IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON ,	)	No. 64649-4-I
Respondent,	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
JEFFREY IVAN TAYLOR,	)	
Appellant.	)	FILED: November 8, 2010

Appelwick, J. — Taylor appeals his convictions for felony stalking and assault in the fourth degree. Taylor claims the permissive inference instruction given regarding felony stalking relieved the State of its burden to prove every element of the crime. He also argues that a trial irregularity resulting from the victim's testimony about excluded prior acts deprived him of a fair trial. Finding no error, we affirm.

FACTS

Jeffrey Taylor dated Shanika Doage for about six years "off and on" beginning in 2000, including living together at times. During the tumultuous

relationship, Taylor frequently acted violently toward Doage. Taylor previously had been convicted of assaulting Doage.

Doage broke up with Taylor in December 2006. Taylor was upset. Doage testified that he called repeatedly and appeared a few times at her home. She also changed her locks when he refused to return his copies of the keys to the apartment. Nervous about her safety, she sought a domestic violence protection order, but was unable to serve it on Taylor. She asked her ex-husband to stay at her home and had family and friends drive her to and from work.

On January 3, 2007, Doage, her son, and her mother went to the Target store in the Westwood Village shopping center in West Seattle. When her mother went to the restroom, Taylor approached Doage and her son. Taylor grabbed Doage's arm and tried to kiss her. Doage pushed him away. He told her that she could not hide from him and recounted to her everywhere she had been since she left work that day. He also told her that he was going to beat her up and that he was going to shoot her. She was afraid for her safety. After she pushed his hand away a second time, he finally walked away. She reported the incident to store security, who called the police. Security also provided a copy of the surveillance video that recorded the incident.

About two days later, Doage and her ex-husband, Michael Fisher, ordered pizza at her apartment. After paying the delivery person, Doage realized that Taylor was in the hallway of her apartment building. He grabbed her arm and tried to pull her outside of the apartment. She yelled at him, telling

him to leave and telling him that she was attempting to take out a no-contact order against him. Fisher heard Doage shouting at Taylor and he grabbed the no-contact order and tried to hand it to Taylor while telling him to leave. Taylor refused to take the protection order and said to Doage, "[O]h, you got protection." He also told Doage that she should "live in fear." Taylor walked away and Doage called the police. Doage did not see Taylor after that night.

The State charged Hall with felony stalking, assault in the fourth degree, and felony harassment. At trial, Taylor testified in his own defense. He testified that he when met Doage at Target it was "purely coincidence" and that he could not have followed her that day because he did not own a car. He testified that he went to Doage's home on January 5 and admitted that he told her to "live in fear." But, he testified that he did not mean to scare her and that he hoped that she would return to him like she had when they had previously broken up.

A jury found Taylor guilty of felony stalking and assault, but was unable to reach a verdict as to felony harassment. The State also charged, and the jury found, that the felony stalking crime was committed within the sight or sound of the victim's minor child. The trial court imposed a standard range sentence.

Taylor appeals.

DISCUSSION

I. Jury Instruction

Taylor contends that the trial court erred in instructing the jury that they could infer his intent to harass or intimidate Doage from his attempts to contact her after he had actual notice that she did not want him to contact her. Although

Taylor did not object to the instruction at trial, giving a jury instruction that relieves the State of its burden to prove every element of the crime is a constitutional error that we may review for the first time on appeal. See RAP 2.5(a)(3); State v. Hanna, 123 Wn.2d 704, 709-10, 871 P.2d 135 (1994) (holding that a challenged inference of intent instruction is reviewable for the first time on appeal). We review challenged jury instructions de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

The challenged jury instruction relates to Taylor's felony stalking charge. The crime of stalking requires that the stalker either intends to frighten, intimidate, or harass the victim or knows or reasonably should know that the victim is afraid, intimidated or harassed even if the stalker did not intend to have that effect. RCW 9A.46.110(1)(c). The statute further provides that "[a]ttempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person." RCW 9A.46.110(4).

The trial court instructed the jury as follows:

> A person who attempts to contact or follow another person after being given actual notice that the person does not want to be contacted or followed may be inferred to have acted with intent to intimidate or harass that person.
>
> This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.[1]

Taylor argues that the court's instruction violated due process, because it

[1] This language is nearly identical to that in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 36.25, at 621 (3d ed. 2008).

relieved the State of the burden to prove every element of the crime.

The State may rely, in part, on permissive inferences to meet its burden of proof. State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). A permissive inference allows, but does not require, a jury to infer the existence of a presumed fact from a proven fact. Hanna, 123 Wn.2d at 710. But, inference instructions violate the due process clause if they relieve the State of its burden to prove each element beyond a reasonable doubt. State v. Randhawa, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Inference instructions do not violate due process if it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Id. at 75. When a permissive inference is the sole and sufficient proof of an element of the crime, due process requires that the presumed fact must flow beyond a reasonable doubt from the proved fact. See State v. Brunson, 128 Wn.2d 98, 107-10, 905 P.2d 346 (1995).

Here, Doage testified that Taylor had called and visited repeatedly. She also testified that she had asked him to return his keys and he refused, forcing her to change the locks. She said that when she saw Taylor at Target, he told her that he was going to beat her up and that he was going to shoot her. She recounted, and he conceded, that he told her at her apartment on January 5 that she should "live in fear." The inference instruction did not constitute the sole proof of the element of intent and thus did not relieve the State of its evidentiary burden.

Taylor also contends that the State did not prove with substantial

assurance that the inferred intent more likely than not flowed from the predicate fact. He contends that he was merely trying to reconcile with Doage as they had after previous breaks in their relationship. Therefore, he argues that it was not a fair inference that Doage would construe his pursuit as intentional harassment, even if she had instructed him to stay away.

Taylor cites to Randhawa in support of his argument. In that case, the trial court gave a permissive inference instruction in Randhawa's prosecution for vehicular homicide. Randhawa, 133 Wn.2d at 75. The instruction permitted the jury to infer that the defendant drove recklessly solely from evidence that he was driving in excess of the maximum lawful speed at the time of the accident. Id. The Supreme Court held that it was error to give the instruction. Id. at 77-78. The evidence was that defendant was traveling between 10 to 20 m.p.h. over the posted speed limit of 50 m.p.h. just before the accident. Id. The court held that Randhawa's speed was not so excessive that one could infer solely from the speed that the defendant was driving in a rash or heedless manner, indifferent to the consequences. Id. But, a similar instruction was held permissible in Hanna, where the defendant had been driving approximately 80 to 100 m.p.h. 123 Wn.2d at 713. The court in Randhawa clarified that the constitutionality of an inference must be assessed in light of the particular facts of the case. 133 Wn.2d at 77.

Here, the fact that Doage had told Taylor she did not want to be contacted and the additional evidence that she changed her locks to avoid contact support an inference that his repeated attempts to contact her were intended to harass

or intimidate her. This inferred intention more likely than not flows from the proof that he was informed she did not want to hear from him or to be followed by him.

The instruction is constitutional under these facts and did not compel the jury to conclude that Taylor intended to intimidate or harass Doage. Therefore, we reject this challenge.

II. Mistrial

Taylor contends that there were trial irregularities that denied him a fair trial.

Pretrial, the State sought to admit several uncharged incidents of prior violence between Taylor and Doage under ER 404(b). The trial court denied the motion in part, preventing the State from introducing evidence about Taylor trying to strangle Doage.

During Doage's direct testimony, the following exchange occurred:

> Q: In addition to telling you that you were going to have to see him, that you were going to see him, did the defendant make any threats to you while you were at Target?
>
> A: He was telling me that he was going to beat me up if I - - I'm going to see you, you know, I'm going to beat you.
>
> Q: And did you believe him?
>
> A: Yes.
>
> Q: And why did you believe him?
>
> A: I mean, throughout our history, I mean, there's been a whole lot of mean things he's done. I mean, he's wrapped vacuum cleaner cords around my neck. He's choked me until I've passed out.
>
> [Defense Counsel]: Your honor, I'd object. I think that goes beyond the court's ruling. I move that the jury be

instructed to disregard that.

Court: The jury will disregard the last answer.

. . . .

Q: Has he carried out on threats in the past?

A: Yes.

Q: And were those threats to hurt you?

A: Yes.

Taylor did not request a mistrial.

Also during direct examination, the State questioned Doage in the following manner:

Q: What else did the defendant say to you when you saw him at Target that day?

A: He told me he was going to beat me up and he told me he was going to shoot me.

Q: Did you believe him when he said that he was going to shoot you?

A: I don't know about shooting me, but I believed him at the time, that he was going to hit me or beat me up. I believe that. I mean, he's said threats with guns before, but he's never acted on them.

Q: Have you ever known [him] to carry a gun?

A: Not carry one on him, no.

Q: Have you known him to ever have one in his possession?

A: I know he's got access to them, but not never one in his possession.

Q: So you were afraid that he would hurt you?

A: Yes.

Taylor did not object.

During redirect, another pertinent exchange occurred:

> Q: [Defense counsel] asked you whether the defendant was welcome at your mother's house. Why isn't the defendant welcome at your mother's house?
>
> A: My mother does not like him. And he's come over to my mother's house and threatened the roommate named Ron that answered the door. He threatened him with a gun, said that if I didn't come outside when he came back, he was bringing a gun.

Taylor objected "to the scope of the answer" and the trial court sustained the objection. Counsel did not request a curative instruction or a mistrial.

In closing, the prosecutor stated:

> [Doage] also told you that although the defendant didn't actually carry a gun that he had access to them and thus she did believe that he could get access to a gun and could shoot her.

Taylor did not object. The question of whether Taylor had previously threatened Doage with a gun was not the subject of a pretrial motion.

In order to preserve a trial irregularity issue for appeal, counsel must request some relief at the time the irregularity occurs. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (defense failure to object during prosecution closing argument or ask for curative instruction or immediate mistrial precluded appellate review); State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007); see also Karl B. Tegland, 14A Washington Practice: Civil Procedure § 30:41, at 281 (2d ed. 2009). A party may seek relief in the form of a curative instruction or immediate mistrial. See Swan, 114 Wn.2d at 661. Where a party objects but does not seek relief, the issue is not preserved. Lord, 161 Wn.2d at

291. Where a party obtains all relief sought, the issue is similarly not preserved. See, e.g., Snyder v. Sotta, 3 Wn. App. 190, 194, 473 P.2d 213 (1970) ("[B]y refusing to make the motion for mistrial, solicited by the trial court, plaintiffs waived their right to subsequently claim a mistrial as to either occurrence of misconduct up to that time."); Casey v. Williams, 47 Wn.2d 255, 257, 287 P.2d 343 (1955) (holding that where counsel for plaintiff notified the judge that a juror had fallen asleep several times, but did not request a mistrial, "Directing the trial court's attention to the alleged misconduct, without asking for relief of any kind, does not . . . preserve the error.").

Here, Taylor did not request relief from the court in regards to Doage's testimony about Taylor's previous threats using a gun. Therefore, Taylor waived review of any alleged irregularity based on those comments. Taylor also waived review of the comments to which he did not object.[2]

Taylor did request a curative instruction in response to Doage's comments about the strangulation. The court complied, instructing the jury to disregard the improper answer. He did not seek a mistrial.

Taylor's actions were not sufficient to preserve the issue for review. Taylor received all relief sought. If he was dissatisfied or the curative instruction was insufficient, he had the burden to again object or to seek a mistrial. Without taking additional action, the trial court was not given the opportunity to cure any error. Therefore, Taylor waived review of any irregularity resulting from these

[2] A party who fails to preserve an error may be entitled to review if the defendant raises a manifest error affecting a constitutional right. RAP 2.5(a)(3). Taylor does not request review on these grounds.

comments as well.

We affirm.

WE CONCUR:

Cox, J.