30, 2009, Hoctor obtained a temporary protection order to prevent Van Mieghem from contacting her. Hoctor testified that this angered Van Mieghem. A corrections officer testified that Van Mieghem became agitated when he was served with the order. Two corrections officers testified that Van Mieghem told them that he would not comply with the order.

The June 30 order remained effective until July 14. On July 21, Hoctor obtained another temporary protection order against Van Mieghem, which was effective for one week. On July 28,

the trial court extended this temporary order, making it effective until a hearing date on August 11. On August 11, Hoctor obtained a protection order prohibiting Van Mieghem from contacting her for one year.

After Van Mieghem's release from Thurston County Jail, and in spite of the protection order forbidding him to contact Hoctor, Van Mieghem sent three postcards to Hoctor at her place of employment[2] and two letters to her home address.[3] Hoctor testified about her reaction to receiving one of the letters at her residence:

> I was afraid that he would track me down in Puyallup at my residence. I was afraid that he may show up in my yard, he may show up on my front doorstep. Since he stated in his letter that he was familiar with Puyallup, I was afraid that he may know exactly, you know, where I lived and what I lived next to and that he would make his presence there.

RP (Feb. 1 & 2, 2010) at 90.[4] Additionally, in August, Van Mieghem sent a kite to Hoctor, apparently from the King County Jail.

The State charged Van Mieghem with felony stalking[5] due to his violations of the protection order and his prior stalking convictions. At trial, the State introduced evidence that

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[2] Each postcard had a July 20, 2009 postmark; thus, it appears that Van Mieghem sent the postcards during the one-week gap between the temporary protective orders.

[3] Hoctor never told Van Mieghem where she lived.

[4] On cross-examination, Hoctor also testified that she told a detective at one point that she did not fear that Van Mieghem would be able to physically harm her because she could protect herself with and without a firearm. She testified that the fact she had a firearm, however, did not alleviate the fear she felt for her roommate and dogs.

[5] RCW 9A.46.110(1) and (5)(b).

Van Mieghem had been convicted in 1996 and 2009 of stalking other victims.[6] The trial court admitted the June 30, July 21, July 28, and August 11 protection orders into evidence.

The trial court gave the following "to convict" instruction to the jury:

> To convict the defendant of the crime of stalking as charged in Count I, each of the following six elements must be proved beyond a reasonable doubt:
>
> (1) That on or about on or between [sic] January 1, 2009 and October 21, 2009, the defendant intentionally and repeatedly harassed Joanie Hoctor;
>
> (2) That Joanie Hoctor reasonably feared that the defendant intended to injure her or another person or the property of Joanie Hoctor;
>
> (3) That the defendant
>
> (a) intended to frighten, intimidate, or harass Joanie Hoctor; or
>
> (b) knew or reasonably should have known that Joanie Hoctor was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her;
>
> (4) That the defendant acted without lawful authority;
>
> (5) That the defendant
>
> (a) had been previously convicted of the crime of stalking; or
>
> (b) violated a protective order protecting Joanie Hoctor; and
>
> (6) That any of the defendant's acts occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (2), (4), (6) and either of the alternative elements (3)(a) or (3)(b), and (5)(a) or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) and (3)(b), or (5)(a) or (5)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

[6] Both parties refer to the earlier of the two convictions as a 1997 conviction. But testimony at trial established that the jury convicted Van Mieghem of this crime on December 4, 1996. *See* RCW 9.94A.030(9) ("conviction" means an "adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty.") Thus, we refer to this conviction as a 1996 conviction.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the six elements, then it will be your duty to return a verdict of not guilty.

CP at 33.[7]

The trial court gave the jury a special verdict form, which asked:

> 1. Did the defendant intend to frighten, intimidate, or harass Joanie Hoctor?
>
> . . . .
>
> 2. Did the defendant know or should he reasonably have known that Joanie Hoctor was afraid, intimidated, or harassed, even if the defendant did not intend to place her in fear or to intimidate or harass her?
>
> . . . .
>
> 3. Did the defendant violate a protective order protecting Joanie Hoctor?
>
> . . . .
>
> 4. Was the defendant previously convicted of the crime of stalking?

CP at 44.

The jury found Van Mieghem guilty of felony stalking. On the special verdict form, the jury answered "not unanimous" to questions one and two; "yes" to question three; and "yes" to question four. CP at 44. The trial court polled the jury on questions one and two; the poll revealed that each juror had answered "yes" to either question one or question two. RP (Feb. 3, 2010) at 7-9.

[7] This "to convict" instruction combines WPIC 36.21.02, the pattern instruction for felony stalking based on a defendant's prior harassment conviction, with WPIC 36.21.03, the pattern instruction for felony stalking based on a defendant's violation of a protective order. *See* 11 Washington Pattern Jury Instructions: Criminal 36.21.02, at 598-99 (3d ed. 2008) (WPIC); WPIC 36.21.03, at 602-03; *see also* RCW 9A.46.060(33) (stalking is a crime of harassment). Elements one through four and element six are identical in both pattern instructions. The "to convict" instruction's fifth element combines the fifth element from WPIC 36.21.02, which appears as (5)(a) in the "to convict" instruction, with the fifth element from WPIC 36.21.03, which appears as (5)(b) in the "to convict" instruction. Like the "to convict" instruction, both pattern instructions explicitly state that the jury may convict if it finds that either of the alternative elements (3)(a) or (3)(b) have been proved beyond a reasonable doubt.

At sentencing, the trial court calculated Van Mieghem's offender score as 3 and sentenced him to 20 months in prison. The trial court included the 1996 stalking conviction in its offender score calculation. Van Mieghem appeals his conviction and sentence.

ANALYSIS

I. Sufficiency of the Evidence

Van Mieghem asserts that insufficient evidence supports his conviction. Specifically, he claims that the State did not prove that he repeatedly harassed Hoctor because she never testified that she suffered substantial emotional distress or that his actions seriously alarmed, annoyed, or harassed her, or caused her detriment. He also argues that the State failed to prove that Hoctor feared that Van Mieghem intended to injure a person or property. We disagree.

When reviewing a challenge to the sufficiency of the evidence, we view all the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). The appellant thus admits the truth the State's evidence and all reasonable inferences that can be drawn from it. *Kintz*, 169 Wn.2d at 551. Further, we "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person commits felony stalking if he or she "intentionally and repeatedly harasses" another person and the person being harassed "is placed in fear that the stalker intends to injure the person, another person, or property of the person." RCW 9A.46.110(1)(a), (b). A person "harasses" another by engaging in a "knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which

serves no legitimate or lawful purpose." RCW 9A.46.110(6)(c); RCW 10.14.020(1). "Course of conduct" means "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." Former RCW 10.14.020(2) (2001). This course of conduct "would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress" to the person. RCW 9A.46.110(6)(c); RCW 10.14.020(1).

The State presented sufficient evidence to convict Van Mieghem of stalking Hoctor. He behaved in a discomforting manner around her by staring at her. He made inappropriate comments in his letters suggesting his desire to enter into a relationship with her. He shouted a sexual crudity about her, which made her feel "[c]oncerned, alarmed, afraid." RP (Feb. 1 & 2, 2010) at 92. He continued to contact her after her supervisor informed Van Mieghem that his actions were inappropriate and that he should desist from communicating with her. Because Hoctor's supervisor was concerned for her safety, she changed Hoctor's work assignments to minimize her contact with Van Mieghem. Ultimately, Hoctor felt compelled to get a protection order. Not only did Van Mieghem violate this order by contacting her at home, he expressed anger that she would get such an order against him. Hoctor testified that Van Mieghem's communications and behavior caused her to fear that he would stalk her, threaten her roommate, and/or harm her dogs. She testified that a letter that Van Mieghem sent to her residence made her afraid that he would appear there. In her testimony, she repeatedly stated that she feared for her roommate and dogs. Based on this testimony, a rational trier of fact could easily have found that Van Mieghem's willful acts (1) caused Hoctor to feel serious fear, alarm, annoyance, or harassment; (2) caused Hoctor to suffer substantial emotional distress; (3) would have caused a

reasonable person to suffer substantial emotional distress, and (4) caused Hoctor to fear that Van Mieghem intended to injure her, her roommate, or her dogs. Accordingly, sufficient evidence exists to sustain Van Mieghem's conviction.

II. Jury Instructions

Van Mieghem asserts two different claims with regard to the "to convict" instruction. He first argues that the "to convict" instruction violated due process because it suffered from a lack of clarity and, therefore, improperly informed the jury that it could convict Van Mieghem without proof of all the required elements. He also contends that the "to convict" instruction violated his state constitutional right to a unanimous jury. *See* Wash Const., art. I, § 21. We disagree with both of his claims.

A. Due Process

Van Mieghem contends that the "to convict" instruction violated due process because it did not make the relevant legal standard manifestly apparent to the average juror. Appellant's Br. at 12 (quoting *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009)). Specifically, he argues that the jury may have believed that it needed to find only one of the four alternative elements that collectively comprised the third and fifth elements of the "to convict" instruction—rather than finding one alternative element from the third element and one alternative element from the fifth element—in order to convict Van Mieghem. He maintains, therefore, that the "to convict" instruction relieved the State of its burden of proof.

Due process requires the State to prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jury instructions that omit an element of the crime violate due process by allowing the jury to convict

without proof of the omitted element. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Because the jury uses the "to convict" instruction as the framework for evaluating guilt or innocence, the "to convict" instruction must contain all of the elements of the crime; reviewing courts may not look to other jury instructions to supply the missing element. *State v. Smith*, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). We review "to convict" instructions de novo. *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009).

Here, the "to convict" instruction satisfied due process. It explicitly informed jurors that they had to find six elements beyond a reasonable doubt to convict Van Mieghem. If the jurors had found only one of the four alternative elements beyond a reasonable doubt—instead of one alternative element from the third element and one alternative element from the fifth element—they would have found five different elements, not the six elements that the "to convict" instruction required for conviction. Further, the "to convict" instruction stated that the jury needed to find "either of the alternative elements (3)(a) or (3)(b), *and* (5)(a) or (5)(b)." Clerk's Papers (CP) at 33 (emphasis added). The instruction's use of the conjunctive "and" informed the jury that it needed to find one of the alternative elements from the third element and one from the fifth element. Thus, we conclude that the legal standard was manifestly apparent to the average juror.

B. Jury Unanimity

Van Mieghem also argues that the "to convict" instruction violated his right to a unanimous jury verdict[8] because it "explicitly instructed jurors that they need not be unanimous to

[8] The state constitution requires that jurors unanimously agree on a defendant's guilt. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citing Wash. Const. art. I, § 21).

convict." Appellant's Reply Br. at 9. He argues that the following language from "to convict" instruction excused the jurors from reaching a unanimous verdict as to two elements of felony stalking:

> To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b), and (5)(a) or (5)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP at 33.

Van Mieghem fails to perceive that this language in "to convict" instruction simply reflects the fact that the legislature made felony stalking an alternative means crime. *See State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) ("Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways.") Thus, to be convicted of stalking, a person must "intend[] to frighten, intimidate, or harass" another person *or* must "know[] or reasonably should know that the person is afraid, intimidated, or harassed." RCW 9A.46.110(1)(c)(i), (ii). Element 3(a) in the "to convict" instruction reflects the statutory *mens rea* of intent (RCW 9A.46.110(1)(c)(i)), whereas element 3(b) reflects the alternative statutory *mens rea* of subjective or objective knowledge (RCW 9A.46.110(1)(c)(ii)). Similarly, the crime of stalking is a felony if the stalker has been previously convicted of stalking *or* if the stalking violates any protective order protecting the person being stalked. RCW 9A.46.110(5)(b)(i), (ii); *see also* RCW 9A.46.060(33). Element 5(a) reflects the first alternative (previous stalking conviction under RCW 9A.46.110(5)(b)(i)), whereas element 5(b) reflects the second alternative (violation of protective order under RCW 9A.46.110(5)(b)(ii)). Van Mieghem's unanimity argument therefore fails because, as he acknowledges, "the defendant does not have a right to a

unanimous jury determination as to the alleged means used to carry out the charged crime or crimes should the jury be instructed on more than one of those means."[9] *Smith*, 159 Wn.2d at 783.

III. Sentencing

Van Mieghem argues that the trial court erred by including his 1996 felony stalking conviction, which had "washed out," in the offender score. Appellant's Br. at 16. The State concedes the error and requests that we remand for resentencing.

We accept the State's concession and remand for resentencing. A felony stalking conviction is a class C felony that washes out if the offender spends "five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c); RCW 9A.46.110(5)(b). The criminal history on Van Mieghem's judgment and sentence lists only the prior stalking convictions from 1996 and 2009. Because he appears to have spent more than five consecutive years in the community without committing a crime that resulted in conviction, his 1996 conviction washes out.

We affirm Van Mieghem's conviction, but remand to the trial court for resentencing based on a correct offender score calculation.

[9] We note that, in alternative means cases, "to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented." *Smith*, 159 Wn.2d at 783. Here, because Van Mieghem does not argue that substantial evidence does not support each of the relied-on alternative means, we do not review the record for substantial evidence.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Worswick, J.