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BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-147

GENE R. LENINGER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
ELIZABETH H. DANELLO
MICHAEL C. LEE
* ANNE Y. PARK
D.C. Bar #461853
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Anne.Park@usdoj.gov
(202) 252-6829

Cr. No. 2022-CMD-4713

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ISSUES PRESENTED

I. Whether there was sufficient evidence of the stalking conviction, where the evidence demonstrated that Leninger engaged in a course of conduct that caused a reasonable person in S.R.'s circumstances to suffer significant mental distress; and

II. Whether the trial court abused its discretion in its response to the jury note by not granting Leninger's request:

A. for a special unanimity instruction on the specific acts that the jury found constituted stalking, assuming Leninger has not waived this claim, where the legislative history of the current stalking statute makes clear that a "course of conduct" is a single element, and thus the jury was not required to agree unanimously on which two specific acts comprised stalking; and (2) because stalking is defined as a continuing course of conduct, a special unanimity instruction was unnecessary; and

B. to clarify to the jury that it had to find that he possessed the requisite mens rea for the acts found by the jury to constitute stalking, where the court had already instructed the jury, consistent with *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019), that the

government was required to prove that he possessed the requisite mens rea on at least two of the occasions that made up the "course of conduct" alleged to constitute stalking, and thus there was no need for the court to provide any clarification on the mens rea requirement, especially when the jury did not seek it.

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COUNTERSTATEMENT OF THE CASE

On August 15, 2022, an information was filed charging appellant Gene R. Leninger with one count of stalking that he should have known would cause a reasonable person in victim S.R.'s circumstances to suffer emotional distress (D.C. Code § 22-3133(a)(3)) (Record on Appeal (R.) 1). From February 7 through February 8, 2023, Leninger was tried before the Honorable Andrea L. Hertzfeld (R. A at 11-12). On February 9, 2023, a jury found Leninger guilty as charged (R. 17; 2/9/23 Transcript (Tr.) 24-

26). On February 27, 2023, Judge Hertzfeld sentenced Leninger to 180 days of incarceration, execution of sentence suspended as to all, and placed him on one year of unsupervised probation (R. 22; 2/27/23 Tr. 26). Leninger filed a timely notice of appeal (R. 23).

The Trial

The Government's Evidence

Leninger and S.R. lived in adjacent apartment buildings in Northwest, D.C. Both were dog owners, and they started a friendship centered around their dogs in the spring of 2022. They would occasionally meet in the shared courtyard behind their buildings to allow their dogs to play together. On May 1, 2022, Leninger confessed his romantic feelings toward S.R., but S.R made clear to him that she wished to remain friends. However, even after S.R. rejected his advances, Leninger continued to pursue her romantically and engaged in a course of conduct, including communications with her on May 4, May 6, May 17, June 27, and July 1, 2022, that he should have known would cause a reasonable person in S.R.'s circumstances to suffer emotional distress.

1. Background

Since 2001, S.R. lived in an apartment building in the 1800 block of 20th Street, NW, Washington, D.C. (2/7/23 Tr. 42-43). Leninger lived in the apartment building next door in the 1900 block of Florida Avenue, NW (2/7/23 Tr. 43-44). Their buildings shared a courtyard that was separated by a fence (2/7/23 Tr. 44-46, 51-52). S.R.'s third-floor apartment faced the courtyard and had a direct view of the courtyard (2/7/23 Tr. 45, 48-51, 57-59, 61).

In the spring of 2022, S.R. had just gotten a dog named Sampson and would bring Sampson to the courtyard, where she first met Leninger, who owned a dog named Riley (2/7/23 47-48). S.R.'s first impression of Leninger was "an old hippy dude," who was in his late 60s; S.R. was 39 years old at the time (2/7/23 Tr. 55). S.R. worked at night running corporate events and bartending, and after work, S.R. would take Sampson to the courtyard and would occasionally see Leninger there with a flashlight and his dog (2/7/23 Tr. 48, 56, 68, 78-79). Their

conversations were friendly and neighborly, mainly about the dogs, and their dogs would play together (2/7/23 Tr. 48, 52-56).[1]

At first, S.R. did not want to give Leninger her phone number, so Leninger asked if he could flash his flashlight in her window as a signal for her to come down to the courtyard and join him (2/7/23 Tr. 56). S.R. agreed, so long as her lights were on and he flashed his light into her living room windows; if she was able to go down to meet him, she would (2/7/23 Tr. 56-58). S.R. did not always notice the signal, but this was how they initially communicated (2/7/23 Tr. 56).

2. April 4, 2022

On April 4, 2022, S.R. was home when she saw Leninger with his dog in the courtyard and went down with Sampson (2/7/23 Tr. 61). She and Leninger started talking, and during this conversation, Leninger abruptly asked if she wanted to see his gun (2/7/23 Tr. 61, 66-67, 136). S.R. was "very shocked" by his question but said sure (2/7/23 Tr. 61-62, 138-39). Leninger pulled out a handgun, removed the clip, and passed the gun to her through the slats of the fence (2/7/23 Tr. 62-63, 139-42). She

[1] There may have been times when S.R. had smoked marijuana or drunk alcohol before meeting Leninger in the courtyard (2/7/23 Tr. 164-65).

held the gun in her hand, looked at it, and gave it back to him (2/7/23 Tr. 63, 142-44). After returning the gun, she grabbed Sampson and went back inside (2/7/23 Tr. 63-64, 144).

This interaction with Leninger made her feel "unnerved," and she thought Leninger's conduct was "very strange, irresponsible, and inappropriate" (2/7/23 Tr. 64-65). However, she continued to talk with Leninger because she did not believe he was trying to threaten her with the gun; rather, it seemed like he was trying to impress her (2/7/23 Tr. 64, 66-67, 135). Before this incident, she and Leninger had discussed guns – Leninger mentioned that he had 32 guns, and S.R. told him that her father kept a gun in the house while she was growing up and that she was not afraid of guns (2/7/23 Tr. 64-65, 134-35).

About a week later, S.R. and Leninger exchanged phone numbers (2/7/23 Tr. 67, 146). S.R. was talking to him about her company's website and suggested exchanging phone numbers; the first text she sent him was her company's website (2/7/23 Tr. 67-68, 70-72, 146-47; Government Exhibit (GX) 4-1).[2] After exchanging numbers, they communicated by

[2] S.R.'s and Leninger's messages from April 12, 2022, through July 1, 2022, were admitted into evidence as GX 4-1 through GX 4-60 (2/7/23 Tr.

(continued . . .)

text (2/7/23 Tr. 69, 147). S.R. told Leninger to text her if he was in the courtyard instead of flashing a light in her window, and if she was around, she would go down with Sampson (2/7/23 Tr. 69). Initially, S.R.'s text messages with Leninger were cordial and neighborly (2/7/23 Tr. 78). However, beginning in May, Leninger started sending text messages to S.R. that made her feel uncomfortable (2/7/23 Tr. 85).

3. May 1-3, 2022

On May 1, 2022, Leninger texted S.R. and asked if she was "available to talk" because he "need[ed] to straighten things out" (2/7/23 Tr. 83; GX 4-22). Later that day, S.R. texted Leninger, stating, "Is it a full moon? Lots of drama today." (2/7/23 Tr. 84; GX 4-26.) Leninger responded, "I see it as many blessings that cannot be counted, remember this date, May 1, please for us darling" (2/7/23 Tr. 84; GX 4-2). S.R. asked, "Are you okay?" (2/7/23 Tr. 85; GX 4-26). Leninger answered, "I want you ok . . . ," to which S.R. replied, "You want my friendship? That's great b[e]c[ause] it's all I am offering" (2/7/23 Tr. 85; GX 4-26). The conversation ended with Leninger stating, "I'm patient that's always the

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70-71). The government will move to supplement the record on appeal with these messages.

place I start" (2/7/23 Tr. 85; GX 4-27). S.R. testified that this exchange made her feel uncomfortable and upset (2/7/23 Tr. 85). She was "absolutely not interested" in Leninger romantically and had not given him any indication that she was (2/7/23 Tr. 86).

The following day, on May 2, 2022, Leninger texted her, and although she felt uncomfortable, she continued to communicate with him because they would inevitably run into each other in the courtyard, and she wanted to stay on good terms with him (2/7/23 Tr. 86-87; GX 4-28). At 3:26 p.m., Leninger texted S.R., informing her that he had taken a nap and had a "nice dream" about her and the dogs "at the beach fetching beach ball" and he "tried to dunk [her] in the water of course to keep [her] cool" (2/7/23 Tr. 87-88; GX 4-28). The next day, on May 3, 2022, Leninger texted her about another dream he had of her "with a bike and a Mom and dad and a hug" (2/7/23 Tr. 90; GX 4-38). S.R. was confused by his texts and had no idea what he was talking about (2/7/23 Tr. 91).

4. May 4, 2022

On May 4, 2022, at 5:25 a.m., Leninger sent a text to S.R., stating, "I'm grateful of you being a true believer and a friend. Thank you [S.] R. Leninger." (2/7/23 Tr. 91; GX 4-45). At 10:19 a.m., S.R. responded,

"Leninger?" (2/7/23 Tr. 92; GX 4-45). S.R. was "freaked out" after receiving this text, which made her feel very uncomfortable (2/7/23 Tr. 92). Leninger was basically calling her his wife by attaching his surname to her name, but she had made it clear to him that she only wanted to be friends (2/7/23 Tr. 92, 94). Despite her discomfort, S.R. continued to respond to Leninger's texts because she could not avoid seeing him and she did not want to upset him – he knew where she lived and could see into her apartment, and he had told her that he owned 32 guns (2/7/23 Tr. 94). Thus, she decided to "brush[ ] over" the situation and "hop[ed] it would just go away" (2/7/23 Tr. 94).

Later that day, beginning at 3:11 p.m., Leninger texted her several times asking to meet with her, stating, for example, "Come out and play!!!"; "Are you going to make an appearance or what[?]"; "[Y]ou have to get your butt down here now[.]"; and "Come down and say be sociable[.]" (2/7/23 Tr. 94-97; GX 4-47, 4-49, 4-50). Leninger was pushing hard for S.R. to meet him in the courtyard, but she did not want to see him and tried to brush him off (2/7/23 Tr. 96-99). Leninger texted, "Don't play that whatever they call that game with me" (2/7/23 Tr. 99). S.R. responded, "I'm busy right now. Later." (2/7/23 Tr. 98-99; GX 4-51, 4-52.)

Leninger texted back, "From the ghetto peace out! Representing," as well as other nonsensical comments that S.R. did not understand (2/7 Tr. 99-101; GX 4-52, 4-53). Leninger appeared to be getting upset because she would not go down to the courtyard and started saying "all these crazy, weird things" (2/7/23 Tr. 101). After Leninger flashed his light into her living room, S.R. finally relented and texted, "Fine. I'll be down." (2/7/23 Tr. 101).

S.R. went down to the courtyard with Sampson and met Leninger (2/7/23 Tr. 101-02). S.R. confronted Leninger and asked him what was going on (2/7/23 Tr. 104-05). S.R. reiterated that she wanted to stay friends and pleaded with him not to ruin their friendship (2/7/23 Tr. 104-05). Although she had explicitly told him that she was not interested in him, Leninger still tried to flirt with her, and S.R. laughed loudly in disbelief when she realized that he had not listened to a single word she had said (2/7/23 Tr. 105-06). Again, S.R. rebuffed his advances, stating "this [wa]s never going to happen," and pleaded with him to listen to her (2/7/23 Tr. 105-06, 108). Leninger further told S.R. that he wanted to have a daughter with her (2/7/23 Tr. 106). Upon hearing this, S.R. felt very upset because Leninger was hearing only what he wanted to hear

(2/7/23 Tr. 107). S.R. was concerned about her situation with Leninger, given that he would not take no for an answer, he told her that he had 32 guns, and he could see in her windows and monitor when she was home (2/7/23 Tr. 107-08).

5. May 6, 2022

On May 6, 2022, at 1:10 a.m., referring to their conversation in the courtyard on May 4, Leninger texted, "I like and enjoy your canter even when I'm offer you one of my best pitch's [a]nd your laughing!!" (2/7/23 Tr. 109; GX 4-56). S.R. texted back, "I said no!" (2/7/23 Tr. 109; GX 4-56). Leninger responded, "Yes! The Wright answer is and it's not multiple choice" (2/7/23 Tr. 109-10; GX 4-57). S.R. replied, "Stop. I said no!" (2/7/23 Tr. 110; GX 4-57). Leninger continued, "Are u scared[?] . . . [S.R.] you have your whole life ahead of you. Hopefully I will share it with you . . ." (2/7/23 Tr. 110; GX 4-57). S.R. texted back, "I said no. So murder me or listen. I am now scared." (2/7/23 Tr. 110; GX 4-57.) Still refusing to accept rejection, Leninger texted, "Let's not rush into things and talk about this when we both have a good understanding of what is really important in each other's lives[.] I'll listen[.] Ok[.]" (2/7/23 Tr. 111; GX 4-58). S.R. responded, "Listen to me saying no" (2/7/23 Tr. 111; GX 4-58). Leninger

texted, "You talk[.] What . . . I don't like the word[.] Could you m[a]ybe consider[.] Ok[.]" (2/7/23 Tr. 112; GX 4-58.) At that point, S.R. had had enough and texted, "Please do not contact me anymore" (2/7/23 Tr. 112; GX 4-58). Leninger responded, "Well[,] correct me if I[']m not understanding you, but in case you mean this literally[,] I will give you your space" (2/7/23 Tr. 112; GX 4-59).

6. May 17, 2022

On May 17, 2022, at about 3:00 a.m., S.R. was lying in bed when she saw light flashing into her bedroom window (2/7/23 Tr. 113-16). S.R. got out of bed, opened her window, and saw Leninger in the courtyard (2/7/23 Tr. 114). S.R. yelled out the window, "I fucking told you to leave me alone, to never contact me again" (2/7/23 Tr. 114). Leninger said, "But S[.R.]," and S.R. yelled, "Shut the [ ] up. I told you to leave me alone." (2/7/23 Tr. 114.) S.R. was angry, hurt, and scared by Leninger's contact with her less than two weeks after she had told him never to contact her again (2/7/23 Tr. 115).

7. June 27, 2022

On June 27, 2022, S.R. received a message from Leninger's icloud account: "Hello [S.R.] sorry I missed u while you were walking Samson[.]

[H]ow you doing?" (2/7/23 Tr. 116-17; GX 4-60). S.R. had been at a friend's house all day and her phone was turned off (2/7/23 Tr. 117). She turned her phone back on when she returned home and saw Leninger's message (2/7/23 Tr. 117). S.R. noticed that someone had been in her apartment while she was out (2/7/23 Tr. 117). She initially thought Leninger had been in her home because she forgot that another friend had picked something up from her apartment that day (2/7/23 Tr. 117-19, 129-30). She was so upset that Leninger had contacted her again, even though she had explicitly instructed him not to do so, that she had nightmares and could not sleep that night (2/7/23 Tr. 118, 125, 152). The next morning, on June 28, 2022, S.R. contacted the police because her fear of Leninger had gotten to the point that she actually believed he would break into her home (2/7/23 Tr. 118, 120, 124-25, 127-28).[3] An officer responded to her apartment, and she filed a police report (2/7/23 Tr. 118, 130).[4]

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[3] On her 911 call, S.R. told the dispatcher that it was not an emergency and that the police could take their time responding to the call (2/7/23 Tr. 125-29).

[4] While S.R. was talking to the police officer in her hallway, her neighbor walked by and asked her what was going on (2/7/23 Tr. 131-33). S.R. told him about the situation and joked, "He wants this. Who doesn't?" (2/7/23 Tr. 133.) S.R. explained that laughing and joking was her way of dealing with the situation (2/7/23 Tr. 133).

8. July 1, 2022

On July 1, 2022, at 5:48 a.m., S.R. received another message from Leninger's icloud account; he sent her a pin drop location of his apartment building on Florida Avenue, NW (2/7/23 Tr. 119-20, 158; GX 4-60). S.R. felt "really scared" by this message (2/7/23 Tr. 120). It was as if Leninger was letting her know, "I'm here," when she knew very well where he lived (2/7/23 Tr. 120, 158). But S.R. did not want to see Leninger – he refused to take no for an answer; she did not know if he had a gun on him; and she did not know if he wanted to hurt her (2/7/23 Tr. 121). S.R. testified that it was frightening for her to see Leninger, including in court (2/7/23 Tr. 121).[5]

The Defense Evidence

The defense called one witness, Metropolitan Police Department Detective Scott Brown, to testify on its behalf. Detective Brown testified that he drafted the affidavit in support of an arrest warrant in this case,

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[5] At the conclusion of the government's case-in-chief, the defense moved for a judgment of acquittal, which was denied by the trial court (2/8/23 Tr. 13-19). Leninger filed a post-verdict renewed Rule 29 motion for a judgment of acquittal (R. 18), which the government opposed (R. 20). On February 27, 2023, the trial court denied Leninger's renewed motion for judgment of acquittal (2/27/23 Tr. 4-5).

and in so doing, he reviewed the relevant text messages between S.R. and Leninger and spoke with S.R. about these text messages (2/8/23 Tr. 28-31). In his affidavit, Detective Brown made a typographical error regarding the date that S.R. sent the text message telling Leninger not to contact her anymore (2/8/23 Tr. 31-32). S.R. sent this text on May 6, but in the affidavit Detective Brown mistakenly recorded the date as April 5 (2/8/23 Tr. 32-34).

SUMMARY OF ARGUMENT

The evidence was sufficient to support Leninger's conviction for stalking. The government presented ample evidence that Leninger engaged in a course of conduct that would cause a reasonable person in S.R.'s circumstances to suffer significant mental distress.

As an initial matter, Leninger has waived his claim that the trial court erred in its response to the jury note by denying his request for a special unanimity instruction on the specific acts that it found constituted stalking, because Leninger deferred to the trial court on this issue, and he cannot now challenge the court's ruling on appeal. In any event, Leninger was not entitled to a special unanimity instruction. The legislative history to the current stalking statute makes clear that a

"course of conduct" is a single element, and thus the jury was not required to agree unanimously on which two specific acts comprised stalking. Moreover, because stalking is defined as a continuing course of conduct, a special unanimity instruction was unnecessary. The trial court therefore did not abuse its discretion in not giving a special unanimity instruction.

The trial court also did not abuse its discretion in its response to the jury note by denying Leninger's request to clarify to the jury that it had to find that he possessed the requisite mens rea for the acts found by the jury to constitute stalking. But the court had already instructed the jury, consistent with *Coleman v. United States*, 202 A.3d 1127, 1130, 1142 (D.C. 2019), that the government was required to prove that he possessed the requisite mens rea on at least two of the occasions that made up the "course of conduct" alleged to constitute stalking. Thus, there was no need for the court to provide any clarification on the mens rea requirement, especially when the jury did not seek it.

ARGUMENT

I. There Was Sufficient Evidence of the Stalking Conviction.

Leninger contends that the evidence was insufficient to support his conviction for stalking (Brief for Leninger at 17-20). Specifically, he argues that the government failed to prove that his conduct would cause a reasonable person in S.R.'s circumstances to feel the requisite level of mental suffering or emotional distress (*id.*). His contentions are without merit.

A. Standard of Review and Applicable Legal Principles

"When considering the sufficiency of evidence, [this Court] 'view[s] the evidence in the light most favorable to the government, giving full play to the right of the fact-finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence.'" *White v. United States*, 207 A.3d 580, 587 (D.C. 2019) (quoting *Cherry v. District of Columbia*, 164 A.3d 922, 929 (D.C. 2017)). "Although the government bears the burden of presenting sufficient evidence, the government is not required to 'negate every possible inference of innocence.'" *Cherry*, 164

A.3d at 929 (quoting *Brooks v. United States*, 130 A.3d 952, 959 (D.C. 2016)). "The evidence is sufficient if 'any rational fact-finder could have found the elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Hernandez v. United States*, 129 A.3d 914, 918 (D.C. 2016)).

The District's stalking statute makes it unlawful, inter alia, for "a person to purposefully engage in a course of conduct directed at a specific individual . . . [t]hat the person should have known would cause a reasonable person in the individual's circumstances to . . . [f]ear for his or her safety or the safety of another person; . . . [f]eel seriously alarmed, disturbed, or frightened; or . . . [s]uffer emotional distress." D.C. Code § 22-3133(a)(3). "'To engage in a course of conduct' means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to . . . communicate to or about another individual." D.C. Code § 22-3132(8)(A). The statute defines "[c]ommunicating" as "using oral or written language, photographs, pictures, signs, symbols, gestures, or other acts or objects that are intended to convey a message." D.C. Code § 22-3132(3). "Emotional distress" is defined as "significant mental suffering or distress that may,

but does not necessarily, require medical or other professional treatment or counseling." D.C. Code § 22-3132(4).

A conviction for stalking requires proof that a defendant "'possess[ ] the requisite mental state' on each of those two (or more) occasions" that comprise the course of conduct. *Mashaud v. Boone,* 295 A.3d 1139, 1149 (D.C. 2023) (quoting *Coleman v. United States*, 202 A.3d 1127, 1140 (D.C. 2019)). Moreover, "to trigger criminal liability, the level of fear, alarm, or emotional distress must rise significantly above that which [is] commonly experienced in day to day living and must involve a severe intrusion on the victim's personal privacy and autonomy." *Coleman*, 202 A.3d at 1145 (internal quotation marks and citations omitted). "Ordinary uneasiness, nervousness, [and] unhappiness are insufficient." *Id*. (internal quotation marks and citation omitted).

B. Discussion

At trial, the government focused on five occasions, which occurred after S.R.'s rejection of Leninger's advances on May 1, to establish the course of conduct underlying the stalking charge: (1) May 4, (2) May 6,

(3) May 17, (4) June 27, and (5) July 1 (2/8/23 Tr. 75-76).[6] Leninger claims that "[n]one of the[se] interactions constituted a 'course of conduct' creating emotional distress, even by objective standards" (Brief for Leninger at 20-21). He is mistaken.

Viewing the evidence in the light most favorable to the government, the government presented ample evidence that Leninger engaged in a course of conduct that would cause a reasonable person in S.R.'s circumstances to suffer "significant" mental distress. D.C. Code §§ 22-3132(4), -3133(a)(3). On May 1, Leninger professed his feelings toward S.R., texting, "I want you ok," and S.R. immediately rejected his overtures, responding, "You want my friendship? That's great b[e]c[ause]

[6] Leninger, however, contends that the government alleged four occasions that constituted the crime of stalking: (1) May 6, (2) May 17, (3) June 27, and (4) July 1 (Brief for Leninger at 17). In any event, the jury, at the very least, could consider Leninger's prior conduct on May 4 as context in determining whether his subsequent conduct on May 6, May 17, June 27, and July 1 would cause a reasonable person in S.R.'s circumstances to suffer the requisite level of emotional distress. *Cf. Coleman*, 202 A.3d at 1141 (noting that a reasonable factfinder can consider a defendant's previous acts in assessing whether he possessed the requisite mental state when he committed the subsequent acts the government says support a conviction for stalking).

it's all I am offering." (2/7/23 Tr. 85; GX 4-26). Despite being rejected outright, Leninger was undeterred.

Early in the morning of May 4, Leninger texted S.R. and referred to her as "[S.]R. Leninger," as though they were married, which caused S.R. to "freak[ ] out" (2/7/23 Tr. 91-92, 94; GX 4-45). Later in the afternoon, he repeatedly texted her to come down to the courtyard, despite her many attempts to brush him off (2/7/23 Tr. 94-101; GX 4-47, 4-49, 4-50). Finally, after he flashed his light into her windows, S.R. relented and went down to the courtyard where she confronted him (2/7/23 Tr. 101-05). S.R. told him, for the second time, that she was not interested in him romantically and "this was never going to happen," but Leninger continued to flirt with her and even told her that he wanted a daughter with her (2/7/23 Tr. 104-08). S.R. had only recently met Leninger and had explicitly told him (twice) that she wanted to remain friends, yet he was completely delusional, referring to her as his wife and saying that he wanted to have a child with her. Leninger's conduct on May 4 would cause a reasonable person in S.R.'s circumstances to feel a level of emotional distress that rose "significantly above that which [is] commonly experienced in day to day living." *Coleman*, 202 A.3d at 1145.

Even after S.R.'s face-to-face rejection of Leninger, Leninger persisted in his unwelcome pursuit of her. On May 6, Leninger texted S.R., acting as if she had not rebuffed his advances, but S.R. immediately reminded him, "I said no!" (2/7/23 Tr. 109; GX 4-56). Leninger refused to take no for an answer, however, saying that the right answer was yes and "it's not multiple choice" (2/7/23 Tr. 109-10; GX 4-57). S.R. told him for the second time, "Stop. I said no!" (2/7/23 Tr. 110; GX 4-57). Leninger still would not relent, telling her that "[h]opefully [he] w[ould] share [her life] with [her]" (2/7/23 Tr. 110; GX 4-57). S.R. told him for the third time, "I said no," and given his persistence, she further stated, "I am now scared" (2/7/23 Tr. 110; GX 4-57). Leninger suggested that they could talk about this later, and S.R. told him for the fourth time "no" (2/7/23 Tr. 111; GX 4-58). Leninger still refused to accept no as an answer, telling her that he "d[id]n't like the word" and asked her to reconsider (2/7/23 Tr. 112; GX 4-58). Fed up, S.R. expressed her desire to put an end to any further communication with him, texting, "Please do not contact me anymore" (2/7/23 Tr. 112; GX 4-58). In this text exchange, S.R. explicitly told Leninger that he was scaring her, yet he would not give up his romantic delusions or accept her refusal of him no matter how many times she told

him no. Leninger's conduct on May 6 caused S.R. – and would cause a reasonable person in S.R.'s circumstances – significant mental distress well beyond "[o]rdinary uneasiness, nervousness, [and] unhappiness." *Coleman*, 202 A.3d at 1145.

Even though S.R. made it clear that she wanted to end all communication with him, Leninger contacted her on three more occasions, each time causing her significant mental distress. First, on May 17, 2022, at about 3:00 a.m., Leninger flashed a light into her bedroom window, and S.R. was so upset that she got out of bed and yelled and cursed at him to leave her alone (2/7/23 Tr. 113-16). Second, on June 27, 2022, S.R. received an email message from Leninger, telling her that he had missed her while she was walking Sampson and asking how she was doing (2/7/23 Tr. 116-17; GX 4-60). In writing this message, Leninger acted as if their friendship had resumed back to normal, and he completely ignored everything that had occurred on May 1, 4, and 6. S.R. was so upset by this message that she could not sleep that night and contacted the police the next morning (2/7/23 Tr. 118, 120, 124-28, 152). Third, on July 1, 2022, Leninger sent S.R. another email with a pin drop location of his apartment building (2/7/23 Tr. 119-20, 158; GX 4-60). S.R.

felt as though Leninger was reminding her, "I'm here," when S.R. did not want to see him, and S.R. felt "really scared" by this message (2/7/23 Tr. 120-21, 158).

Looking at each occasion comprising the course of conduct in isolation, Leninger argues that on each occasion "his statements to [S.R.] were not objectively frightening or alarming" (Brief for Leninger at 17-21). However, the jury had to determine whether his conduct would "cause *a reasonable person in [S.R.]'s circumstances* to . . . [s]uffer emotional distress" D.C. Code § 22-3133(a)(3) (emphasis added). Those "circumstances" were not confined to the facts of each incident, as Leninger suggests. Rather, they encompassed the broader context of S.R.'s and Leninger's relationship and all that had transpired between them, including that: Leninger was her neighbor, and not only did he know where she lived, but also he could monitor when she was home; S.R knew that Leninger had 32 guns in his home and carried a gun; and S.R. unequivocally rejected Leninger's romantic advances on numerous occasions and told him not to contact her again. Thus, while Leninger's email message to S.R. on June 27 asking how she was doing might seem innocent enough standing on its own, when viewed in the context of their

prior interactions, a factfinder could reasonably conclude that Leninger's conduct on June 27 would cause significant mental distress to a reasonable person in S.R.'s circumstances. *See Coleman*, 202 A.3d at 1146 ("In the context of the two prior staring incidents, the fact that Mr. Coleman knew where the complainant lived, the early morning hour, and the two unequivocal requests that he leave the complainant alone, a factfinder could reasonably conclude that Mr. Coleman should have known that his behavior on October 12 [in "linger[ing] around" in order to watch the complainant as she walked] would be seriously alarming to a reasonable person in the complainant's position.").

II. The Trial Court Did Not Abuse Its Discretion in Responding to the Jury Note.

Leninger contends that the trial court erred in its response to the jury note by denying his request (1) for a special unanimity instruction "direct[ing] the jury to be unanimous about the [specific] occasions that it found constituted stalking" (Brief for Leninger at 21-23); and (2) "to require the jury to find that [he] possessed the [requisite] mens rea, the "should have known" standard[,] for the acts found by the jury to constitute stalking" (*id.* at 23-28). His contentions are without merit.

A. Additional Background

In the final charge to the jury, the jury was provided with the following instruction on stalking:

> The elements of stalking, each of which the [g]overnment must prove beyond a reasonable doubt, are number one, that [ ] Leninger himself communicated to S[.R.]; two, that [ ] Leninger did so in person and/or by any means; three, that [ ] Leninger did so voluntarily and on purpose and not by mistake or accident; four, that [ ] Leninger did so on two or more occasions; and five, on at least two of the occasions [ ] Leninger acted where he reasonably should have known that his conduct would cause a reasonable person in [S.R.]'s circumstances to fear for her safety or the safety of another person, or feel seriously alarmed, disturbed, or frightened, or suffer emotional distress. The conduct on each occasion need not be the same as that on any other occasion.
>
> The term "communicated" means the use of oral or written language, photographs, pictures, signs, symbols, gestures, or other acts or objects that are intended to convey a message.
>
> The term "any means" includes the use of a telephone, cellular phone, smart phone, mail, delivery service, email, text message, website, or other method of communication or any device. The term "emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling. (2/8/23 Tr. 60-61.)

The jury was also provided with a general unanimity instruction (2/8/23 Tr. 65 ("A verdict must represent the considered judgment of each juror, and in order to return a verdict, each juror must agree on that verdict. In

other words, your verdict must be unanimous."). Leninger did not object to these instructions (2/8/23 Tr. 9-11, 47-48, 103-05).

After the jury was instructed, the trial court dismissed the jurors to begin deliberations at 12:49 p.m. on February 8, 2023 (2/8/23 Tr. 102). At 4:42 p.m., the jury sent a note to the court, which the court read into the record:

> "Regarding element number five 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?" (2/8/23 Tr. 112).[7]

Because the court had to relieve her staff for the day, it informed the parties that it would address the note in the morning (2/8/23 Tr. 112).

The next morning, relying on *Coleman* and the legislative history of the current stalking statute, Council of D.C., Comm. on Pub. Safety & Judiciary, Rep. on Bill 18-151, at 33-34 (June 2009), the government argued that the jury only needed to "unanimously decide that there [we]re two acts of stalking, and it [wa]s not necessary for them to agree on the same two acts" (2/9/23 Tr. 6, 9-12). Thus, the government asserted

[7] The jury asked a second question: "What is the definition of an 'occasion?'" (2/8/23 Tr. 112). But because Leninger does not challenge the trial court's response to this second question, we do not discuss it here.

that the answer to the jury's question was no – i.e., the jury did not have to be unanimous on the two specific occasions causing the victim emotional distress (2/9/23 Tr. 7, 14).

Initially, defense counsel argued that the jury should be instructed that it had to be unanimous on the two acts comprising the stalking charge (2/9/23 Tr. 7-8). But after reviewing the legislative history and *Coleman*, defense counsel stated that he would "defer to the [c]ourt" on the issue (2/9/23 Tr. 10-12). The court agreed with the government that, although the jury had to find unanimously that "on at least two occasions" Leninger engaged in conduct that he should have known would cause a reasonable person in S.R.'s circumstances emotional distress, the jury did not have to agree unanimously on "what those two occasions [wer]e" (2/9/23 Tr. 12).

Despite acknowledging that "the jury didn't specifically ask this," defense counsel further asked the court for a "point of clarification" that, "even tho[ugh] the jury d[id]n't need to be unanimous on which two specific acts," the jury "d[id] need to unanimously agree that a requisite mens rea existed for each act that they f[ound]" (2/9/23 Tr. 12-13).

The court noted that the jurors were "not asking a question about the mens rea," and thus it was reluctant "to raise an additional issue beyond what the jury [wa]s asking right now" (2/9/23 Tr. 13). Accordingly, the court proposed answering the note by reading the question to the jury and stating, "no, but the jury must agree that at least two such occasions occurred" (2/9/23 Tr. 14-15). Defense counsel stated, "That's fine, your Honor," and the government also agreed to the proposed reinstruction (2/9/23 Tr. 15).

The jury was brought back into the courtroom and reinstructed as follows with respect to the question "regarding element No.5 of the count of stalking":

> "Do the jurors have to be unanimous on identifying the specific occasion causing the victim to be fearful, alarmed, or suffer emotional distress?" The answer to that question that I will instruct you is, no, but the jury must unanimously agree that at least two such occasions occurred. (2/9/23 Tr. 20-21.)

The jury resumed deliberations at 10:06 a.m. (2/9/23 Tr. 21). At 11:25 a.m., the court received a note from the jury stating, "We have arrived at a verdict. We are unanimous in the verdict." (2/9/21 Tr. 22). The jury found Leninger guilty of stalking (2/9/21 Tr. 24-26).

B. Standard of Review and Applicable Legal Principles

This Court has "repeatedly held that a defendant may not take one position at trial and a contradictory position on appeal." *Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993). When a defendant does so his claim is waived, and this Court will not consider it. *See Plummer v. United States*, 43 A.3d 260, 267 (D.C. 2012) (where "appellant expressly declared that he did not object," and "invit[ed] and induc[ed] the judge" to take a course that he challenges on appeal, his claim is waived and that "waiver is final"); *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007) ("Generally, the invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take.").

A trial court enjoys broad discretion in responding to a jury's note and in deciding whether and how to reinstruct a jury. *Alcindore v. United States*, 818 A.2d 152, 155 (D.C. 2003); *Bouknight v. United States*, 641 A.2d 857, 860 (D.C. 1994); *Murchison v. United States*, 486 A.2d 77, 83 (D.C. 1984). This Court's task in reviewing a claim of reinstructional error is "to determine whether the reinstruction given here by the trial court correctly stated the law." *Scott v. United States*, 954 A.2d 1037,

1045 (D.C. 2008). A preserved challenge to a trial court's reinstruction is reviewed for an abuse of discretion. *Alcindore*, 818 A.2d at 155; *Murchison*, 486 A.2d at 83.

This Court has held that a special unanimity instruction is required when "'a single count encompasses two or more factually or legally separate incidents.'" *Parks v. United States*, 627 A.2d 1, 8 (D.C. 1993) (quoting *Gray v. United States*, 544 A.2d 1255, 1257 (D.C.1988)). However, "no such instruction is required 'when a single count is charged and the facts show a continuing course of conduct, rather than a succession of clearly detached incidents, . . . absent some factor that differentiates the facts on legal grounds.'" *Guevara v. United States*, 77 A.3d 412, 419 (D.C. 2013) (quoting *Gray*, 544 A.2d at 1258).

C. Discussion

As to Leninger's first contention – that the trial court erred in denying his request for a special unanimity instruction directing the jury to agree unanimously on the two specific occasions comprising the course of conduct – he has waived this claim. Although defense counsel initially asked for the special unanimity charge, after reviewing the legislative history and *Coleman*, counsel backed down and stated that he would

"defer to the [c]ourt" on this issue (2/9/23 Tr. 10-12). The court concluded that the jury only had to find unanimously that on at least two occasions Leninger engaged in conduct that he should have known would cause a reasonable person in S.R.'s circumstances emotional distress, but that it did not have to agree unanimously on "what those two occasions [wer]e" (2/9/23 Tr. 12). Leninger cannot defer to the court at trial, thereby encouraging the court to respond to the jury note in the way that it did, and then challenge the trial court's reinstruction on appeal. *See Plummer*, 43 A.3d at 267; *Preacher*, 934 A.2d at 368; *Brown*, 627 A.2d at 508. Leninger has therefore waived this claim, and this Court should decline to consider it.[8]

In any event, even if Leninger has not waived this claim, it is without merit. Leninger contends that *Coleman* implicitly rejected the argument that a special unanimity instruction is not needed for a stalking charge, "when it held that 'the requisite mens rea must be proved with respect to the conduct (the "occasions" or acts) comprising

[8] Even if the Court does not find waiver, Leninger's failure to object to the trial court's reinstruction would subject his claim to plain-error review. *See* Super. Cr. Crim. R. 52(b). Leninger fails to show error under any standard of review.

the course of conduct, not merely with respect to the course of conduct as a whole'" (Brief for Leninger at 21 (quoting *Coleman*, 202 A.3d at 1140)). But *Coleman* did not address the unanimity issue that Leninger raises in this appeal. In fact, the Court in *Coleman* acknowledged that the legislature had rejected "a proposal that would require the jurors to be unanimous as to which acts constituted the stalking," and further noted that this rejected proposal "did not involve the mens rea question" at issue there. 202 A.3d at 1140 n.17 Thus, contrary to Leninger's contentions, *Coleman*'s holding (that the government had to prove a defendant possessed the requisite mens rea on at least two of the occasions that comprise the course of conduct to convict him of stalking) has no bearing on the issue of unanimity. *Id.* at 1139-42.

As the Court in *Coleman* recognized, the Council explicitly rejected a change proposed by the D.C. Public Defender Service (PDS) regarding "what unanimity is required from jurors in a stalking case" – and more specifically, PDS's argument that "each act of stalking is an element upon which the jury must agree unanimously." Council of D.C., Comm. on Pub. Safety & Judiciary, Rep. on Bill 18-151, at 33-34 (June 26, 2009) (Committee Report). In rejecting PDS's proposal that each act of stalking

constitutes an element of the offense, the Council made clear that a "course of conduct" is a single element, and thus the jury was not required to agree unanimously on which two specific acts comprised stalking:

> [I]f a defendant is accused of stalking because he called the alleged victim 24 times in one day – should the jury be required to unanimously find the same two acts of calling stalking or is it sufficient that each juror finds two acts sufficient? The Committee believes it is sufficient that the jury can unanimously decide that there are two acts of stalking and it is not necessary for them to agree on the same two acts. If they are able to unanimously agree that overall conduct equates to stalking beyond a reasonable doubt, it seems overly burdensome to require that they agree upon the same acts.

Committee Report at 34.

In *Washington v. United States*, 760 A.2d 187 (D.C. 2000), this Court examined the prior version of the stalking statute and held that the defendant was not entitled to a special unanimity instruction. *Id.* at 198-99. In so holding, the Court noted that stalking "is defined as a series of incidents that are part of a course of conduct extending over a period of time," and accordingly, "it is the continuing course of conduct which constitutes the offense, not the individual discrete actions making up the course of conduct." *Id.* at 198. Because stalking involved "'a continuing course of conduct[,] . . . a special unanimity instruction [wa]s

unnecessary.'" *Id.* (quoting *Gray*, 544 A.2d at 1258). Indeed, "a majority of other jurisdictions have held that juries need not receive an unanimity instruction regarding the specific acts that make up a course of conduct for the crime of stalking." *Latham v. State*, --- So. 3d ---, 2022 WL 5396439, at *3 (Ala. Crim. App. Oct. 7, 2022) (listing cases); *accord State v. Elliott*, 987 A.2d 513, 520 (Me. 2010) (listing cases).

In sum, Leninger was not entitled to a special unanimity instruction regarding the specific acts that constituted stalking. *See Elliot*, 987 A.2d at 520 ("[A] 'course of conduct' is a single element," and therefore "[u]nanimity among the jurors is not required . . . as to each act that makes up that course of conduct"). Accordingly, the trial court's reinstruction to the jury correctly stated the law and did not constitute an abuse of discretion. *Scott*, 954 A.2d at 1045 (D.C. 2008).

As to Leninger's second contention – that the trial court erred in denying his request to require the jury to find that he possessed the requisite mens rea for the acts found by the jury to constitute stalking – the jury was so instructed consistent with *Coleman*, and therefore the trial court did not abuse its discretion. In its final charge, the court instructed the jury that the government had to prove beyond a reasonable

doubt that "on at least two of the occasions [ ] Leninger acted where he reasonably should have known that his conduct would cause a reasonable person in [S.R.]'s circumstances to . . . suffer emotional distress" (2/8/23 Tr. 60-61). In *Coleman*, this Court clarified that, to prove stalking, the government was required to prove that the defendant possessed one of the requisite guilty states of mind (here, the "should have known" standard) on at least two of the occasions that made up the "course of conduct" alleged to constitute stalking. 202 A.3d at 1130, 1142. That is precisely what the trial court informed the jury here, and there was no need for a "point of clarification," as requested by defense counsel in response to the jury note, especially when the jury did not specifically seek clarification about the mens rea requirement (2/9/23 Tr. 12-13). While the trial court must respond appropriately where a jury note indicates that the jury is "confused," *Alcindore*, 818 A.2d at 155, the court is not obliged to step in where there is no confusion – and indeed could interfere with jury deliberations if it did.

To the extent Leninger is arguing that the jury was required to find that he possessed the requisite mens rea on the same two occasions or for each of the five occasions underlying the course of conduct (Brief for

Leninger at 23), *Coleman* does not so hold. It merely requires that the jury find that the defendant possessed the requisite mens rea on at least two of the occasions. The trial court correctly stated the law in its instructions and in its response to the jury note, and therefore it did not abuse its discretion.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
ELIZABETH H. DANELLO
MICHAEL C. LEE
Assistant United States Attorneys

/s/
ANNE Y. PARK
D.C. Bar #461853
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Anne.Park@usdoj.gov
(202) 252-6829

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 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, amended May 2, 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.

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Signature

23-CM-147
Case Number(s)

Anne Y. Park
Name

December 21, 2023
Date

Anne.Park@usdoj.gov
Email Address

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Donald L. Dworsky, Esq., on this 21st day of December, 2023.

/s/
ANNE Y. PARK
Assistant United States Attorney