IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CLARENCE ANDREW KINTZ, aka CHUCK KINTZ, Petitioner.	)	No. 81688-3 En Banc
STATE OF WASHINGTON, Respondent, v. CLARENCE ANDREW KINTZ, aka CHUCK KINTZ, Petitioner.	)	No. 81689-1
	)	Filed August 26, 2010

ALEXANDER, J.—Clarence Kintz obtained review of a decision of the Court of Appeals affirming his convictions in Whatcom County Superior Court on two charges of stalking. Kintz contends that the Court of Appeals erred by affirming the trial court's

interpretation of the term "separate occasions," which appears in the stalking statute, RCW 9A.46.110. He also contends that the Court of Appeals incorrectly determined that sufficient evidence was presented at trial to support his convictions. We affirm the Court of Appeals.

I

The Westfall Incident

On December 21, 2005, Theresa Westfall was walking with her three children and two dogs in Bellingham's Lake Padden Park. As Westfall and her group (hereinafter referred to as Westfall) walked by a white van in a parking lot, the driver said something to Theresa Westfall about "parking." Verbatim Report of Proceedings (VRP) (June 28, 2006) at 215, 227, 231. Westfall then walked down a trail that eventually connected with a road. When Westfall came out to the road, the white van approached them slowly from behind and then drove by and out of sight. At that point, Theresa Westfall became frightened.

The white van reappeared and this time crept slowly past Westfall. The van then turned around and made a third pass by Westfall. A short while later the van again drove slowly by Westfall. The van then pulled into a parking lot, backed up, and drove by Westfall a fifth time. By this time, according to Theresa Westfall, she was "very scared and angry." *Id.* at 221.

After the van made its fifth pass, it came to a stop at a stop sign. Despite the fact that there was little traffic, the van remained at the stop sign until Westfall crossed

the street in front of the van. After Westfall finished crossing the street, the van remained at the stop sign. This caused Theresa Westfall to call 911. The van then drove by Westfall a final time. Westfall did not see the van again.

During the passes and during the time the van was at the stop sign, the driver of the van did not say anything to Westfall. Theresa Westfall testified that she did not look at the person driving the van and, when asked at trial if she could identify Kintz as the driver of the van, she was unable to do so.

Two officers from the Bellingham Police Department responded to Theresa Westfall's 911 call. The officers stopped a white van near Lake Padden approximately 20 minutes after they were dispatched. Kintz, who was driving the van, told the officers that he was lost and was looking for a friend's house. He also stated that he had come to the park after having an argument with his wife.

The Gudaz Incident

On January 28, 2006, Jennifer Gudaz was jogging on the shoulder of a road that abutted Lake Samish, near Bellingham. As Gudaz headed north on the road, she noticed a white van, driving south, go past her. The driver of the van made no contact with Gudaz and, consequently, at that time she was unconcerned.

Later the same van, now driving north, came up next to Gudaz and stopped. The driver of the van asked Gudaz if she could provide directions to an address. After he gave her an address, Gudaz indicated that she could not help him. Gudaz testified that she "was a little bit nervous" at this time and "didn't feel comfortable." *Id.* at 85,

105.

Gudaz, who had continued running, later saw the van moving down a driveway. Gudaz indicated that she "felt a little more comfortable at that point" because she thought the driver "had found where he was going." *Id.* at 86-87. However, the van subsequently drove by Gudaz and stopped in front of her. The driver, at this point, again asked Gudaz for directions telling her that he did not know where he wanted to go. He later asked Gudaz how to get to the freeway. The driver also tried to hand Gudaz a clipboard, saying that he wanted her to draw him a map. Gudaz drew the requested map, gave the driver directions, and started jogging again as the van left. Gudaz said that by this time she was "pretty frustrated" and "pretty scared." *Id.* at 113.

Gudaz later saw the van on the side of the road and ran past it. Shortly thereafter the van pulled up next to her again. It then crossed into the oncoming lane, faced the wrong way, and came within one foot of Gudaz. The driver said, "'Do you need a ride?'" *Id.* at 91. Gudaz answered, "[N]o." *Id.* The driver then asked, "'You don't need money?'" *Id.* Gudaz responded by pointing up the road, saying, "'No. Maybe your road is up there.'" *Id.* She then started running again. The van continued traveling in the same direction as Gudaz until it left her sight.

Gudaz, frightened by what she had experienced, ran down a road toward Lake Samish and hid between a fence and a shed for approximately 10 to 15 minutes. She said that by this time she was "really scared" and "a mess." *Id.* at 93. When Gudaz saw two bicyclists picking berries, she came out from her hiding place and ran toward

them. The bicyclists accompanied Gudaz to a nearby county park.

On their way to the park, Gudaz and the bicyclists saw the van coming toward them. They observed it travelling slowly as it rounded a corner and then increase speed as it drove quickly past Gudaz and the bicyclists. Gudaz testified that she was "freaked out" after the van drove by. *Id.* at 95. She had no further contact with the van or its driver. When Gudaz and the bicyclists reached the county park, Gudaz called 911. The entire incident, according to Gudaz, took place in approximately one hour or less.

Gudaz reported the van's license plate number to the Whatcom County Sheriff's Department. The van was registered to Clarence Kintz's wife, Mary Kintz. About a week after the incident, Clarence Kintz told a deputy from the sheriff's department that he initially contacted Gudaz on the morning of January 28 because he was lost and that after driving around the lake, he had asked her for directions. Kintz denied offering Gudaz a ride or money.

Procedural History

Kintz was charged in Whatcom County Superior Court with two counts of misdemeanor stalking under separate informations.[1] *See* Clerk's Papers (CP) at 103-04; *see State v. Kintz*, Whatcom County Super. Ct. J. & Sentence Cause No. 06-1-

[1]The State originally charged Kintz with two counts of felony stalking. At a pretrial hearing for Kintz's motion to dismiss, the parties stipulated that the both charges were erroneously filed as felonies and both charges were accordingly amended to gross misdemeanors.

00324-4 (Aug. 9, 2006). One information related to the Westfall incident and the other related to the Gudaz incident.

At the conclusion of the trial, the jury was instructed in part that one element of the charge relating to the Westfall incident was that Kintz "intentionally and repeatedly harassed or repeatedly followed Theresa Westfall" and that one element of the charge arising from the Gudaz incident was that Kintz "intentionally and repeatedly harassed or repeatedly followed Jennifer Gudaz." CP at 46, 47. Although the jury found Kintz guilty of each count "of the crime of stalking as charged," it was not asked to specify whether it found Kintz had stalked Westfall and Gudaz by intentional and repeated harassment or by repeated following.[2] CP at 22.

Kintz appealed his convictions to Division One of the Court of Appeals. He raised several claims there, including insufficiency of the evidence. *State v. Kintz*, 144 Wn. App. 515, 521-23, 191 P.3d 62 (2008).[3] The Court of Appeals concluded that "[w]hether the evidence is sufficient turns on the legal meaning of 'separate occasion.'"

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[2]The verdict form contained two blank spaces with instructions to "write in not guilty or guilty" for each charge. CP at 22. The jury wrote "Guilty Guilty" in both blank spaces, which the trial judge treated as a finding of guilt on each charge. *Id.* at 16; *see Kintz*, J. & Sentence Cause No. 06-1-00324-4 (Aug. 9, 2006), at 2.

[3]Kintz also challenged (1) the sufficiency of the evidence of his identity for the charge relating to the encounters with Westfall, (2) the trial court's joinder of the stalking charges, (3) the trial court's admission of ER 404(b) testimony, (4) some of the prosecutor's questions to the defense expert witness as alleged prosecutorial misconduct, (5) the sentence as allegedly disproportionate, and (6) alleged cumulative error. *State v. Kintz*, noted at 144 Wn. App. 515, ¶¶ 19-50 (2008). In the unpublished portion of its opinion, the Court of Appeals rejected each of these arguments. Kintz did not seek review of any of these claims. *See* Appellant's Pet. for Discretionary Review at 4-5.

Id. at 521-22. It affirmed both convictions, holding in part that the trial court did not err (1) "in interpreting the repeated contact provision of the statute" or (2) "in finding that sufficient evidence supported a conclusion that Kintz had contact with the victims on separate occasions as contemplated by the statute." *Id.* at 523. The Court of Appeals did not specify whether the separate occasions involving Kintz and his victims were intentional and repeated harassment or repeated following.

Kintz petitioned our court for review of the published portion of the Court of Appeals decision, including "the Court of Appeals['] holding regarding the definition of 'separate occasion,' and whether there were sufficient evidence herein to support the element of 'repeated' following or harassment." Appellant's Pet. for Discretionary Review at 5.[4] We granted review and consolidated the cases. *State v. Kintz*, 165 Wn.2d 1011, 1012, 198 P.3d 513 (2008).

II

A

Kintz first asserts that the Court of Appeals erred by affirming the trial court's interpretation of the term "separate occasions," which is contained in RCW 9A.46.110, the stalking statute. "Interpretation of a statute is a question of law that we review de

[4]In a footnote in his petition for discretionary review, Kintz claims for the first time that "it could be argued that the Stalking Statute is unconstitutionally vague." Appellant's Pet. for Discretionary Review at 16 n.1. Kintz has not sought review of this claim nor has he set forth any argument in support of it. Although we decline to address this issue, we note that the Court of Appeals recently held that a vagueness challenge to the stalking statute was "meritless." *State v. Haines*, 151 Wn. App. 428, 439, 213 P.3d 602 (2009), *review denied*, 167 Wn.2d 1022, 225 P.3d 1011 (2010).

novo." *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003)).

The stalking statute provides in relevant part:

> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
> (b) The person being harassed or followed 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 under all the circumstances; and
> (c) 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.[5] The term "repeatedly" is defined as meaning "on two or more separate occasions." RCW 9A.46.110(6)(e). The statute does not, however, define "separate occasions." "Follows" is defined as "deliberately maintaining visual or physical proximity to a specific person over a period of time." RCW 9A.46.110(6)(b).[6]

"Harasses," according to RCW 9A.46.110(6)(c), means "unlawful harassment as

[5]Two amendments to the statute became effective subsequent to the filing of the informations charging Kintz. Laws of 2007, ch. 201, § 1 (amending subsections (5)(b)(v) and (6)); Laws of 2006, ch. 95, § 3 (amending subsection (5)(b)(v)). The amendments did not modify any of the terms relevant to this case.

[6]The statute further provides, "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).

defined in RCW 10.14.020," which in turn states:

> (1) "Unlawful harassment" means 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. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.
>
> (2) "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. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."

In upholding the trial court's interpretation of "separate occasions," the Court of Appeals concluded that a separate occasion is a "distinct, individual, noncontinuous occurrence or incident." *Kintz*, 144 Wn. App. at 522 (relying in part on the definitions of "separate" and "occasion" in *Webster's Third New International Dictionary* (1969)). In reaching this decision, it observed that "[t]he legislature could have defined 'separate occasions' as separate days or dates or as separated by a minimum time period, but it did not do so" and reasoned that "[t]his suggests that the legislature did not intend a stalking charge to hinge on a predefined interval of time between incidents." *Id.* at 522-23.

Kintz claims the Court of Appeals erred by interpreting "separate occasions" as it did, arguing that it is an ambiguous term that could mean an event occurring over the course of a day, several hours, or within only a few minutes. Appellant's Pet. for

Discretionary Review at 8, 14-15. Accordingly, Kintz asks us to apply the rule of lenity, resolve the ambiguity in his favor, and rule that separate occasions are "event[s] occurring at least over a substantial period of time."[7] *Id*. at 15. The State responds that the term is unambiguous. Suppl. Br. of Resp't at 12.

"When interpreting any statute, our primary objective is to 'ascertain and give effect to the intent of the Legislature.'" *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006) (quoting *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). In order to determine legislative intent, we begin with [an examination of] the statute's plain language, according it its ordinary meaning. *Id.* "[W]e may discern the plain meaning of nontechnical statutory terms from their dictionary definitions." *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006) (citing *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992)). If necessary, it is also appropriate to rely on the thesaurus when interpreting statutes. *See, e.g., Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 584 n.5, 716 P.2d 879 (1986); *Zobrist v. Culp*, 95 Wn.2d 556, 561, 627 P.2d 1308 (1981); *Crane Towing, Inc. v. Gorton*, 89 Wn.2d 161, 171, 570 P.2d 428 (1977).

If language in a statute is subject to only one interpretation, then our inquiry

[7]Kintz also urges our court to look to *State v. Rico*, 1999-158 (La. App. 3 Cir. 6/2/99), 741 So. 2d 774 (considering undefined term "repeated" in Louisiana's stalking statute), for guidance with respect to determining what constitutes separate occasions. Appellant's Pet. for Discretionary Review at 12-14. The State contends that *Rico* does not compel the result sought by Kintz because Louisiana's stalking statute, unlike Washington's, did not define the terms "repeatedly" or "following." Suppl. Br. of Resp't at 19-20. The State also asserts that *Rico* is factually distinguishable from the instant case. We agree with the State's assertions.

ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Language is deemed unambiguous when it is not susceptible to two or more reasonable interpretations. *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003) (citing *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993)). If 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) (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); *State v. Roberts*, 117 Wn.2d 576, 585, 817 P.2d 855 (1991)).

Here, as the Court of Appeals noted, "*Webster's Third New International Dictionary* 1560, 2069 (1969) defines 'occasion' as 'a particular occurrence: happening, incident"; 'separate' is defined as 'set or kept apart,' 'not shared with another: individual, single,' autonomous, independent, distinct, and different." *Kintz*, 144 Wn. App. at 522. Similarly, our court has held that the undefined term "separate" in a different statute meant "'not shared with another,' 'individual,' 'single,' 'existing by itself,' 'independent,' 'distinct,' and 'different.'" *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996) (quoting Webster's Third New International Dictionary 2069 (1986))). Given these plain meanings, we conclude that the term "separate occasions" in the stalking statute is unambiguous, agreeing with the Court of Appeals that the only reasonable interpretation of the term is "a distinct, individual, noncontinuous occurrence or incident." *Kintz*, 144 Wn. App. at 522.

In reaching this decision, it is our view that the interpretation of separate occasions that Kintz asks us to adopt is not reasonable and, therefore, does not demonstrate an ambiguity. His interpretation of the meaning of the term is not supported by the above-discussed plain language of the stalking statute and plain meaning of "separate" or "occasion." Nor is it consistent with the legislative history of the stalking statute, which demonstrates a consistent broadening, rather than limiting, of the applicability of the statute. *See* Laws of 2006, ch. 95, § 3 (expanding stalking to include acts committed against certain employees of the Department of Social and Health Services); Laws of 1999, ch. 27, § 1 (expanding scope of statute by clarifying that electronic communications are included in the types of conduct that may constitute stalking or harassment); Laws of 1994, ch. 271, § 801 (broadening the scope of proscribed behavior by adding "harass[ing]" to the type of conduct that constitutes stalking and replacing the requirement that a stalker repeatedly follow a person while "in transit from one location to another" with the condition that the stalker repeatedly deliberately maintain visual or physical proximity over a period of time in a manner the stalker would reasonably know would instill fear of injury to the victim's person or property).

In addition, the interpretation suggested by Kintz is unsupported by Washington case law interpreting and applying the stalking statute broadly. *See, e.g.*, *State v. Becklin*, 163 Wn.2d 519, 182 P.3d 944 (2008) (upholding defendant's stalking conviction based on stalking by third party at defendant's direction); *State v. Lee*, 135

Wn.2d 369, 394, 957 P.2d 741 (1998) (holding sufficient evidence supported stalking convictions of both defendants); *State v. Askham*, 120 Wn. App. 872, 880-81, 86 P.3d 1224 (2004) (upholding convictions, including felony stalking, where defendant's only actual contact with victim was sending repeated e-mails); *State v. Ainslie*, 103 Wn. App. 1, 6-7, 11 P.3d 318 (2000) (upholding stalking conviction despite defendant never having actual physical or verbal contact with victim).

Moreover, the definition Kintz sets forth violates the rule of statutory interpretation prohibiting courts from adding words or clauses to an unambiguous statute when the legislature has chosen not to include that language. *Delgado*, 148 Wn.2d at 727 (two-strike statute not subject to construction beyond unambiguous plain language); *see also, e.g., State v. Thompson*, 151 Wn.2d 793, 800-01, 92 P.3d 228 (2004) (court prohibited from reading "civil actions" into plain language of "knock and wait" statute). As the State correctly argues and the Court of Appeals properly reasoned, the legislature could have required separate occasions to occur over a "substantial period of time" but chose not to do so. *See* Suppl. Br. of Resp't at 13; *Kintz*, 144 Wn. App. at 522-23. Consequently, we cannot add that limiting language. Furthermore, even if we felt that the omission of a "substantial period of time" limitation was a legislative error, "'[t]his court has exhibited a long history of restraint in compensating for legislative omissions.'" *Delgado*, 148 Wn.2d. at 730 (quoting *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 663 (1982)).

Kintz also contends that the definition of "separate occasions" applied by the

Court of Appeals was erroneous because it incorporates "the term 'non-continuous.'" Appellant's Pet. for Discretionary Review at 16. We disagree because "noncontinuous" is synonymous with "discontinuous," which in turn is a synonym for "separate." Roget's International Thesaurus § 801.20, at 561, § 812.4, at 568 (5th ed. 1992). "Discontinuous" is also synonymous with "distinct" and "independent," two terms that our court has held mean "separate." *Id.*; *Bolar*, 129 Wn.2d at 367. Thus, it was not error for the Court of Appeals to use "noncontinuous" in defining "separate occasions" for purposes of the stalking statute.

The plain meaning of "separate occasions" is clear and subject to only one reasonable interpretation. Consequently, the rule of lenity does not apply. In sum, we agree with the Court of Appeals' interpretation of the term "separate occasions."

B

Kintz argues that, even if the Court of Appeals' interpretation of the term "separate occasions" is correct, there was insufficient evidence to support his convictions. Thus, he contends the Court of Appeals erred by concluding otherwise. The test for determining the sufficiency of the evidence is 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. *Engel*, 166 Wn.2d at 576 (citing *Wentz*, 149 Wn.2d at 347). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). "Circumstantial evidence and direct evidence are equally reliable" in determining the sufficiency of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009).

RCW 9A.46.110(1)(a) provides alternative means of committing the crime of stalking: intentionally and repeatedly harassing or repeatedly following another person. As we have observed, "repeatedly" is defined as "on two or more separate occasions," meaning distinct, individual, noncontinuous occurrences or incidents. RCW 9A.46.110(6)(e). Thus, a stalking conviction requires evidence of two or more distinct, individual, noncontinuous occurrences of following or harassment, and no minimum amount of time must elapse between the occurrences, provided they are somehow separable.

A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994). In this case, the jury was instructed that it must find that Kintz "intentionally and repeatedly harassed or repeatedly followed Theresa Westfall" to convict him of stalking Westfall,

and similarly that it must find that Kintz "intentionally and repeatedly harassed or repeatedly followed Jennifer Gudaz" to convict him of stalking Gudaz. CP at 46, 47. The trial court treated the jury's entry of "Guilty Guilty" in both blank spaces on the verdict form as a finding of guilt on each charge. *Id*. at 16. Because the jury did not express unanimity as to the means by which Kintz stalked his victims, we have examined the record to determine if sufficient evidence supports each alternative means.

Kintz advances two arguments in support of his claim that there was insufficient evidence to support his convictions. First, he asserts that the Westfall incident and the Gudaz incident are each "only one ongoing 'following' briefly interrupted by a short break in visual proximity," and thus the State cannot show that Kintz stalked his victims "repeatedly." Pet'r's Suppl. Br. at 12. The State responds that both incidents satisfy the requirement of two or more separate occasions because each involved "repeated contacts, separated by time and physical space." Suppl. Br. of Resp't at 19.

Kintz argues alternatively that "to establish sufficient evidence of repeated following under subsection (1)(a), there must be sufficient evidence that [he] on at least *four* separate occasions deliberately appeared at the subject locations to maintain visual or physical proximity with each of the respective victims." Pet'r's Suppl. Br. at 12. He arrives at the number four by layering RCW 9A.46.110(1)(a)'s requirement that a person follow another "repeatedly," defined by subsection (6)(e) as "on two or more separate occasions," on subsection (6)(b), which provides that "[a] finding that the

alleged stalker *repeatedly* and deliberately appears at . . . any . . . location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person." RCW 9A.46.110 (emphasis added). According to Kintz, the two or more occasions of following necessary to commit stalking must be multiplied by the "repeatedly," again defined as two or more, in the definition of "follows." We reject this contention.[8]

Kintz misreads the statute. Subsection (6)(b) defines "follows" as simply "maintaining visual or physical proximity to a specific person over a period of time." Thus, a person may follow by doing this only once. The next sentence—"A finding that the alleged stalker repeatedly and deliberately appears . . . is sufficient to find that the alleged stalker follows . . . ."—is not part of the definition, only an illustration. Appearing "repeatedly" is "sufficient" to satisfy the definition of "follows"; it is not *necessary*. Of course, a person must follow "repeatedly," meaning on two or more separate occasions, to satisfy the stalking statute. Thus, contrary to Kintz's assertion, the crime of stalking by "repeatedly follow[ing]" requires sufficient evidence that the person "maintain[ed] visual or physical proximity to a specific person over a period of time" on *two* separate occasions, not four.

[8]Kintz did not raise this argument in his petition for review. He argued this for the first time in the supplemental brief he presented after we granted review. This court will generally not consider issues raised for the first time in a supplemental brief filed after review has been granted. *State v. Leyda*, 157 Wn.2d 335, 340, 138 P.3d 610 (2006) (citing *Douglas v. Freeman*, 117 Wn.2d 242, 258, 814 P.2d 1160 (1991); RAP 13.7(b)). We choose to address Kintz's "layering" argument because the sufficiency of the evidence hinges on the correct reading of the statutory scheme.

The Court of Appeals in a recent case, *State v. Haines*, 151 Wn. App. 428, 213 P.3d 602 (2009), *review denied*, 167 Wn.2d 1022, 225 P.3d 1011 (2010), rejected an argument similar to the one Kintz now presents. That case dealt with the "harasses" prong of the stalking statute instead of the "follows" prong. The defendant, Haines, argued that the stalking statute requires proof of six predicate acts of harassment. *Id.* at 430. He arrived at the number six by layering RCW 9A.46.110(1)(a)'s requirement that a person "repeatedly" harass his victim, meaning two or more times, on subsection (6)(c)'s definition of "harasses." Subsection (6)(c) provides that "'[h]arasses' means unlawful harassment as defined in RCW 10.14.020." RCW 10.14.020(2) in turn requires a "course of conduct," meaning "a pattern of conduct composed of a series of acts over a period of time, however short." Pointing to the dictionary definition of "series" as "'a group of usu[ally] three or more things,'" Haines contended that the stalking statute required proof of least six separate acts of harassment to convict a person of stalking: two for "'repeatedly'" in RCW 9A.46.110(1)(a), and three for the "'series'" that comprises a "'course of conduct'" under RCW 10.14.020(2). *Haines*, 151 Wn. App. at 435 (quoting *Webster's Third New International Dictionary* 2073 (1993)).

The Court of Appeals rejected this reasoning, observing that nothing in the statute suggests that each of the individual acts that together comprise harassment, as defined by RCW 10.14.020, must, by itself, constitute harassment:

> To the contrary, both the plain text and structure of the statutory sections at issue indicate that what must be "repeated" is a "course of conduct" that "seriously alarms, annoys, harasses, or is detrimental" to the victim. There is no basis whatsoever to suppose that each of the separate acts

> that comprise that course of conduct must be vexatious when taken in isolation. It is the *combination* of separate acts—none of which is necessarily criminal in its own right—that must be "seriously alarm[ing], annoy[ing], harass[ing], or detrimental" to the victim in order for the perpetrator to have committed the criminal offense of stalking.

Id. at 435 (alterations in original). We agree with the Court of Appeals' reasoning in *Haines* and conclude, as did that court, that stalking requires two separate acts of harassment or two separate acts of following.[9] It remains to test the Westfall and Gudaz incidents against this requirement to see whether sufficient evidence supports each alternative means. We address each incident in turn.

Westfall Incident[1]

The Westfall incident consisted of four distinct episodes, each separated by a significant interruption of Kintz's contact with Westfall. The first episode consists of Kintz's initial attempt to make contact with Westfall in the parking lot. It ended when Westfall walked down the trail. The second episode consists of Kintz's first pass and

[9]The dissent says it is perplexed by our citation of *Haines*. Dissent at 6. We have adopted the Court of Appeals' rationale in *Haines* because it disposes of various layering arguments that aim to multiply the "two or more separate occasions" in RCW 9A.46.110(6)(e) by either the "repeatedly" in RCW 9A.46.110(6)(b) or the "series of acts" in RCW 10.14.020(2). Contrary to the dissent's assertion, our holding today does not "transform *both* Haines's first *and* second acts into stalking." Dissent at 8. The two occasions of harassment in *Haines* continued without interruption until the defendant got in his car and drove away. *See Haines*, 151 Wn. App. at 430-32. The fact that these two occasions were separated by "[a] little over a month," *id.* at 431, simply makes that an easier case than this one, where breaks in contact were shorter.

[1]The dissent fashions an argument out of our heading, implying that the word "incident" rather than "incidents" is significant. RCW 9A.46.110 defines a single offense made up of multiple separate acts. The singular word "incident" corresponds to one count of stalking, not to the multiple occasions of following or harassment that made up this offense.

ended when Kintz drove out of Westfall's view. At this point, Westfall testified that she became frightened. The third episode encompasses Kintz's second pass, three-point turn, and third pass, at which point Kintz again drove away, leaving Westfall "very scared and angry." VRP (June 28, 2006) at 221. The fourth episode includes Kintz's fourth pass (second three-point turn), and fifth pass (the encounter at the stop sign), and finally a sixth pass. During each episode, Kintz "deliberately maintain[ed] visual and physical proximity" to Westfall. Thus, each episode constitutes a separate occasion of following under RCW 9A.46.110(6)(b). Viewed in the light most favorable to the State, a rational trier of fact could easily have found Kintz guilty of stalking Westfall by following her on two or more separate occasions.[11]

Episodes two, three, and four also constitute separate occasions of unlawful harassment as defined by RCW 10.14.020. Each represents a "course of conduct" directed at Westfall, which seriously alarmed her, served no lawful purpose, was such as would cause a reasonable person to suffer substantial emotional distress, and actually caused substantial emotional distress, as evidenced by Westfall's very real

[11]The dissent says that the majority "goes astray by conflating the definition of 'follows' with the definition of, for example, 'encounters,'" which is defined as "'to come upon face to face,' 'meet,' 'a direct often momentary meeting,' or a 'momentary or temporary contact.'" Dissent at 11 & n.15 (quoting Webster's Third New International Dictionary 747 (2002)). The dissent hypothesizes: "If I encounter a person on the street, then encounter them again in a different location, I could arguably be accused of following that person once. But I could not . . . be accused of following that person *twice*." *Id*. at 11-12. That is not what Kintz did; he did not simply show up at different points along Westfall's path. Whenever he appeared, he adjusted the speed and location of his van to match Westfall's; in the words of the statute, he "maintain[ed] visual [and] physical proximity" to her "over a period of time," and then drove away, only to reappear later and *repeat* the process.

fear. Each would also cause a reasonable parent to fear for the well-being of her children; especially episode four, when Westfall crossed in front of Kintz's idling van with her three children. Based on the breaks in contact between these episodes, the jury could have found that they constituted two or more separate occasions of harassment. Thus, the Court of Appeals properly concluded that sufficient evidence supported Kintz's conviction on the charge of stalking Westfall.

Gudaz Incident

The Gudaz incident was similarly divided into four discrete episodes (leaving aside the first time Gudaz saw the white van, when Kintz drove past her as she was jogging on the shoulder). These four episodes are again separated by a break in Kintz's contact with his target; this time, Gudaz. The first episode consists of Kintz's first stop next to Gudaz and his request for directions. It ended at the point Kintz drove away. The second episode includes Kintz's appearance in a driveway near Gudaz; his subsequent pass; his second stop and second request for directions; and his insistence that Gudaz draw him a map on the clipboard that he thrust out the window. It ended when Kintz again drove away, out of Gudaz's sight, leaving her "pretty frustrated" and "pretty scared." VRP (June 28, 2006) at 113. The third episode encompasses Kintz's presence on the side of the road along which Gudaz was jogging; his third stop, when he pulled up next to Gudaz in the oncoming lane and parked within one foot her; his offer of a ride and money; and his continued travel in Gudaz's direction after she started running again. This episode ended when Kintz finally drove away. At this point, Gudaz, who was "really scared" and a "mess," hid between a shed and a fence until she saw two bicyclists picking berries. *Id*. at 93. The fourth episode consists of Kintz's past, which left Gudaz "freaked out." *Id*. at 95

In our view, each of these episodes satisfies the statutory definition of following: "deliberately maintaining visual or physical proximity to a specific person over a period

of time." RCW 9A.46.110(6)(b). Each episode, moreover, was bounded by a break in contact between Kintz and Gudaz. Thus, the jury could reasonably find that together they make up two or more separate occasions of following. The jury could also find that they constitute two or more separate occasions of harassment. Episodes two, three, and four in particular represent courses of conduct directed at a specific person, Gudaz, which seriously alarmed her, served no lawful purpose, are such as would cause a reasonable person to suffer substantial emotional distress, and actually caused substantial emotional distress. Accordingly, we affirm the Court of Appeals' conclusion that sufficient evidence supported Kintz's conviction on the charge of stalking Gudaz.

C

Before concluding, we address some of the arguments made by the dissent. The dissent attempts to show that the stalking statute is susceptible to two reasonable interpretations by claiming that "separate occasion[]" in RCW 9A.46.110(6)(e) "very likely describes an interrelated series of events that comprises a single episode," and that this could just as well describe the "totality" of Kintz's interactions with Westfall or Gudaz as it could the "microevents in the larger scheme of the same incident." Dissent at 3. The problem with this argument is that what the dissent refers to as the "microevents" that make up the two counts of stalking in this case, i.e., the episodes delineated in part B, are only "interrelated" to the extent that they involve the same victim, the same intent, and similar conduct; specifically, following and harassment. Of

course, they *must* be interrelated in these ways, by definition, if they are to satisfy RCW 9A.46.110. The statute in question describes a crime made up of constituent parts—two or more occasions—that are "separate" in one sense but necessarily related in others. The so-called "microevents" in this case *are* "'[s]eparate,'" meaning "'kept apart,' . . . 'detached,' 'isolated,'" dissent at 3 (quoting Webster's Third New International Dictionary 2069 (2002)), in one crucial respect: they are divided one from the other by periods of time in which Kintz was out of contact with his victims; periods that the dissent is very reluctant to acknowledge. Only by overlooking these can it be said that Kintz's interactions "were not set or kept apart." *Id.* at 4. If these separate events can be said to comprise a single episode, it is because they comprise a single episode of *stalking*.

The dissent also says that the legislature has left courts "rudderless" by not defining "separate occasions" in RCW 9A.46.110(6)(e). *Id*. at 2. 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.[12] Thus, the dissent accuses us of "artificially deconstructing the events in [a] single pattern to create multiple patterns,"

[12]This is implicit in the dissent's contention that the stalking statute is subject to more than one reasonable interpretation when applied to the facts of Kintz's case. The "problem," as the dissent sees it, is that Kintz's interactions with Westfall or Gudaz can be seen as one "occasion" instead of "separate occasions." *Id*. at 3-4. This view assumes that the breaks in contact in this case were insignificant, and therefore may be disregarded. In other words, so little time separated one interaction from the next that these "occasions" cannot be seen as "separate." Of course, the statute asks the trier of fact to determine whether the alleged following or harassment occurred on "separate occasions." The dissent incorrectly characterizes what is a challenge to the sufficiency of the evidence as a challenge to the statutory language.

and elsewhere of "cleav[ing] a single course of conduct into multiple courses of conduct." *Id.* at 6. No artifice was necessary because the breaks in contact appear in the record. The dissent is simply unsatisfied with the length of those breaks and persists in its view that the totality of Kintz's contacts with Westfall or Gudaz constituted but a single occasion. The jury saw things differently. The dissent suggests that any breaks in contact here were too short as a matter of law, but never tells us where the line should be drawn; a line, we emphasize, that the legislature never drew. Our reading of RCW 9A.46.110 simply leaves it to a jury to determine whether such instances of following and harassment, divided by such breaks, were "separate" within the meaning of the stalking statute.

The dissent asserts that what it regards as our "drastic broadening" of the definition of "follows" has "imprudent policy ramifications" because it criminalizes situations in which breaks in contact have resulted in less contact between a stalker and his victims than there would have been had the stalker "hovered closely" around them without interruption. *Id*. at 12. In that case, there would be only one occasion of following, and "[h]e 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." *Id.* The dissent's claim that "[t]his makes no sense" assumes that uninterrupted following is more criminal than following that is broken off and later resumed, i.e., repeated; but it is *repetition*, not duration, that the legislature has made

the sine qua non of stalking: "A person commits the crime of stalking if . . . [h]e . . . intentionally and *repeatedly* harasses or *repeatedly* follows another person; . . ." RCW 9A.46.110(1)(a) (emphasis added).

This is perfectly sensible 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, as opposed to coming into contact with her by chance. Indeed, the record here reflects that Kintz's repeated contacts engendered progressively greater fear on the part of Westfall and Gudaz because, with each encounter, it became more apparent that the contacts were not accidental and innocent, but intentional and malevolent. Westfall became frightened when Kintz first followed her family in his van after trying to get her attention in the parking lot, but became "very scared and angry" when he repeated that conduct. VRP (June 28, 2006) at 221. Similarly, Gudaz was unconcerned the first time Kintz drove past her, but became "a little bit nervous" when he returned to ask for directions. She felt "pretty scared" when he came back again to have her draw him a map, grew "really scared" when it became clear that it was she and not directions to the freeway that he was after—"need a ride?"—and ultimately felt "freaked out." *Id*. at 85, 113, 93, 91, 95.

Finally, in the service of its argument that no rational jury could have found the elements of stalking beyond a reasonable doubt, the dissent downplays the threatening nature of the contacts in this case. The dissent says that Kintz's conduct simply "fell outside the norm." Dissent at 12. We disagree. Kintz's conduct was not just abnormal,

it was threatening. Indeed, Westfall was frightened enough to look for a rock or brick with which to defend her family, and Gudaz at one point considered jumping in the lake to get away from Kintz. The dissent, nevertheless, equates Kintz's behavior to "an ill-considered pickup line" or getting into an argument with a customer in a coffee shop. *Id*. at 8-9. The dissent says that we are criminalizing "commonplace interactions" with the result that "many Washingtonians" will find themselves "guilty of stalking in their everyday lives." *Id*. at 9. The dissent's minimization of the threatening nature of Kintz's behavior is belied by the defense's own expert witness, a clinical psychologist, who answered "yes" when asked if "women reasonably fear harm or injury when stalked in the manner described in these police reports." VRP (July 3, 2006) at 405.

III

In conclusion, we affirm the Court of Appeals' decision upholding the trial court's interpretation of separate occasions in the stalking statute and its conclusion that sufficient evidence supported Kintz's convictions.

AUTHOR:

Justice Gerry L. Alexander

WE CONCUR:

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Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice James M. Johnson

Justice Debra L. Stephens