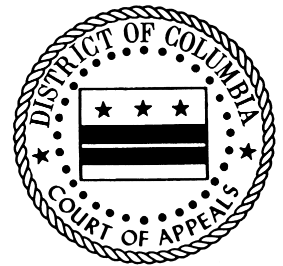

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-147

GENE R. LENINGER,
Appellant,

v. **(2022-CMD-4713)**

UNITED STATES,
Appellee.

Appeal from the Superior Court of the District of Columbia—Felony Division

---

BRIEF FOR APPELLANT

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LISTING OF PARTIES

Undersigned counsel hereby certifies that the only parties who appeared in the District of Columbia Superior Court in this case were Mr. Gene R. Leninger and the United States of America. Mr. Leninger was represented by attorney Shawn Sukumar. The United States was represented at trial by Assistant United States Attorneys Michael Lee and Mingda Hang, and by Jacqueline Yarbrough at a status hearing.

No intervenors or *amici curiae* appeared in this case.

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ISSUES PRESENTED

1. Whether there was sufficient evidence to convict, or to survive motions for judgments of acquittal.

2. Whether the court erred in denying the defense request for a special unanimity instruction to the jury.

3. Whether the court erred in denying the defense request that the jury had to find the requisite *mens rea* for the events that it held constituted the crime of stalking.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-147

GENE R. LENINGER,
Appellant,

v. **(2022-CMD-4713)**

UNITED STATES,
Appellee.

Appeal from the Superior Court of the District of Columbia--Criminal Division—Felony Branch

---

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

A year-long acquaintance between two neighbors—an older man and a younger female—based on letting their dogs play together—ended after he expressed an interest in being more than a friend and she told him to desist, which he did. The government put on evidence of four occurrences—including the one in which she told him to stop and he complied—and the jury convicted the man, Gene R. Leninger, of stalking.

This brief argues that (1) evidence of the occurrences was insufficient to constitute a course of conduct constituting stalking and that the court should have granted requested judgments of acquittal; (2) the court erred in not requiring the jury to find evidence of criminal intent in the occurrences; and (3) the court erred in not requiring that the jury be unanimous about the occurrences it found which constituting the offense of stalking.

EVIDENCE PRESENTED*

Gene R. Leninger was convicted of the misdemeanor crime of stalking, pursuant to 22 D.C. Code §3133(a)(3) (2001 ed.), following a jury trial before the Honorable Andrea Hertzfeld. The charging Information and the sentencing Order are in the Appendix.

Thirty-nine year old complainant Sarah Rosner lived in an apartment building at 1809 20th Street, N.W., near Dupont Circle in the District of Columbia (2/7/23 Tr-42-43, 55). There is a small backyard area that, divided by a slat fence with holes in it, is separated from the backyard of a connected apartment building (see Gov't exhs 2-3 through 2-4. This is where she met Mr. Leninger, in the spring of 2022, when their dogs played together (*id.*, 47-48). "We

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* Transcript references are to the trial transcripts of February 6, 7, 8 and 9, 2023, or the sentencing transcript from February 27, 2023.

were friendly . . . just so the dogs could play" (*id.*, 48). "He would open the gate and we would go into" Mr. Leninger's courtyard so the dogs could play (*id.*, 53-54). She thought he was "[j]ust an old hippy dude". "[H]e reminded me of my uncle, so I assumed he was, like, late 60s or something" (*id.*, 55).

Her windows looked into Mr. Leninger's courtyard (61), although she did not know where he lived (*id.*, 45). She worked at night, and they arranged that he could flash a flashlight in her window at night, she said, and "if my light's on – like, reasonably, if my light's on you can flash the light, and, you know, if I see – if I can come down, I will" so the dogs could play. "[T]hat's the way had we [*sic*.] communicated." (*id.*, 56; see Gov't exhs 3-5 and 3-12).

On April 4th, the two were talking by the fence while the dogs played. The two "had discussed guns", including that he owned 32 guns (*id.*, 64). Mr. Leninger asked if she wanted to see his gun. Although she testified she was "very shocked", she said, "'[y]eah, sure. Let's see your gun.'" (*id.*, 61-63). She was "not afraid of guns, whatever" (*id.*, 64), but afterward she thought is "awkward and strange, a weird thing to do" (*id.*, 65). "I felt like he was trying to impress me." "It didn't seem very threatening to me at the time." (*id.*, 66-67), and they continued their acquaintance. They exchanged phone

numbers and communicated by text. She said, "I'm like text me if you're out there; If I can – you know, if I'm around, I'll come out." (*id.,* 67, 69-70). She agreed that they were friendly with each other (*id.,* 70).

The text messages were reviewed in court (Gov't exhs 4-1 thought 4-60). They talked about things like a party in the courtyard, and Mr. Leninger offered to walk her dog when she was injured (*id., 73,* 75). They communicated about personal topics like her job, medications she was on, and music they liked (*id.,* 72, 76, 80). The communications were "cordial, surface, neighborly" (*id.,* 78). She said they were both "night owl[s]", and they exchanged casual pleasantries like wishing her "sweet dreams", asking her how she was feeling, with comments like "[g]ood night girlie girl" (*id.,* 78- 81). When she was going out, he advised her to be safe and she replied she'd call him when she got back (Gov't exhs 4-22-23).

In a series of texts between the two on May 1st, he asked if she was available to talk. "I need to straighten things out", he wrote and referred to her as "darling (*id.,* 83-84), a term she opined that she did not invite (*id.,* 84-85). He wrote at one point, "I want u ok", and she answered, "[y]ou want my friendship? That's great bc it's all that I'm offering" (Gov't exh 4-26). He replied, "I'm patient", "I enjoyed

speaking with you", and signed off with "best friend" (Gov't exhs 4-27 and 4-28). She said the message made her feel "uncomfortable, upset", "annoyed. Because I don't understand why he would --- what does he – he wants me? It was just way out of the league of anything plausible or possible, and just, you know – and it made me worry because he's there, he's got – can see in my windows and now he wants me. And, like, you know, I thought it was safe, this old man with his dog and my dog, and the dogs would play." (*Id.,* 85-86). None-the-less, she continued to communicate with him and would go out to let the dogs play together, although she testified that she "was going to try to stay on good terms" with him since she saw him everyday in the courtyard; she wanted to "tread lightly". She "didn't want drama" (*id.,* 86-87).

On May 2nd, he said he had a dream in which they (including the pets) were all together, and she responded in a conversation about her pet, including coming down to the backyard to get an item from him, although she said the talk about his dream made her feel "[w]orried and upset" (*id.,* 87-88; Gov't exhs 4-29 and 4-30). Despite her testimony, she exchanged a long conversation with him about protests she observed (Gov't exhs 4-30 through 4-34). She told him that she

had good dreams, and he answered that he, too, had another dream relating to her (*id.,* 90; Gov't exh 4-38).

As late as May 4th, she was still coming down to meet with him and to let the dogs run around (*id.,* 101; Gov't exhs 4-41, 4-42, 4-54). He wrote that he was "grateful of you being a true believer and a friend. Thank you. Sarah R. Leninger" (*id.,* 91-92; Gov't exh 4-44). She testified that linking their names made her feel "very uncomfortable, freaked out" (*id.,* 92). Yet, she continued to text with him about such matters as shoes, the dogs, and "raging against the patriarchy" (*id.,* 95; Gov't exhs 4-48, 4-49). She said she continued to see him because "he's my neighbor", he "told me had 32 guns", and she was going to have to see him, but that she would keep her responses short, not wanting "to upset this person" (*id.,* 94). She said that he wanted her to come out with her dog, but she was "brushing him off" (*id.,* 96-97; Gov't exh 4-47).

Even though she didn't know what some of his messages meant, but thought that he "just seemed like he was getting upset that I wasn't coming down to hang out with him" (*id.*, 101; Gov't exh 4-52). She confronted him about her concerns when they were outside together on the 4th, but he "didn't listen to a single word that I had just said, honestly" (*id.,* 104-05). She felt his responses were

attempts to try to flirt with her, including saying that he wanted to have a daughter with her (*id.,* 106). She felt, she said, "[u]pset and unlistened to and like every woman in this world" (*id.,* 107). She explained that she meant, "like men not listening", like, he only heard what he wanted to hear and didn't listen to me", concluding that "I had to do something and put my foot down and really be a lot more firm" (*id.,* 107).

She denied giving any indication to him that she was interested in him (*id.,* 108). Early the next morning, on May 6th, he texted her that she "had her whole life ahead of" her, and "[h]opefully I will share it with you" she replied, no" she texted him "no" and "[p]lease don't contact me anymore", and, in response to his question, answered that she was "now scared" (*id.,* 109-10; Gov't exhs 4-56 through 4-59). In response, Mr. Leninger said, "[w]ell correct me if I'm not understanding you, but Incase you mean this literally I will give you your space sorry yours to kind of a person to misunderstand (*id.,* 112; Gov't exh 4-59). However, she testified that on May 17th, he flashed his light in her window as he had before, and she opened her window and forcibly told him to leave her alone, and he said, "[b]ut Sarah" (*id.,* 114). She testified that "now I'm scared, I'm angry. You know, I have to get out of bed and yell out the window." (*Id.,* 115).

After that, he did not text her again except to ask how she was doing, on June 27th (*id.,* 117; Gov't exh 4-60). At one point she feared that he had been in her apartment, but learned that it was, instead, a friend of hers who had visited while she was out (*id.,* 118). "[T]he next morning is when I finally called the police, because I was, like, how could you think this man was in your home" (*id.*). She added that she also received a July 1st message with his location but without any text (*id.,* 119-20, Govt' exh 4-60). She said that she was "[s]cared, really scared, like he was coming to get me or something" (*id.,* 120), and she repeated that it was frightening to see him in court: "I don't know if he has a gun. I don't know if he wants to hurt me. I don't know." (*id.,* 121).

Cross-examination elicited that when she called the police, she told them that it was not an emergency (127).

Three other witnesses testified. Police Office Apolinar Nunez (2/7/23 Tr-21-39) said he arrested Mr. Leninger based on a warrant, and helped lay the foundation for the introduction of pictures and maps. He said on cross-examination (*id.,* 40) that Mr. Leninger was cooperative and non-threatening.

Police Officer Byron Jenkins testified that on July 6th, 2023, he served papers on Mr. Leninger. and video of that from his body-worn

camera was shown (*id.,* 169-77) in which Mr. Leninger said that he had not contacted Ms. Rosner for two months, that she had tried to contact me, and that there was a "silly situation in an e-mail", but the Officer said he did not know what that was about (*id,* 176-77). On cross-examination, he said that Mr. Leninger was cooperative, non-threatening, and calm (*id.*, 178).

Finally, Detective Scott Brown testified that he wrote the arrest warrant for Mr. Leninger (2/8/23 Tr-28-43), including referencing the May 6th text message (*id.,* Gov't exh 4-59) from Ms. Rosner saying, "(p)lease do not contact me anymore".

At the end of the government's evidence, the defense motion for a judgment of acquittal was denied (*id.,* 13, 19).

The government's closing said that its evidence of four occasions of contact between the parties constituted stalking, that Mr. Leninger robbed Ms. Rosner of her right to be free of fear" "[a]nd because of this, the Government has charged the Defendant with stalking" (2/8/23 Tr-67). In its rebuttal argument, it also argued that Mr. Leninger's statement on July 6th to Officer Jenkins that he had had no contact with Ms. Rosner was inconsistent with his following statement that he had sent her an email, showed "consciousness of guilt" (*id.,* 99).

Jury instructions.

Neither side objected (2/6/23 Tr-138, 2/8/23 Tr-11) to the standard "Red Book" instruction on stalking which required that Mr. Leninger communicated with Ms. Rosner voluntarily and on purpose and not by mistake or accident, on two or more occasions, and that he acted on at least two of the occasions where he reasonably should have known that his conduct would cause a reasonable person in her circumstances to fear for her safety, feel seriously alarmed, disturbed, or frightened, or suffer emotional distress. (2/8/23 Tr-60; Criminal Jury Instructions for the District of Columbia, instruction 4.501 (5th ed, 2018)). The instruction specified that the conduct on each occasion need not be the same as that on another occasion, and that "emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counselling (*id.*).

The jury note.

After about three hours of deliberation, the jury asked (1) "[r]egarding Element 5 of the count of stalking, do the jurors have to be unanimous on identifying the specific occasions causing the victim to be fearful, alarmed, or suffer emotional distress"; and (2) "[w]hat is the definition of an 'occasion'" (2/8/23 Tr-112).

Both the government and the defense agreed that the jury had to be unanimous on two specific acts (2/9/23 Tr-5-6, 7), but the government argued that the jury did not have to agree on the same two acts (*id.*, 6, 10). The defense argued that the jury had to find the *mens rea* for each act (*id.*, 8), but the court ruled that since the jury note did not ask about *mens rea* so it would not address that (*id.*). Relying on a footnote in *Coleman v. United States*, 202 A.3d 1127, 1140 n.17 (D.C. 2019) and the legislative history of the law, the court found that "they're [the legislative committee] taking it out of the sort of general unanimity requirements in terms of the specifics of the act" (*id.*, 10), when the committee rejected the "idea that the jury would have to be unanimous in terms of what the committee intended for the statute to require" (*id.*, 11). Therefore, the court proposed the answer should be that the "jury need not agree as to what those two occasions are" (*id.*, 12).

The defense argued that the jury still had to "unanimously agree that a requisite mens rea existed for each act that they find" (*id.*), but the court denied the request, saying it would not go beyond what the jury note was asking (*id.*, 13). It told the jury that it need not be unanimous about the specific occasions causing Ms. Rosner to suffer emotional distress or be fearful or alarmed, but that it "must

unanimously agree that at least two such occasions occurred" (*id.,* 15), and that it "should use the ordinary meaning that you give the word [occasion] in your everyday lives" (*id.,* 18, 21).

Conclusion of the trial.

Shortly after receiving an answer to the note, the jury found Mr. Leninger guilty (2/9/23 Tr-24). Prior to sentencing, the defense made a "renewed Rule 29 Motion For a Judgment of Acquittal "(Record-18) which was denied on the sentencing date (2/27/23 Tr-5). Allocution indicated that Mr. Leninger was the sole caretaker for his bed-ridden wife (*id.,* 3, 21). He was sentenced to 180 days of incarceration, execution of sentence suspended as to all, and was placed on unsupervised probation for one year, with a stay-away order (*id.,* 27). The sentencing order (Record-22) is in the Appendix.

Applicable Law.

Stalking. To be guilty of stalking, the government had to prove that Mr. Leninger engaged in a course of conduct directed at Ms. Rosner that he should have known would cause a reasonable person in her circumstances to fear for her safety, feel seriously alarmed, disturbed or frightened, or suffer emotional distress. 22 D.C. Code §3133(a)(3) (2001 ed.).

To "engage in a course of conduct" required the government to prove there were at least two independent occasions in which Mr. Leninger possessed the "should have known" *mens rea* on each of the occasions of distressing conduct; that is, that "he 'should have known' that a reasonable person in the complainant's position would feel "seriously alarmed, disturbed or frightened, or suffer emotional distress". These emotional states are defined collectively as "emotional distress". *Mashaud v. Boone*, 2023 D.C. App. LEXIS 154, 14 (D.C. 2023)(*en banc*).

Mens rea. "If either the actus reus –the unlawful conduct—or the mens rea—the criminal intent—is missing at the time of the alleged offense, there can be no conviction." *Fleming v. United States*, 224 A.3d 213, 229-30 (D.C. 2020)(quoting *Rose v. United States,* 525 A.2d 849, 852 (D.C. 1987)).

Stalking is a general intent crime and does not require proof of what is in the defendant's mind. *Coleman v. United States*, 202 A.3d 1127, 1143 n.22 (D.C. 2019) (citing the commentary to the Model Stalking Code). The "'should have known' standard . . . is necessarily objective". *Id.*

> [W]hen applying such a standard, [the Court] assume[s] that the defendant *did* not know a particular thing, and we determine whether he *should* have known that thing by reference to whether

> someone else "a reasonable person" who is aware of the same facts and circumstances as the defendant *would* have known it. (italics in original).

Id, 1143.

> Even where a defendant lacks the intent to inflict emotional distress, they will violate the stalking statute if they engage in a course of conduct that they know or 'should have known would cause a reasonable person' to suffer emotional distress' (citation omitted). In either case, the statute does not require any showing that the targeted person in fact suffered emotional distress; it is enough that the defendant intended such distress or should have known that a reasonable person would suffer it.

Mashaud, 2023 D.C. App. LEXIS 154, 14-15.

The statute requires that the government prove that the defendant possessed the prohibited mental state during at least two occasions. *Coleman v. United States,* 202 A.3d 1127, 1142 (D.C. 2019).

Unanimity. The single charge of stalking includes separate factual incidents. "[A] special unanimity instruction is required when 'a single count encompasses two or more factually or legally separate incidents'" (citations omitted). *Guevara v. United States,* 77 A.3d 412, 419 (D.C. 2013). "The requirement for a special unanimity instruction arises when the court cannot deduce from the record whether the jury must have agreed upon on particular sets of facts." *Washington v. United States,* 760 A.2d 187, 197 (D.C. 2000)(quoting *Simms v. United States*, 634 A.2d 442, 445 (D.C. 1993)). "Such an instruction is

necessary to prevent the possibility that some jurors might vote to convict based solely on one incident while others vote to convict based solely on the other." *Scarborough v. United States,* 522 A.2d 869, 871 (D.C. 1987)(*en banc*); *Shivers v. United States,* 533 A.2d 258, 261 (D.C. 1987).

When a single count encompasses two or more separate incidents, the Sixth Amendment requirement of a unanimous verdict obliges the judge to instruct the jury that it must reach unanimous agreement as to a particular incident. "Without a requirement that the jurors agree on the same incident, . . . the right to a unanimous jury verdict would be meaningless". *Williams v. United States,* 981 A.2d 1224, 1228 (D.C. 2009).

Sufficiency of the evidence. In review, the Court must determine "whether the government's evidence was strong enough that a jury behaving rationally really could find it persuasive beyond a reasonable doubt." *Austin v. United States,* 292 A.3d 763, 773 (D.C. 2023)(quoting *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001)(*en banc*)). Evidence is considered in the light most favorable to the government. *In re K.M.*, 75 A.3d 224, 230 (D.C. 2013).

Motion for judgment of acquittal. The trial court's decision to deny a defense motion for judgment of acquittal is reviewed *de novo.*

The reviewing court and the trial court apply the same standard to "determine whether the evidence, viewed in the light most favorable to the government, was such that a reasonable juror could find guilt beyond a reasonable doubt." *Guzman v. United States*, 821 A.2d 895, 897 (D.C. 2003)(quoting *Johnson v. United States,* 756 A.2d 458, 461 (D.C. 2000)).

Review standard. The Constitutional harmless error standard of review set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967), applies to instructional errors. Reversal is required unless the government can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained since the defense requests to instruct the jury about unanimity and the need to find the *mens rea* for each event were clearly made. *See Green v. United States,* 231 A.3d 398 414 n.55 (D.C. 2020); *Roberts v. United States,* 213 A.3d 593, 597 (D.C. 2019). "Objections must be made with reasonable specificity". "When jury instructions are at issue, objection . . .must 'be made with sufficient precision to indicate distinctly the party's thesis" (citations omitted)". *Atkinson v. United States,* 121 A.3d 780, 785 (D.C. 2015).

ARGUMENT

I. There was insufficient evidence to convict, and the court should have granted the motions for judgment of acquittal.

There was no "course of conduct" in the four occasions that the government alleged constituted the crime of stalking. The evidence was insufficient to convict, and the court should not have allowed the evidence to go to the jury.

1. On May 6, 2022, the government presented evidence via text messages between Mr. Leninger and Ms. Rosner from roughly 1:00 am to 2:00 am, concluding with Ms. Rosner telling Mr. Leninger for the first time, "[p]lease do not contact me anymore" (Gov. exh 4-59). Mr. Leninger immediately replied that, "[w]ell, correct me if I am not understanding you, but in case you mean this literally I will give you your space sorry your to kind of a person to misunderstand." (*Id.).*

His statements to her were not objectively frightening or alarming. Instead, Mr. Leninger acknowledged her request and told her that he would comply with it.

2. On May 17, 20222, Ms. Rosner said that a light was flashed into her apartment, that she went to the window, saw Mr. Leninger in the courtyard and told him to leave her alone. This was consistent with the history of his flashing a light into her apartment at night to

see if she wanted to come down to let the dogs play, a procedure that she had agreed to and which had been used before. She testified that while this made her feel scared and angry because she had to yell at him from her window (2/7/23 Tr-115) because she no longer wanted to interact with him, this did not appear to cause her the sort of emotional distress envisioned by the *Coleman* decision which said the law "is meant to prohibit seriously troubling conduct", *Coleman v. United States,* 202 A.3d 1127, 1144 (D.C. 2019).

Further, the legislative history said the stalking law aims at "behaviors that potentially lead to violence, a loss in the quality of life, or even death", "yet avoid inadvertent criminalization of legal behaviors". D.C. Council Comm. On Pub. Safety & Judiciary Rep. on Bill 18-151 Comm. Report at 32-33 (2009). Mr. Leninger's behavior—based on his previously friendly relationship with Ms. Rosner, his restraint since the May 6th text, and the habit they had worked out to allow him to flash a light in her apartment to see if she wanted to come out—was the sort of legal behavior that the law never intended to criminalize.

3. On June 27, 2022, Mr. Leninger texted her to ask how she was doing. There was nothing frightening in the message, and although Ms. Rosner called the police the next day, she told them that,

"[i]t's not an emergency", the police could "take their time" because "he can't get in my building or anything", and when the police arrived, she testified that while speaking to the police, she joked with a neighbor that "[Mr. Leninger] wants this, who doesn't?" It is not clear what she was referring to, but it is likely that she thought herself out of his "league" (2/7/23 Tr-85). Applying an objective standard, the message—merely asking how she was doing—(Gov't exh 4-60) could not create any emotional distress or make an objective person seriously alarmed.

4. On July 1, 2022, the government admitted a location screenshot from Mr. Leninger's email address to her phone. It contained no words or messages, and the location showed that Mr. Leninger was inside his own home. Ms. Rosner testified that she was not surprised that he would be in that location since she knew where he lived. There was no evidence that this was intentionally sent to her, and there was no language in the message that would cause emotional distress, applying an objective standard.

Government's lengthy exhibit 4—the text messages—showed Mr. Leninger and Ms. Rosner had a typical friendly relationship—at least as shown by the exhibit—from April 1st through May 6th, based on their interest in their dogs playing in the yard, and their keeping late

hours, until he expressed a romantic interest in her. Even after that, they talked, sometimes at length, about their feelings (her denouncing the patriarchy and complaining that men don't listen), events (demonstrations) discussing their dreams, and even shoe fashions. As late as May 4th, she went down to the yard to meet him (Gov exh 4-54, at 11:59 pm). It appears that the late night exchanges on the night of May 6th (Gov exh 4-5) relate to some discussion between the two outside of the emails, where she thanks him for listening, but when he says he enjoys her [b]anter, she says "no" and "stop" in government exhibit 4-57, six minutes later. Government exhibit 4-58, at 2:04 am on the early morning hours of May 6th, shows he understood that she was serious about not wanting him to contact her, and he said he would comply with her request.

None of the interactions constituted a "course of conduct" creating emotional distress, even by objective standards. Merely because she did not like his interest in becoming more than friends does not constitute the sort of dangerous behavior the law was intended to prevent—"to enable early intervention before stalking escalates into violence" (Comm. Report at 32). The law was designed to address "seriously troubling conduct, not mere unpleasant or mildly worrying encounters". *Coleman*, 202 A.3d at 1144. The court should

have granted the motions for judgments of acquittal. The acts did not fit the definition the legislative committee had in mind—seriously troubling conduct—not an acquaintanceship that made one party feel uncomfortable. The evidenced was insufficient to convict, and the court should not have allowed the evidence to proceed to the jury.

II. The Court erred in not giving a special unanimity instruction.

The single stalking charge included within it a number of occurrences. A unanimity instruction is normally not needed "when a single count is charged and the facts show a continuing course of conduct, rather than a succession of clearly detached incidents", *Gray v. United States,* 544 A.2d 1255, 1258 (D.C. 1988). However, this Court rejected the theory that a course of conduct approach regarding stalking does not require a unanimity instruction when it held that "the requisite mens rea must be proved with respect to the conduct "the 'occasions' or acts) comprising the course of conduct, not merely with respect to the course of conduct as a whole". *Coleman*, 202 A.3d at 1140. It noted that the "legislative history of the stalking statute also supports requiring the government to prove that a defendant possessed the requisite mental state on at least two occasions" (*id.*).

By failing to direct the jury to be unanimous about the occasions that it found constituted stalking, it only had to find that, in general, there were two or more occasions of communication in which an objective person should have known would cause emotional distress. It did not have to examine each incident to see if the requisite mental state. There is no way to tell which incident or incidents they agreed upon. Indeed, each juror was not even required to consider each incident, just whether it unanimously agreed that there were the two or more occasions. This is contrary to what *Coleman* held, and is the Sixth Amendment violation that *Scarborough v. United States,* 544 A.2d 1255, 1257 (D.C. 1988)(*en banc*), warned against: some may have convicted based on one set of incidents while other jurors may have voted to convict based on the others, and there is no way to determine if the jury agreed on a particular set of facts. *See Washington v. United States,* 760 A.2d 187, 197 (D.C. 2000);

Here the jury was asked only if it found proof beyond a reasonable doubt in the course of conduct. There is no evidence that the jurors were asked which two occasions they found constituted stalking. There is no way to determine if it agreed upon a particular set of facts, and therefore it could not address whether Mr. Leninger possessed the "should have known" knowledge that an objective

reasonable man might have held regarding each incident. The committee Report saying that the jury did not have to be unanimous about which events it found is flawed because such a view preempts analysis of which occasions violated the objective standard and which occasions were the ones that constituted stalking. Its view was contradicted by the *Coleman* court which ruled that the government had to prove the *mens rea* with the specific acts, not to the course of conduct as a whole. *Coleman,* 202 A.3d at 1140. The court therefore erred in not requiring the jury to unanimously agree on Mr. Leninger's mental intent in the occurrences.

III. The Court erred in not asking the jury to find that Mr. Leninger had the requisite *mens rea* for the four occasions.

A. The Court should have granted the defense request, in replying to the jury note, to require the jury to find that Mr. Leninger possessed the *mens rea*, the "should have known" standard for the acts found by the jury to constitute stalking. This Court has held that the government must prove that he had the "should have known" mental state during at least two of the occasions, *Coleman,* 202 A.3d at 1142. The Court's denial of the defense request to ask the jury to do this therefore omitted an essential element from the jury's consideration. "If there exists a reasonable possibility that the jury's

verdict on a given count was affected by the 'instructional error,' then appellant is entitled to relief." *Atkinson v. United States,* 121 A.3d 780, 787 (D.C. 2015) (quoting *Robinson v. United States,* 100 A.3d 95, 107 (D.C. 2014)).

Since the Court did not ask, as the defense requested, the jury to find that Mr. Leninger had the *mens rea* on each of the occasions for which they found him guilty, it was never determined that he had the necessary mental state—to objectively know that "he should have known" that his actions would create emotional distress on the part of Ms. Rosner. Indeed, since Mr. Leninger's actions did not rise to the level of causing a reasonable person to feel not just annoyance of unease, but "mental anguish", *Coleman,* 202 A.3d at 1145, the Court should have granted the motion for judgment of acquittal, and this Court should find that there was insufficient evidence to constitute the crime of stalking.

The government did not show that Mr. Leninger committed the acts with any of the prerequisite criminal intent. The purpose of the statute is clear: "to enable early intervention before stalking escalates into violence. *See* D.C. Council Comm. On Pub. Safety & Judiciary Rep. on Bill 18-151 at 32. "The stalking statute is meant to prohibit seriously troubling conduct, not mere unpleasant or mildly worrying

encounters that occur on a regular basis in any community." *Coleman v United States*, 202 A.3d 1127, 1144 (D.C. 2019).

The Committee Report discussed this situation:

> [a] familiar example . . . is when a man and woman go on a date. After the date, the man is interested and repeatedly contacts the woman for another date. The woman meanwhile is not interested and does not respond to his communications. At what point does the man's conduct become harassing to that woman? Annoying? Alarming? Disturbing? The answer is not found in a bright line distinction between strict definitions for acceptable and alarming. Neither is it the intent of this legislation to accurately pinpoint that distinction. *Instead, the purpose is to enable law enforcement to intercept behaviors that potentially lead to violence, a loss in the quality of life, or even death.*"(emphasis added).

Comm. Report at 32-33. The behavior of Mr. Leninger fits the hypothetical dating situation discussed in the report which did not objectively amount to the crime envisioned by the committee. It is exactly the kind of behavior that the committee believed fell short of stalking.

B. In gradations of *mens rea* from the most serious to the least, the Modern Penal Code, §2.02(2)(a)-(d) (Am. Law Inst. 1962) defines levels of culpability as "purposely, knowingly, recklessly or negligently. *Carrell v. United States*, 165 A.3d 314, 321 (D.C. 2017); *See Harris v. United States*, 125 A.3d.704, 708 n. 3. Even reckless levels of culpability require proof that a defendant had the mental

intent to commit a crime. *Counterman v. Colorado,* 2023 U.S. LEXIS 2788*; ____S.Ct.____; 2023 WL 4187751 (2023). Stalking is a crime of negligence because a defendant should have been aware of the risk, but was not. *Beachum v. United States*, 197 A.3d 508, 510 (D.C. 2018).

The mental intent for crimes of negligence requires that a defendant "should have known" that the conduct would cause a reasonable person in the individual's circumstances to suffer emotional distress. *Id.* "[G]enerally, courts should infer that the government must prove at least that a defendant" knows the facts that make his conduct fit the definition of the offense. *Elonis v. United Stated,* 575 U.S. 723, 735 (2015).

"Merely inferring a negligence, i.e., should-have-known-standard is disfavored. *Carrell*, 165 A.3d at 323. This is because the defendant should be aware of the risk but disregarded it. Whether s/he should have been aware of the risk is judged by the objective standard of a reasonable person, but that the risk must be "substantial and unjustifiable"; that is, the risk must be "of such a nature and degree" that failure to perceive it "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation". Model Penal Code §202(2)(d), *supra.* Mr. Leninger's

actions were not the "gross deviation from the standard of care" that the law is aimed at. *See* D.C. Council Comm. On Pub. Safety & Judiciary Rep. on Bill 18-151 at 32 ("[t]he stalking statute is meant to prohibit seriously troubling conduct, not mere unpleasant or mildly worrying encounters").

The Supreme Court holds that it is important to distinguish "wrongful conduct from otherwise innocent conduct". *Elonis*, 575 U.S. at 736. "[W]hen determining culpability, "what the defendant thinks does matter". *Carrell v. United States,* 165 A.3d 314, 322 (D.C. 2017)(quoting *Elonis* at 738)). Yet, the court denied the defense request to instruct the jury that it had to find the mental intent of Mr. Leninger for at least two of the acts was denied. Stalking is not a strict liability crime, but is one that still requires a consideration of whether he should have known that his conduct would cause a reasonable person in Ms. Rosner's situation to suffer emotional distress. It was not done here due to the court's ruling. This is a Sixth Amendment violation of Mr. Leninger's right to have the jury find each element of the crime charged. *In re Winship*, 397 U.S. 358 (1970); *Smith v. United States*, 279 A.3d 850, 854 (D.C. 2022)("[c]riminal defendants generally have a constitutional right to a jury trial at which the prosecution bears the burden of proving all

elements of each charged offense beyond a reasonable doubt")). The court erred in not instructing the jury that it had to unanimously find that Mr. Leninger possessed the necessary mental intent to commit the crime of stalking.

CONCLUSION

WHEREFORE, the conviction should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing appellant's brief was served upon the Office of the U.S. Attorney for the District of Columbia by electronic filing this 24th day of July, 2023.

Donald L. Dworsky
Donald L. Dworsky

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed April 3, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, filed April 3, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being “pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

D L Dworsky
Signature

23-CM-147
Case Number(s)

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