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State v. Eliasen Appellant's Brief 2 Dckt. 41428

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. DESIREE B. ELIASEN, Defendant-Appellant.	No. 41428-2013 (Bannock Co. CR-2008-17128-MD) **BRIEF IN SUPPORT OF PETITION FOR REVIEW**

Desiree Eliasen submits the following in support of her Petition for Review.

A. *Why Review Should be Granted*

This Court should grant review pursuant to I.A.R. 118(b)(1) because the Court of Appeals has decided a question of substance not heretofore determined by this Court. Specifically, it has held in a published opinion that the stalking statute's requirement that the defendant commit a "course of conduct" by engaging in "repeated acts of nonconsensual contact" can be satisfied by evidence that the defendant committed one continuous act of nonconsensual contact, in a case where the nature of the nonconsensual contact changed from appearing to following to surveilling and then back to following – all without a break in contact. This Court has never interpreted the meaning of the phrase "repeated acts of nonconsensual contact" as used in I.C. § 18-7906(2)(a). It should accept review to do so now.

B. *Statement of Facts*

Desiree was charged by citation with one count of Second-Degree Stalking in violation of I.C. § 18-7906. R 96. The state alleged that:

> On or about 26 September 2008, in the City of Pocatello, State of Idaho, the Defendant, DESIREE ELAISEN, knowingly and maliciously engaged in a course of conduct that seriously annoyed, alarmed or harassed Lynette Sampson causing her to suffer substantial emotional distress by following and/or maintaining surveillance upon Lynette Sampson.

R 160. She entered a plea of not guilty. R 105.

At trial, Lynette Sampson testified that she lives at 454 Wyldwood Lane in Pocatello. She is married to Pocatello Police Officer Richard Sampson and they have two young children. T pg. 176, ln. 10-20. On Friday, September 26, 2008, she was planning to go to the Goodwill Store to make a donation and then go to the Fred Meyer store to shop. T pg. 177, ln. 4-5. At about 12:45 p.m., she and her three-year-old daughter left the house. *Id*, ln. 8 -12. As she was backing out of the garage and driveway, she noticed a brown Blazer stopped in the roadway facing east. T pg. 178, ln. 22-25. She waited a few seconds for the Blazer to move. When it didn't move, she backed onto the road and drove west. T pg. 179, ln. 1-2. The Blazer headed east, did a U-turn and then headed west. T pg. 180, ln. 1-3. Ms. Sampson drove a block and one-half east on Wyldwood, turned south on Meadowbrook, traveled a short block, then turned right onto E. Alameda heading west toward Yellowstone Ave. She did not notice where the Blazer was at this point. *Id.*, ln. 9-24.

Alameda and Yellowstone are both major arterials in Pocatello. Ms. Sampson drove west on Alameda for three blocks and stopped for a red light at Yellowstone. She was in the left turn lane and the Blazer was right behind her. T pg. 181, ln. 5-18.

Ms. Sampson then turned left and drove to the Goodwill Store at 441 Yellowstone Ave.,

about one-half of a mile from the intersection. She did not notice the Blazer behind her. T pg. 181, ln. 5-13. When she pulled into the Goodwill, she noticed the Blazer "turned sharply" into the parking lot and then park. Ms. Sampson got out of her car, got some bags out of the trunk, and started walking to the donation door. A Goodwill employee came out to help her with the donations and she stood by the door while the employee took the bags inside. While she was waiting, she saw the Blazer. T pg. 182, ln. 5 - pg. 183, ln. 4. Ms. Sampson identified Ms. Eliasen as the driver of the Blazer. T pg. 183, ln. 18 - pg. 184, ln. 2. At that time she did not know Ms. Eliasen. T pg. 176, ln. 25 - pg. 177, ln. 1. Ms. Sampson left the Goodwill the back way, and turned right on Pine St. This route is safer than taking a left onto Yellowstone because there is a traffic signal at Pine. The Blazer was behind her at the red light at Pine and Yellowstone. She then turned north onto Yellowstone heading toward the Fred Meyer as did the Blazer. Ms. Sampson turned right on Cedar St., which is located a long block north of Pine, without signaling. T pg. 184, ln. 10 - pg. 185, ln. 23. The Blazer also turned right. TT pg. 186, ln. 1 - pg. 187, ln. 1.

Ms. Sampson then called her husband, but was not able to reach him. She called again while driving eastbound on Cedar and, after speaking to him, decided to drive to the police station. T pg. 187, ln. 11-18. She turned right from Cedar onto Jefferson Ave., right again from Jefferson onto Oak, and left onto Sherman where the police station is located. T pg. 188, ln. 4-22. Both Jefferson and Oak are main thoroughfares in Pocatello. The Blazer was between two to four cars behind Ms. Sampson as she drove down Jefferson and Oak. The Blazer continued down Oak Street and did not turn down Sherman. T pg. 189, ln. 15 - pg. 65, ln. 5.

Officer Sampson testified that his wife arrived at the police station and told him the license plate number of the Blazer. T pg. 206, ln. 16. He testified that Ms. Eliasen's "name came

back" when he "r[an] that license plate." T pg. 220, ln. 18 - pg. 221, ln. 1.

The jury found Ms. Eliasen guilty. R 270.

C. *The Evidence is Insufficient to Show a Course of Conduct Consisting of Repeated Acts of Non-Consensual Contact*

Ms. Eliasen's right to due process has been violated because the state's evidence, even when viewed in the light most favorable to the prosecution, is insufficient for any rational trier of fact to have found 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).

The state charged Ms. Eliasen with that portion of the statute which provides that "[a] person commits the crime of stalking in the second degree if the person knowingly and maliciously . . . [e]ngages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress." R 160. The statute defines the term "course of conduct" to mean "*repeated acts* of nonconsensual contact." I.C. § 19-7906(2)(a) (emphasis added). Examples of "[n]onconsensual contact" under section 2(c) include appearing at the residence of the victim, as well as "[f]ollowing the victim or maintaining surveillance[.]"

Here, the evidence was insufficient because there was only a single occurrence of non-consensual contact between Ms. Eliasen and Ms. Sampson. And a single occurrence of nonconsensual contact cannot constitute a "course of conduct" under I.C. § 19-7906(1)(a). While there is no Supreme Court opinion addressing this issue, the principles of statutory interpretation require that conclusion. As this Court has said,

> the objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole,

> and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

State v. Schulz, 151 Idaho 863, 866-67, 264 P.3d 970, 973-74 (2011).

While the plain language of the statute requires "repeated acts" of nonconsensual contact, all the evidence shows, even when taken in the light most favorable to the state, is that Ms. Eliasen drove to Wyldwood Lane and followed Ms. Sampson until Ms. Sampson turned off of Oak Street onto Sherman Street, stopping only for traffic signals and when Ms. Sampson paused at the Goodwill. That is a single instance of nonconsensual contact.

The district court, without citation to supporting authority, was of the "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." R 76. And the Court of Appeals affirmed the district court finding that "[t]here is substantial and competent evidence in the record to support the conclusion that Eliasen's actions constituted a course of conduct . . . . Eliasen committed a nonconsensual contact by appearing at the victim's residence and another when she conducted a U-turn and followed the victim." Exhibit A, pg. 4. (A copy of the Court of Appeals's published opinion is attached hereto as Exhibit A.)

However, the Court of Appeals's conclusion is contrary to the plain language of the statute, which does not require multiple instances of prohibited conduct. It requires "repeated acts of nonconsensual contact." I.C. § 18-7906(2)(a). There is only one act of "nonconsensual contact" here even if there was prohibited conduct by waiting at Wyldwood Lane, following to Goodwill, waiting there and then continuing the following. The nonconsensual contact between Ms. Eliasen and Ms. Sampson began at Wyldwood Lane and did not end until Ms. Sampson

turned off Oak Street onto Sherman Street. While the nature of the nonconsensual contact changed, there was still only one uninterrupted contact.

The natural reading of the statute is that there can only be a new act of "nonconsensual contact" when there is some break in the original "nonconsensual contact." Without such a break, there cannot be "repeated acts of nonconsensual contact," as required by the statute. Here, there was no break in the contact. Desiree drove to Wyldwood Street, began the contact when she followed Ms. Sampson to Goodwill, paused when Ms. Sampson shortly paused and then continued following when Ms. Sampson resumed, all without breaking off the nonconsensual contact at anytime. According to Ms. Sampson, there was no time that Desiree left the immediate area nor did Desiree break off contact from the time Ms. Sampson left her home on Wyldwood until they parted ways when Ms. Sampson turned off Oak Street onto Sherman. Only one instance of nonconsensual contact occurred.

The district court cited to two Washington State cases, both interpreting the Washington State stalking statute. Revised Code of Washington § 9A.46.110(1)(a) prohibits "intentionally and repeatedly harassing or repeatedly following another person." R 76-77. The Washington Supreme Court has written in this regard, "As we have observed, 'repeatedly' is defined as 'on two or more separate occasions,' meaning district, individual, noncontinuance occurrences or incidents." *State v. Kintz*, 238 P.3d 470, 477 (Wash. 2010). Thus, Ms. Eliasen did not repeatedly engage in acts of nonconsensual conduct under *Kintz's* definition of "repeatedly," as there was only one contact. *Accord, City of Seattle v. Meah*, 297 P.3d 69, 72 (Wash. Ct. App. 2011) (Evidence of "separate occasions" insufficient where defendant attempted to talk to complaining witness on bus, continued when he followed her off the bus and up the street and ended when a third party intervened. "Because no reasonable jury could find that Meah's

conduct constituted more than a single, continuous episode of following, the evidence introduced at Meah's trial was insufficient to support Meah's stalking conviction based on two or more separate occasions of following.")

Contrary to the Washington Court's common sense understanding of the word "repeatedly," the Court of Appeals's interpretation of "repeated acts" here is contrary to the plain language of the statute. It would lead to the absurd result that the behavior of the complaining witness determines whether there is a single occurrence of contact or multiple instances (and thus criminal liability) simply by pausing or changing directions while being followed. Under the Court of Appeal's interpretation of the statute, conviction would be permitted if Ms. Sampson was driving South, stopped at a stop sign, then turned West, if Desiree followed the same route. These results are plainly not what the Legislature meant by "repeated acts of nonconsensual contact" and the Court of Appeals's interpretation which leads to those results should be rejected. *State v. Schulz*, *supra*; *see also State v. Harvey*, 142 Idaho 727, 730, 132 P.3d 1255, 1258 (Ct. App. 2006) (constructions of a statute which leads to an absurd result are disfavored); *see also State v. Anderson*, 145 Idaho 99, 103, 175 P.3d 788, 792 (2008) ("[T]he rule of lenity states that criminal statutes must be strictly construed in favor of defendants.").

D. *Conclusion*

This Court should take this opportunity to determine the meaning of "repeated acts" in the statute. Under the correct understanding of that phrase, the evidence here does not show there was a course of conduct as required by statute. Therefore, this Court should grant review, vacate the conviction and enter a judgment of acquittal because there was not substantial and competent evidence to support the verdict. *Jackson v. Virginia*, *supra*; *In re Winship*, *supra*; *State v. Hollon*, 136 Idaho 499, 501, 36 P.3d 1287, 1289 (Ct. App. 2001).

Respectfully submitted this 28th day of August, 2014.

Dennis Benjamin
Attorney for Desiree Eliasen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August, 2014, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to:

Jessica Lorello
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Dennis Benjamin

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41428

STATE OF IDAHO,	)	**2014 Opinion No. 57**
	)	
Plaintiff-Respondent,	)	**Filed: July 24, 2014**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
DESIREE B. ELIASEN,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Stephen S. Dunn, District Judge. Hon. Rick Carnaroli, Magistrate.

Intermediate appellate decision of the district court affirming magistrate's judgment of conviction for second degree stalking, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP; Dennis Benjamin, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Desiree B. Eliasen appeals from the decision of the district court in its appellate capacity affirming the magistrate's judgment entered upon a jury verdict finding her guilty of second degree stalking, Idaho Code § 18-7906. She claims there was insufficient evidence to support her conviction.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Eliasen was charged with one count of second degree stalking. The victim is the wife of a police officer and they have two young children. As the victim and her three-year-old daughter left their residence to run errands, she noticed a brown Chevy Blazer stopped on the road across from her home. After waiting for the Blazer to proceed down the street, which it ultimately did not, the victim backed out of her driveway. The Blazer then made a U-turn and followed her to the Goodwill store, which entailed traveling several blocks and making four turns. The victim

EXHIBIT A

exited her vehicle at the Goodwill store and carried her donations to the door. She then proceeded to exit the parking lot and when she stopped at a traffic light, she became concerned the Blazer was still following her. When the light changed, the victim turned and the Blazer followed her. Instead of proceeding to Fred Meyer, she made another turn and the Blazer continued to follow her.

The victim became frightened and tried to reach her husband. Her first call was unsuccessful, but she was able to reach him on her second phone call and they decided she should go to the police station to meet him. It was not until the victim turned in front of the police station that the Blazer stopped following her and continued to go straight. The victim reported the license plate number.

After being charged with second degree stalking, Eliasen filed a motion to dismiss, arguing she had only followed the victim on one occasion and that the statute requires a "course of conduct" as an essential element. The magistrate court denied the motion, holding that the police report could be interpreted as demonstrating two separate events, distinguished by the victim stopping at the Goodwill store. Thereafter, the State filed a complaint and Eliasen filed a renewed motion to dismiss, which was also denied.

At trial, Eliasen unsuccessfully moved for a judgment of acquittal. A jury convicted Eliasen of second degree stalking. Eliasen appealed to the district court. The only issue she pursued on appeal was whether the State presented sufficient evidence to prove the material elements of the offense beyond a reasonable doubt. The district court found the magistrate's ruling was supported by substantial and competent evidence in the record. The district court upheld the jury verdict and affirmed the judgment of the magistrate.

Eliasen timely appeals to this Court arguing there is insufficient evidence to support her conviction.

II.

ANALYSIS

When reviewing the decision of a district court sitting in its appellate capacity, our standard of review is the same as expressed by the Idaho Supreme Court:

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow

> therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.

Pelayo v. Pelayo, 154 Idaho 855, 858-59, 303 P.3d 214, 217-18 (2013) (quoting *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012)). Thus, the appellate courts do not review the decision of the magistrate court. *Bailey*, 153 Idaho at 529, 284 P.3d at 973. Rather, we are procedurally bound to affirm or reverse the decisions of the district court. *State v. Korn*, 148 Idaho 413, 415 n.1, 224 P.3d 480, 482 n.1 (2009).

Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We will not substitute our view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

Under the applicable statute, a person "commits the crime of stalking in the second degree if the person knowingly and maliciously . . . [e]ngages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress." I.C. § 18-7906(1)(a). Eliasen claims there is insufficient evidence to support her conviction. Specifically, she argues that the district court erred in finding there was sufficient evidence to conclude her behavior constituted a "course of conduct" as required by the statute. The statute defines "course of conduct" as "repeated acts of nonconsensual contact involving the victim or a family or household member of the victim, provided however, that constitutionally protected activity is not included within the meaning of this definition" I.C. § 18-7906(2)(a). The statute further provides that "nonconsensual contact" includes, but is not limited to:

> (i) Following the victim or maintaining surveillance, including by electronic means, on the victim;
>
> (ii) Contacting the victim in a public place or on private property;

(iii) Appearing at the workplace or residence of the victim;
(iv) Entering onto or remaining on property owned, leased or occupied by the victim;
(v) Contacting the victim by telephone or causing the victim's telephone to ring repeatedly or continuously regardless of whether a conversation ensues;
(vi) Sending mail or electronic communications to the victim; or
(vii) Placing an object on, or delivering an object to, property owned, leased or occupied by the victim.

I.C. § 18-7906(2)(c). Eliasen argues the district court's ruling is erroneous because while the type of prohibited contact may have changed, there was only a single occurrence of nonconsensual contact between her and the victim because there was no break in the contact. Therefore, she claims the evidence was insufficient to show "repeated acts of nonconsensual contact." The State argues the district court was correct because the statute does not require a break in contact, only that there be "repeated acts of nonconsensual contact."

In finding that there were "repeated acts," the district court reasoned that Eliasen engaged in more than one of the types of prohibited contact: conducting surveillance of the victim, following the victim, and appearing at her residence. It found there were actually four specific instances of prohibited conduct: (1) appearing at the victim's residence; (2) following her to Goodwill; (3) conducting surveillance on the victim while she was at Goodwill; and (4) following her from Goodwill to the police station.

Eliasen argues the district court's analysis converting a change in the nature of the contact into separate instances of contact is contrary to the plain language of the statute. Eliasen asserts there cannot be "repeated acts of nonconsensual contact" because there can only be a new act if there is a break in the original contact. She cites *State v. Anderson*, 145 Idaho 99, 175 P.3d 788 (2008), for the position that "[t]he rule of lenity states that criminal statutes must be strictly construed in favor of defendants." *Id.* at 103, 175 P.3d at 792. However, where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003).

There is substantial and competent evidence in the record to support the conclusion that Eliasen's actions constituted a course of conduct, and that in this case, there are "repeated acts of nonconsensual contact." We need not determine whether Eliasen's conduct constituted more than two instances of nonconsensual contact. Eliasen committed a nonconsensual contact by

appearing at the victim's residence and another when she conducted a U-turn and followed the victim. Therefore, the evidence is sufficient to support her conviction.

III.

CONCLUSION

There is sufficient evidence to support Eliasen's conviction for second degree stalking. Therefore, we affirm the district court's appellate decision affirming the magistrate's judgment of conviction and sentence.

Chief Judge GUTIERREZ and Judge LANSING **CONCUR.**