5-21-2014

State v. Eliasen Appellant's Reply Brief Dckt. 41428

IN THE SUPREME COURT FOR THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff/Respondent	)	No. 41428-2013
	)	(Bannock Co. CR-2008-17128-MD)
vs.	)	
	)	
DESIREE ELIASEN,	)	
	)	
Defendant/Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court
of the Sixth Judicial District of the State of Idaho
In and For the County of Bannock

HONORABLE STEVEN S. DUNN
District Judge
HONORABLE RICK CARNAROLI
Magistrate Judge

Dennis Benjamin
NEVIN, BENJAMIN, McKAY
& BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
db@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Jessica M. Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0020
(208) 334-2400

Attorneys for Respondent

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II. ARGUMENT IN REPLY

As set forth in the Opening Brief, the state failed to show there was a course of conduct consisting of repeated acts of nonconsensual contact as required by I.C. § 18-7906. As nothing in the record or the Brief for Respondent supports the district court's contrary conclusion, this Court should vacate the conviction and enter a judgment of acquittal.

The entirety of the state's argument is that "the statute does not require a 'break in the contact.' Rather, it only requires 'repeated acts of non-consensual contact', with 'nonconsensual contact' being further defined as including certain types of actions." State's Brief, pg. 9-10. However, in context, the acts must occur on separate occasions to be "repeated acts," rather than "serial acts" or just "acts." Under the district court and state's interpretation of the statute, a person could be convicted upon evidence of one occasion of following by foot, if the victim jaywalked across the street but the defendant waited for the proper signal before resuming. This Court should decline to read the statute so broadly because "[c]onstructions of a statute that would lead to an absurd result are disfavored." *State v. Ephraim*, 152 Idaho 176, 178, 267 P.3d 1291, 1293 (Ct. App. 2011) *citing State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004).[1]

In this case, there was only one continuous incident of nonconsensual contact. Even if Ms. Eliasen's action may be said to have changed from surveilling to following and back again

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[1] The lack of Idaho precedent as to the meaning of the phrase "repeated acts of one consensual contract" is likely the result of no one else ever being charged, much less convicted, of stalking based upon a single continuous incident. This case may be the exception to the rule due to prosecutorial overreaching and jury sympathy caused by the fact that the complaining party is a police officer's wife. This suspicion is supported by the fact that the entire case is based upon the testimony of that one person with no corroborating witnesses or physical evidence and no confession or admission of any kind in stark contrast to the typical stalking case.

during the incident there was only one incident of nonconsensual contact. That is not sufficient to sustain the conviction under the plain language of the statute. *See City of Seattle v. Meah*, 297 P.3d 69, 72 (Wash. Ct. App. 2011) (Where the district court's "view that a change in the nature of the conduct that a defendant engages in creates a sufficient break in the events to demonstrate a course of conduct through repeated acts of nonconsensual contact with a victim" was rejected.)[2]

Iii. CONCLUSION

For the reasons set forth above and in the Opening Brief, this Court cannot determine, based upon its independent consideration of the evidence, that there was substantial and competent evidence to support the verdict. *State v. Hollon*, 136 Idaho 499, 501, 36 P.3d 1287, 1289 (Ct. App. 2001). The state's evidence is also constitutionally insufficient because, even when viewed in the light most favorable to the prosecution, no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Desiree Eliasen asks this Court to vacate the judgment of conviction and enter a judgment of acquittal.

Respectfully submitted this 21st day of May, 2014.

Dennis Benjamin
Attorney for Desiree Eliasen

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[2] At the same, the district court's interpretation would also permit conviction if, in the hypothetical above, the complaining witness stopped at the crosswalk. That would "cause a change in the nature of the conduct" from following to surveilling and then back to following when the witness began to walk again, *ad infinitum*. As previously argued, the behavior of the complaining witness should not determine whether there is a single occurrence of contact or multiple instances (and thus criminal liability).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have on this 21st day of May, 2014, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin