Nos. 81688-3, 81689-1

SANDERS, J. (dissenting)—By erroneously interpreting the definition of "separate occasions" in RCW 9A.46.110, the majority today affirms the conviction of a man the legislature never intended to punish. The majority's misconception effectively rewrites Washington's stalking statute. I dissent.

I. Statutory Interpretation

We review statutory interpretation de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Our "fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Arborwood Idaho, L.L.C. v. City of Kennewick,* 151 Wn.2d 359, 367, 89 P.3d 217 (2004). When interpreting a statute we first look to its plain language. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, our inquiry is at an end. *Id.* "The statute is to be enforced in accordance with its plain meaning." *Id.* If the statute remains subject to multiple interpretations after analyzing the plain language, it is ambiguous. *Id*. "A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). When a criminal statute is ambiguous, the rule of lenity

requires us to construe the statute in favor of the defendant, absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

The majority accurately summarizes the statutes at bar but detours from their constraint. Stalking can occur either by harassment or by following. *See* RCW 9A.46.110(1)(a). Stalking by harassment requires a (1) repeated[1] (2) course of conduct amounting to unlawful harassment,[2] among other factors not at issue here. Stalking by following requires (1) repeatedly[3] and (2) "deliberately maintaining visual or physical proximity to a specific person over a period of time,"[4] among other factors. "Repeatedly" means "on two or more separate occasions." RCW 9A.46.110(6)(e).

The legislature failed to define "separate occasions" in RCW 9A.46.110(6)(e), leaving courts rudderless to derive its meaning.[5] The majority attempts to rectify this

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[1] *Id.*

[2] Unlawful harassment requires 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 10.14.020(1). A course of conduct is "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." RCW 10.14.020(2).

[3] RCW 9A.46.110(1)(a).

[4] RCW 9A.46.110(6)(b).

[5] The majority misconstrues this statement. *See* majority at 23. It alleges, "Clearly, the 'rudder' the dissent has in mind is some measurement of time that must transpire between the first and second occasions of following or harassment." *Id*. A time lapse *could* be a valuable instrument to determine separate occasions, as it was in *State v. Haines*, 151 Wn. App. 428, 213 P.3d 602 (2009), *review denied*, 167 Wn.2d 1022, 225 P.3d 1011 (2010), *see infra* pp. 6-8, but a predetermined length of time is not a requirement. The majority's claim to the contrary is unfounded and speculative.

lack of direction by referencing the dictionary[6] and inapposite cases,[7] but these comparisons leave us with more questions than answers.

The problem lies in applying the term "separate occasions" to the facts. "Separate" means "set or kept apart," "standing alone," "detached," "isolated," "existing by itself," and so forth. Webster's Third New International Dictionary 2069 (2002). "Occasion" means "a particular occurrence," "happening," or "incident." *Id*. at 1560.

Little in these dictionary definitions helps us determine the legislature's intent. The definitions, which essentially provide synonyms to the statutory language, do not adequately guide us in applying the law to the facts. A "separate occasion" very likely describes an interrelated series of events that comprises a single episode. The totality of Clarence Kintz's interactions with either Theresa Westfall or Jennifer Gudaz could be accurately described as a detached or isolated happening or incident. However, while I do not think it is the correct approach, a "separate occasion" could also reasonably describe (as the majority believes) a series of microevents in the larger scheme of the same incident. The legislature may have intended that we regard each event in the series of events as an isolated occasion.

Because the language of the statute is not clear, we cannot know which answer

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[6] Majority at 9, 11.

[7] *Id*. at 12.

is correct. For purposes of lenity, however, the correct answer does not matter. It is the ambiguity that concerns us. The stalking statute, RCW 9A.46.110, is subject to at least two reasonable interpretations. Because the rule of lenity requires that we find for Kintz, I would reverse and dismiss the charges. *See Jacobs*, 154 Wn.2d at 601.

In my view, even if we assume the stalking statute is unambiguous, its plain language would compel the exact opposite result of that reached by the majority. I cannot agree with the majority's application of these terms to the facts. Kintz's interactions with Westfall were not separate. The same is true for Kintz's interactions with Gudaz. His series of acts, instead, are best described as shared, related, connected, and similar. They were not set or kept apart. Both Westfall and Gudaz felt frightened due to the *totality* of their interaction with Kintz, not due to each act in isolation. If the statute were not ambiguous, the term "separate occasions" would suggest Kintz's series of acts formed a single occasion.

The majority expressly identifies each of Kintz's encounters as an "incident" (e.g., "The Westfall Incident," majority at 2 and 19, and "The Gudaz Incident," *id.* at 3 and 21). This characterization of each encounter as a single—not repeated—event undermines the majority's argument and highlights the folly of fragmenting Kintz's course of conduct to manufacture separate occasions. The dictionary considers the term "incident" to be synonymous with the term "occasion." Webster's, *supra*, at 1560. By its own terms, then, the majority acknowledges that each incident formed a

single—not repeated—occasion. Stalking by repeated harassment or repeated following requires separate, i.e., repeated, occasions or incidents.

If the stalking statute were not ambiguous, its plain language would insist Kintz did not harass or follow either individual on separate occasions. The facts suggest he did so only once.

II. Insufficient Evidence

To determine sufficiency of the evidence we must determine, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Engel*, 166 Wn.2d at 576. "[I]f the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994) (citing *State v. Green,* 94 Wn.2d 216, 616 P.2d 628 (1980)). Here, the jury did not indicate the means—harassment or following—by which it found Kintz guilty of stalking. Accordingly if insufficient evidence exists to convict under either means, we must overturn Kintz's conviction.

a. Stalking by Harassment

Stalking by harassment requires that the defendant "repeatedly harasses" another person without lawful authority, among other factors. RCW 9A.46.110(1)(a). As explained above, "repeatedly" means "on two or more separate occasions."

9A.46.110(6)(e). "Harasses" means "unlawful harassment," pursuant to RCW 10.14.020. *See* RCW 9A.46.110(6)(c). "Unlawful harassment" is 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 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." RCW 10.14.020(2).

To be found guilty of stalking under the harassment prong, then, the course of conduct (i.e., the *pattern* of conduct composed of a *series of acts*) must occur *repeatedly* (i.e., happen more than once). Said another way: The defendant must commit a series of acts more than once to stalk a victim by harassment. In both the Westfall and Gudaz incidents, Kintz engaged in only one course of conduct. By definition his actions comprised a single *pattern* or single *series* of acts.

But the majority today rewrites the stalking statute to effectively delete the "repeatedly" requirement in RCW 9A.46.110(1)(a), allowing the State to prosecute for stalking when it is not warranted. The majority achieves this end by artificially deconstructing the events in this single pattern to create multiple patterns. It cleaves a single course of conduct into multiple courses of conduct to satisfy the "repeatedly" element of RCW 9A.46.110(1)(a). This sleight of hand impermissibly toys with the stalking statute's plain language. It manipulates facts to force them into the stalking

statute when, in reality, they do not fit.

The majority cites a Court of Appeals case, *State v. Haines*, 151 Wn. App. 428, 213 P.3d 602 (2009), *review denied*, 167 Wn.2d 1022, 225 P.3d 1011 (2010), for the proposition that harassment requires two separate acts to qualify as stalking. Majority at 17-18. Its reliance on this case is perplexing. *Haines* unequivocally supports the notion that "any *single* incident of harassment must comprise a harassing 'course of conduct' as defined by RCW 10.14.020(2)—i.e., a 'series of acts over a period of time, however short.'" *Haines*, 151 Wn. App. at 435 (quoting RCW 10.14.020(2)). "[B]oth the plain text and structure of the statutory sections at issue indicate that what must be 'repeated' is a 'course of conduct' . . . ." *Id*. "The plain meaning of the words at issue is, again, that it is the *series* of acts that, when combined, serve to sufficiently alarm, annoy, or cause detriment such that the definition of 'harassment' is met." *Id*. at 436.

As *Haines* points out, a series of acts creates a single act of harassment—not a single act of stalking. The *Haines* court affirmed Haines's conviction because his harassing conduct (*e.g.*, a series of acts including threats to rape and kill a female store clerk) occurred on clearly separate occasions. *Id*. at 437. The first occasion included a single course of conduct (or a "series of acts") when Haines repeatedly told the clerk he intended to (1) rape her, (2) Haines left the shop, (3) the clerk followed him outside to ensure he didn't hurt other customers, and finally (4) Haines threatened to rape and kill her again. *Id*. at 430-31. This was the first case of unlawful harassment. The

second (or "repeated") incident of harassment occurred more than a month later, when Haines again performed a series of harassing acts. *Id*. at 431-32.[8] This repeated harassment (or repeated course of conduct) rightfully constituted stalking.

The majority today would transform *both* Haines's first *and* second acts into stalking, when in reality each is unlawful harassment. Haines was guilty of stalking because he harassed his victim initially, then a second time more than a month later. Unlike *Haines*, Kintz's case involves only a single series of acts (i.e., only one course of conduct) with each individual. Kintz cannot be guilty of stalking by harassment because he did not harass either Westfall or Gudaz repeatedly.

The majority today impermissibly expands stalking incidents by criminalizing commonplace interactions. I read the majority opinion to criminalize, like Kintz, (1) a driver asking a stranger for directions, then (2) turning around (beyond eyeshot) and driving slowly past that same stranger. Majority at 19-20. It categorizes these two events as separate courses of conduct, each worthy of unlawful harassment. Any two interactions separated by "breaks in contact between [the] episodes" could qualify as stalking. *Id*. at 20. If this is right, many Washingtonians would be guilty of stalking in their everyday lives. A person who enters into a heated verbal exchange with a customer at a coffee shop, breaks off the exchange, but then restarts the debate

[8] The Court of Appeals characterized Haines's interactions with the victim as "both," which indicates the court found only two occasions—the initial encounter and the second more than a month later. *Haines*, 151 Wn. App. at 437.

minutes later on the sidewalk could be guilty of stalking. Similarly, a man who uses an ill-considered pickup line, is rebuffed, but again attempts to woo the object of his affection later, could be convicted of stalking.[9] This cannot be right.

Based on the facts of this case, no rational trier of fact could have found the essential elements of stalking by harassment beyond a reasonable doubt. Insufficient evidence exists to uphold Kintz's conviction. Because the jury did not indicate the alternative means by which it found Kintz guilty, and because the evidence is insufficient to support a conviction for stalking by harassment, Kintz's conviction cannot be sustained. *See Ortega-Martinez*, 124 Wn.2d 708. I would reverse and dismiss the charges.

b. Stalking by Following

Notwithstanding the need to reverse because insufficient evidence exists to support stalking by harassment, I would also reverse because insufficient evidence exists to convict on the alternative means of stalking by following.

Stalking by following requires a repeated following, among other factors. RCW 9A.46.110(1)(a). "Follows" is defined as

[9] The majority again misconstrues the dissent. *See* majority at 25-26. The dissent does not "downplay[] the threatening nature of the contacts," *id*. at 25, nor does it "minimiz[e] . . . the threatening nature of Kintz's behavior." *Id*. at 26. To the contrary, the dissent plainly recognizes the women's fear. *See, e.g., supra* p. 4 ("Both Westfall and Gudaz felt frightened due to the *totality* of their interaction with Kintz . . . ."); *infra* p. 12 ("There can be little doubt the interactions frustrated, angered, and upset both women."). The dissent does not comment on Westfall and Gudaz except to analogize potentially similar interactions which the majority newly criminalizes. This does not "downplay" the facts of this case. Majority at 25. The majority's allegation to the contrary is at best erroneous.

> deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

RCW 9A.46.110(6)(b). Following, then, does not explicitly require a course of conduct similar to stalking by harassment, but it does implicitly require something similar. Logically, one cannot follow another without committing a series of acts.[1] Maintaining visual or physical proximity requires multiple actions on the part of the would-be stalker. This *series* of acts equates to a single episode of following. That single episode of following, in turn, must be repeated on at least two occasions. RCW 9A.46.110(1)(a).[11]

In both the Westfall and Gudaz incidents, Kintz's acts amount to a single episode of following. RCW 9A.46.110(6)(b) describes a series of acts that would constitute a single episode of "follow[ing]."[12] Kintz "repeatedly and deliberately

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[1] This is the subtle distinction the majority fails to grasp. I do not disagree that "a person may follow by [maintaining visual or physical proximity to a specific person over a period of time] only once." Majority at 17. But maintaining visual or physical proximity itself requires multiple acts, *e.g.*, U-turns.

[11] I agree with the majority that Kintz wrongly argues four occasions of following are required to establish sufficient evidence of stalking by following. Majority at 16. Two occasions of following are enough. I do, however, disagree with the majority's interpretation of "follows."

[12] The majority unconvincingly brushes aside the plain language of the statute by stating the example "is not part of the definition, only an illustration." Majority at 17. The majority's dismissal is inappropriate, however, because the "illustration" perfectly describes the facts of this case.

appeared at . . . any other location to maintain visual or physical proximity to the person." RCW 9A.46.110(6)(b). These actions are "sufficient to find that the alleged stalker *follows* the person." *Id.* (emphasis added). The statute does not say the actions are sufficient to find the alleged stalker "repeatedly follows" the person. The statute articulates a single incident of following. Accordingly Kintz followed Westfall and Gudaz once because, over a period of time, Kintz endeavored to maintain his physical proximity to the women by repeatedly and deliberately appearing where he thought they would be. But he did not follow the women *repeatedly*, as required by RCW 9A.46.110(1)(a).

The majority, instead, slices the Westfall incident into "four distinct episodes." Majority at 19.[13] It asserts that "each episode constitutes a separate occasion of following under RCW 9A.46.110(6)(b)" because Kintz "'deliberately maintain[ed] visual and physical proximity.'" *Id*. (quoting RCW 9A.46.110(6)(b)). This argument has no legs. The majority goes astray by conflating the definition of "follows" with the definition of, for example, "encounters."[14] If I encounter a person on the street, then encounter them again at a different location, I could arguably be accused of following that person once. But I could not, despite the majority's reading, be accused of following that person *twice*.

[13] The majority likewise breaks the Gudaz incident into "four discrete episodes." Majority at 21.

[14] Defined as "to come upon face to face," "meet," "a direct often momentary meeting," or a "momentary or temporary contact." Webster's, *supra*, at 747.

Such a drastic broadening of the definition of "follows" also has imprudent policy ramifications. If, hypothetically, Kintz had maintained complete visual or physical proximity to both Westfall and Gudaz (i.e., hovered closely around them without any lapse in time or distance), his hovering would have constituted only one episode of following. He would not be guilty of stalking. But because Kintz briefly lost visual contact and had to regain immediate proximity to the women—in effect having *less* contact with the individuals over the course of conduct—under the majority's reasoning he is guilty of stalking. This makes no sense.

I would hold in both the Westfall and Gudaz incidents that Kintz's acts comprised only a single occasion of following. There can be little doubt the interactions frustrated, angered, and upset both women. Kintz's conduct, and perhaps his demeanor, fell outside the norm exercised by most people. But because there was no *repeated* following, as required by RCW 9A.46.110(1)(a), there is insufficient evidence to convict Kintz of stalking by following.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: