To be argued by
BRENT FERGUSON

New York Supreme Court

Appellate Term - First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JOHN RINALDI,

Defendant-Appellant.

BRIEF FOR RESPONDENT

CYRUS R. VANCE, JR.
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
(212) 335-9000
danyappeals@dany.nyc.gov

DAVID M. COHN
BRENT FERGUSON
ASSISTANT DISTRICT ATTORNEYS
Of Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOHN RINALDI,

Defendant-Appellant.

BRIEF FOR RESPONDENT

INTRODUCTION

Defendant John Rinaldi appeals from a June 17, 2016 judgment of the Criminal Court of the City of New York, New York County (Kevin McGrath, J.), convicting him after a bench trial of two counts of Stalking in the Fourth Degree (Penal Law §§ 120.45(1), (2)), one count of Harassment in the First Degree (Penal Law § 240.25), and one count of Harassment in the Second Degree (Penal Law § 240.26(3)). On June 17, 2016, the court sentenced him to an aggregate term of sixty days in jail and entered an order of protection.[1] Defendant has served his sentence.

[1] Specifically, defendant received sixty days in jail for each of the stalking convictions and the first-degree harassment conviction, and fifteen days in jail for the second-degree harassment conviction. All four sentences were ordered to run concurrently, for an aggregate term of sixty days in jail.

This case arises from defendant's repeated, unwanted confrontations and contacts with actress Brooke Shields between November 2013 and May 2015. Defendant began making constant attempts to contact Shields in the 1980s, writing letters, making telephone calls, and even showing up uninvited to her birthday party at a restaurant in Manhattan. Because defendant was "obsessed" with Shields and sought to pursue personal encounters, Shields's security team treated him as an "inappropriate pursuer" and asked her to report all of defendant's attempts at contact.

Defendant began a more aggressive effort to be a part of Shields's life in November 2013. On November 8, he delivered a box to her home on West 10th Street, in Manhattan, containing a teddy bear and two letters from his purported charity. Two weeks later, he waited outside her home with a framed picture of Shields as a young child and tried to give it to her, saying it was for her daughter, Rowan. After Shields avoided defendant and went inside, her employee told defendant not to approach the house or contact Shields or her family.

Nevertheless, defendant returned to Shields's home twice within the next few weeks, unsuccessfully trying to speak to Shields. A few months later, defendant approached Shields's husband, Chris Henchy, on the street near their home, and admitted to Henchy that he had "spooked" Shields during their previous encounter. Henchy agreed that he had scared her, and told defendant to "leave Brooke alone." Yet Shields continued to see defendant and his car near her home. In addition, throughout 2014, defendant frequently used social media to address Shields and discuss her

daughter Rowan, and once attended an event Shields held to promote her book, using the audience question-and-answer time to speak to Shields, and the rest of the audience, at length.

In May 2015, defendant escalated his attempts at contact. He parked his car in front of Shields's home on May 3, and seemed intent on staying there until he persuaded Shields to accept him into her life. Over the next few days, he approached her in person and sent messages discussing her whereabouts and asking her to be nicer to him.

On May 5, Shields saw that defendant had written her name in the dust on his car's window. After Shields expressed fear, her assistant wiped off the writing with his sleeve, and defendant responded by sending a message that said, "pls tell your faggy henchman 2not [*sic*] touch my car." Later that night, when returning from an event, Shields and the same assistant saw defendant in his car in the same spot, and he drove quickly away when the assistant approached him. Shields filed a complaint with the police that night.

A police officer found defendant sleeping in his car on the morning of May 6 and told him not to contact Shields or her family, to stay away from her house, and to stop posting messages about her online. Yet the police observed him walking slowly in front of her house later the same day, and gave him a second warning that afternoon. Defendant ignored those warnings, and over the next ten days he posted frequently about Shields on Twitter, at one point tweeting about his "Second Amendment" rights. On May 15, he sent a lengthy e-mail to Shields's publicist discussing his feelings about

Shields, referencing an incident in which another actress, Rebecca Shaeffer, had been murdered by a stalker. Defendant was subsequently arrested.

By a Criminal Court Information (Docket No. 2015NY030419), defendant was charged with two counts of Stalking in the Fourth Degree, one count of Harassment in the First Degree, and one count of Harassment in the Second Degree. Following a suppression hearing not at issue on appeal, defendant proceeded to a bench trial before the Honorable Kevin McGrath on June 13, 2016. On June 17, 2016, the court found defendant guilty of all four charges and, on the same day, sentenced defendant as described above.

On appeal, defendant argues that the trial evidence was insufficient and that the verdict was against the weight of the evidence.

THE EVIDENCE AT TRIAL

The People's Case[2]

A. Background: contacts with Shields in the 1980s.

BROOKE SHIELDS became famous in the 1980s, starring in films such as *The Blue Lagoon* and *Endless Love.* Defendant began to send Shields letters and call her house during that decade, which was brought to the attention of BRIAN CRETER, a member of Shields's security team (Creter, Jun. 13: 113-115; Shields, Jun. 13: 128). Defendant

[2] Parenthetical references preceded by a last name and a date are the respective witness's trial testimony. Citations to "T" are to non-testimonial portions of the trial transcript. References designated "DB" are to the defendant's brief.

also began writing letters to Shields's assistant in charge of handling her fan mail (Shields, Jun. 13: 130). Defendant's letters were not typical fan letters. In his first letter, he said he was "obsessed" with Shields, and at least ten of his letters discussed plans to pursue face-to-face encounters with her (Creter, Jun. 13: 111, 113). Because of this troublesome content, Shields's security team labelled defendant an "inappropriate pursuer" (Creter, Jun. 13: 111).[3]

In 1987, defendant went uninvited to Shields's birthday party at a restaurant in downtown Manhattan and posed for photos with Shields and her mother Teri (Shields, Jun. 13: 132). Shields believed that her mother spoke to defendant only because "[i]f she was threatened by someone, she tried to bring them in to have an eye on them" (Shields, Jun. 14: 47).

Over the years, defendant attended many of Shields's Broadway performances, at one point claiming to "go 2every [*sic*] play" that Shields was in (People's Exhibit 13G) (5/10/15 Tweets). After the shows, defendant would wait outside the stage door hoping to speak to Shields (Shields, Jun. 13: 133). He did not often ask for an autograph like other fans, but was usually there to tell her he knew about a recent development in her personal life (Shields, Jun. 13: 166). When she saw defendant, Shields would ask her bodyguard at the theater to tell the police who were standing guard that there was

[3] Also, when identifying dangerous behavior, the security team would not only look for direct threats, but for communications "that show[ed] obsessive love," because "there has never been a public figure stalker attack [in which the stalker] has threatened that person first" (Creter, Jun. 13: 123).

a "higher alert" and would inform her assistants, including MICHAEL ZARARA, who ran her social media accounts (Shields, Jun. 13: 168; Zarara, Jun. 14: 103, 180).

B. Defendant approaches Shields's home four times in late 2013 and is warned to stay away from her.

On November 8, 2013, defendant dropped off a box with a teddy bear and two letters at Shields's home on West 10th Street, where she lived with her husband, CHRISTOPHER HENCHY, and their two daughters (Henchy, Jun. 14: 191-92, 212). After it was delivered, the package was given to Shields's assistant DANIEL MCCANN, who later informed Shields about its contents (McCann, Jun. 14: 53-55). In the letters, defendant claimed that he operated a charity to support the recovery effort in Newtown, Connecticut (the location of the Sandy Hook massacre), and asked for assistance with building a children's center there (Shields, Jun. 14: 32; McCann, Jun. 14: 53-55; Henchy, Jun. 14: 212-14; People's Exhibit 5 (11/8/13 Letters)). One letter contained a small shirtless photograph of defendant and listed other celebrities who were supposedly involved in the charity's efforts, and the other asked Shields to take the teddy bear and deliver it to the ribbon cutting ceremony of the children's center in Newtown (McCann, Jun. 14: 71-72; Henchy, Jun. 14: 212-14; People's Exhibit 5 (11/8/13 Letters)).[4]

[4] Witnesses at trial questioned the charity's legitimacy (McCann, Jun. 14: 67; Zarara, Jun. 14: 122).

On November 23, Shields returned home with Zarara to find defendant at her house once more (Shields, Jun. 13: 138-40, Jun. 14: 22-24; Zarara, Jun. 14: 103, 166). He waited for Shields by her front steps, holding a silver picture frame with a picture of Shields when she was a small child. When Shields and Zarara approached the house, defendant held the picture frame up and said "I have something for Rowan," Shields's daughter (Zarara, Jun. 14: 175-76; Shields, Jun. 13: 140). Shields did not speak to defendant, but said, "No, no, no, no, no. That's one of the guys." (Zarara, Jun. 14: 104; Shields, Jun. 13: 138-39, Jun. 14: 22). Zarara then stood in front of defendant so Shields could walk around and go inside her house (Zarara, Jun. 14: 104; Shields, Jun. 13: 139, Jun. 14: 22-24). When she ignored him, defendant yelled, "What, you don't want it?" and seemed agitated and frustrated (Zarara, Jun. 14: 105). His presence and demeanor, and the fact that he mentioned her daughter's name, made Shields "fearful [and] on edge," and made her feel like she was in a "vulnerable position" (Shields, June 13: 148).

Shortly after Shields and Zarara went inside, Zarara came back outside to speak to defendant. Defendant explained that he "wasn't a creep" and gave Zarara his driver's license for identification (Zarara, Jun. 14: 105; People's Exhibit 8 (Driver's License)). Defendant then walked to the corner, but stood on the corner staring at Shields's house for about ten minutes. He walked around the corner and out of view several times, but repeatedly returned to a spot from which he could look at Shields's home (Zarara, Jun.

14: 107). Zarara walked to the corner and told defendant "not to contact anyone in [Shields's] house," bring gifts or "hang around" the house (Zarara, Jun. 14: 109, 187).

Defendant seemed disconcerted by Zarara's warning. He had a "nervous energy" during their conversation, and seemed to reject the notion that his actions were inappropriate, saying that he saw the family in the neighborhood "all the time" and "never [said] anything to them" (Zarara, Jun. 14: 108). A few days later, on or around November 26, 2013, defendant posted several messages on Shields's WhoSay account,[5] saying that he was "horrified to hear saying hello was inappropriate," adding, "I love you — but you're better than this" (People's Exhibit 10) (11/2013 WhoSay Posts).

Less than two weeks later, on December 8, 2013, defendant was back at Shields's home. This time, Shields was getting on a motor scooter driven by McCann (Shields, Jun. 13: 140; McCann, Jun. 14: 55-56, 74). Shields saw defendant approaching them and said, "That's him. Just go." (McCann, Jun. 14: 56; Shields, Jun. 13: 141, Jun. 14: 11). Though McCann began to drive the scooter away from the house, he stopped to wait for a red light at the corner of the block. Defendant followed the scooter to the corner and kept trying to talk to Shields, but she pretended not to hear him, and McCann drove away (Shields, Jun. 13: 141, Jun. 14: 12; McCann, Jun. 14: 75). Later, defendant returned to Shields's home. Shields was not home, but defendant spoke to

[5] WhoSay was a social media website on which celebrities could post photographs and messages, and anyone could see and respond to those posts (Zarara, Jun. 14: 111-12).

the family's babysitter, KELLY CORRIGAN. Defendant asked whether Shields had received the box with the teddy bear that he had previously delivered (Corrigan, Jun. 14: 92-93, 100). Corrigan later alerted Shields and Henchy about the encounter (Corrigan, Jun. 14: 92, 100-01).

C. Defendant acknowledges that he "spooked" Shields, and is warned again to "leave Brooke alone."

On March 4, 2014, defendant approached Henchy about "[a] hundred feet" from Shields's and Henchy's home (Henchy, Jun. 14: 192, 205). Defendant told Henchy "he thought he had spooked" Shields (Henchy, Jun. 14: 193). Henchy told him that was correct and that defendant had "ma[de] her unsettled and nervous and scared" (Henchy, Jun. 14: 193). He then told defendant to "leave Brooke alone" (Henchy, Jun. 14: 217-18). Henchy later reported the incident to Shields's security company (Henchy, Jun. 14: 194).

D. Defendant tweets messages to Shields, attends her public event, and is seen frequently near Shields's home.

Seven months later, on October 7, 2014, defendant sent Shields a photo on Twitter of a young child, with the caption "my Rowan Sophia" (People's Exhibit 22) (10/7/14 Tweet). On November 17, 2014, using the account he had set up for the charity he claimed to operate, he sent another message with a photo of Shields that said "if there was a more beautiful being . . ." (People's Exhibit 11) (11/17/14 Tweet).

On November 23, 2014, defendant attended an event at which Shields was promoting a book she had written (Shields, Jun. 13: 142). He sat in the front row, asked

for the microphone, gave Shields a picture of her mother, and then spoke at length without asking a question (Shields, Jun. 13: 142, 146, Jun. 14: 9-10). Several days later, defendant blogged about the event on the website he set up for his charity, and said that he did have a question for Shields, "but knowing her as I do I [didn't] need to put her on the spot, hell, I see her al[l] the time in the neighborhood" (People's Exhibit 12) (11/28/14 Sandy Hook Center Blog Post).

After the event, Shields began to see defendant more often in the neighborhood, always close to her home (Shields, Jun. 13: 146). She also frequently saw his car outside the house "for days at a time," and he told her that he sometimes lived in his car (Shields, Jun. 13: 146, Jun. 14: 12-13, 50). When she saw him while her daughters were with her, she would not go home because she was fearful for their safety (Shields, Jun. 13: 147-48).

E. Defendant intensifies his attempts at personal contact and shows anger at Shields's rejection. Shields contacts the police.

On May 3, defendant parked outside Shields's home once again, and then sent her a Twitter message (using his charity's account) telling her that he thought she was out of town, and that she should let him know if she wanted the parking spot (People's Exhibit 13E) (5/3/15 Tweet). Defendant recounted that the next day he offered her the parking spot in person, this time when she was with Rowan, and she declined

(People's Exhibits 7 (5/15/15 E-mail to Fritzo), 20A (7/21/15 Sandy Hook Center Blog Post)).

On the morning of May 5, Shields was with her trainer returning home from a workout, and defendant was waiting near her home (Shields, Jun. 13: 149). She tried to keep her trainer with her, then walked inside the house to avoid defendant (Shields, Jun. 13: 149). A short time later, defendant tweeted that he saw her coming home, and added, "Pls b nicer- I'm sch gd guy!" (People's Exhibit 6) (5/5/15 Tweets). Later in the day, Shields saw defendant's car in the same spot as it had been before, but this time he had written "Brooke" in the dirt on his car window in the same style as her signature (Shields, Jun. 13: 150; McCann, Jun. 14: 57, 78-79). Shields found this "disturbing and creepy," and at Shields's request, McCann wiped it off the car (Shields, Jun. 13: 150; McCann, Jun. 14: 79). In response, on the same day, defendant sent Shields a Twitter message that read, "pls tell your faggy henchman 2not [*sic*] touch my car. It's an act of vandalism& [*sic*] not appreciated." (People's Exhibit 6) (5/5/15 Tweets).

That evening, Shields and McCann returned from an event. When they walked past defendant's car, still parked outside her home, they saw him "rustling" around in the back seat (Shields, Jun. 13: 151; McCann, Jun. 14: 58, 80). They both went inside, and then McCann came back outside to confront defendant. By the time he got outside, however, defendant was driving away (Shields, Jun. 13: 151; McCann, Jun. 14: 59, 80). Shields went to the police station to file a complaint that night (Shields, Jun. 13: 151). She also asked McCann to stay at her house that night and the next night because her

husband was away and she feared for her safety and her daughters' safety (Shields, Jun. 13: 154; McCann, Jun. 14: 63). At that point, Shields's daughters were asking if they would be kidnapped, and her older daughter Rowan's mind was "going crazy" from fright (Shields, Jun. 13: 154-55).

F. The police warn defendant to stay away from Shields. He ignores their warning and sends disturbing messages, and is then arrested.

The next morning, Lieutenant KEVIN BLAKE (then a detective) approached defendant, who was sleeping in his car near Shields's home (Blake, Jun. 17: 253-54). Blake told defendant that Shields had filed a complaint and that defendant should stay away from Shields, her house, and her family. Blake also told defendant to refrain from engaging in activity online directed at Shields (Blake, Jun. 17: 255). Defendant acknowledged the warnings and was cooperative (Blake, Jun. 17: 255). However, Blake saw defendant walking down Shields's street later the same day; though he was walking briskly at first, he slowed down in front of Shields's house (Blake, Jun. 17: 255-56).

Just after Lieutenant Blake saw defendant, he and Detective STANLEY DASH walked down West 10th Street to find him, and two minutes later saw defendant in a coffee shop on the corner of Shields's street (Blake, Jun. 17: 255-56; Dash, Jun. 17: 231). The officers reiterated the warnings to defendant, who said that he was not sure why Shields was uncomfortable when "he had been speaking to Ms. Brooke Shields for years" (Dash, Jun. 17: 231; Blake, Jun. 17: 256-57). Detective Dash reminded defendant that he had not been speaking with Shields for years, but only her mother Teri, and

defendant acknowledged that was true (Dash, Jun. 17: 231). Defendant then said "he would no longer contact [Shields] in any form or fashion," and the officers told him not to tweet about her (Dash, Jun. 17: 232; Blake, Jun. 17: 254-55).

Nevertheless, defendant sent a rash of messages targeting Shields over the next ten days (People's Exhibits 7 (5/15/15 E-mail to Fritzo), 15 (5/6/15 Tweets), 18 (5/12/15 Tweet)). For instance, in a Twitter post on May 6, the same day he received two warnings from the police, he mentioned Shields's mother and said that she would not have been "so cruel" (People's Exhibit 15) (5/6/15 Tweets). The same day, defendant posted a flurry of tweets about Shields using her celebrity to "bully," and he mentioned his "Second Amendment" rights (People's Exhibit 15) (5/6/15 Tweets). Finally, on May 15, 2015, defendant sent a long e-mail to Shields's publicist Jill Fritzo, though portions of the message were addressed to Shields herself (People's Exhibit 7) (5/15/15 E-mail to Fritzo). In the e-mail, he first claimed that he "never wanted to know" Shields, and then lamented that Shields and her "effeminate assistant" did not appreciate his gift to her and that Shields had been rude to him multiple times (People's Exhibit 7) (5/15/15 E-mail to Fritzo). He explained that he did not attend certain events of Shields's because of Henchy's warning (People's Exhibit 7) (5/15/15 E-mail to Fritzo). The e-mail also included a long discussion of Rebecca Shaeffer, an actress

who was killed by a stalker in the 1980s (People's Exhibit 7 (5/15/15 E-mail to Fritzo); Henchy, Jun. 14: 196).

Defendant was arrested on the morning of May 16 (Dash, Jun. 17: 228).

The Defense Case

Prescription drug records showed that defendant had been using a pharmacy near Shields's home since 2003 (Defendant's Exhibit A).

POINT

THE EVIDENCE WAS SUFFICIENT TO PROVE DEFENDANT'S GUILT, AND THE VERDICT FULLY ACCORDED WITH THE WEIGHT OF THE CREDIBLE EVIDENCE (Answering Defendant's Brief).

Defendant stands convicted of two counts of Stalking in the Fourth Degree for engaging in a course of conduct directed at Brooke Shields that, first, he knew or should have known was likely to cause her to fear material harm (Count 1), *see* Penal Law § 120.45(1), and, second, caused material harm to her mental or emotional health (Count 2), *see* Penal Law § 120.45(2). In addition, defendant stands convicted of Harassment in the First Degree for intentionally and repeatedly harassing Shields by committing acts that placed her in reasonable fear of physical injury (Count 3), *see* Penal Law § 240.25, and Harassment in the Second Degree for repeatedly committing acts with intent to harass, annoy, and alarm Shields that had no legitimate purpose, and indeed alarmed and seriously annoyed her (Count 4), *see* Penal Law § 240.26(3). On appeal, defendant challenges the sufficiency and weight of the evidence, asserting that

he had a legitimate purpose for contacting Shields (DB: 29), that he was not sufficiently warned to stay away from her (DB: 30-31), that he did not engage in a course of conduct directed at Shields (DB: 32-33), that some of his conduct was protected by the First Amendment (DB: 33), that Shields never reasonably feared or experienced material harm (DB: 39-40, 43), and that he never intended to harass her (DB: 42). Contrary to defendant's contentions, his guilt was well proven.

A guilty verdict is supported by legally sufficient evidence "if there is any valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt." *People v. Gordon*, 23 N.Y.3d 643, 649 (2014) (internal quotation marks omitted); *see also People v. Denson*, 26 N.Y.3d 179, 188 (2015). Courts must consider the evidence "in the light most favorable to the prosecution, . . . recognize that the People are entitled to all reasonable evidentiary inferences," and "assume that the [trier of fact] credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded." *Gordon*, 23 N.Y.3d at 649 (internal quotation marks omitted); *see also Denson*, 26 N.Y.3d at 188.

When reviewing whether a verdict is against the weight of the evidence, this Court first must determine "whether an acquittal would not have been unreasonable." *See People v. Kancharla*, 23 N.Y.3d 294, 303 (2014) (internal quotation marks omitted). Second, if an acquittal would not have been unreasonable, it must "weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and

evaluate the strength of such conclusions" to determine whether the trier of fact was "justified in finding the defendant guilty beyond a reasonable doubt." *Id.* (internal quotation marks omitted). Intermediate appellate courts must accord "[g]reat deference" to the factfinder and be "careful not to substitute themselves for the" trier of fact, which had the "'opportunity to view the witnesses, hear the testimony and observe demeanor.'" *People v. Romero*, 7 N.Y.3d 633, 644 (2006) (quoting *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987)).

Applying these standards here, this Court should not disturb the trial court's verdict.

A.

To begin, the trial evidence compellingly proved defendant's guilt of both counts of fourth-degree stalking. To establish defendant's guilt of Stalking in the Fourth Degree under Count 1, the People needed to prove that he "intentionally, and for no legitimate purpose, engage[d] in a course of conduct directed at" Shields, and that defendant knew or should have known that his conduct was likely to give Shields a reasonable fear that he would materially harm her, her family or friends, or her property. Penal Law § 120.45(1). To prove defendant's guilt of stalking under Count 2, the People needed to demonstrate that the course of conduct consisted of "following, telephoning, or initiating communication or contact" with Shields or her family and friends, that it "cause[d] material harm to [her] mental or emotional health," and that

defendant "was previously clearly informed to cease that conduct." *Id.* § 120.45(2). Each of those elements was well proven.

1.

First, both stalking counts required a showing that defendant's actions toward Shields lacked a legitimate purpose. *Id.* § 120.45. And, as the Court of Appeals has explained, a person acts "intentionally and for no legitimate purpose" when he has no "justification to engage someone[] other than to hound, frighten, intimidate or threaten." *People v. Stuart*, 100 N.Y.2d 412, 426, 428 (2003). Under this standard, a defendant need not intend to cause fear or harm. Rather, the law "focuses on what the offenders do, not what they mean by it or what they intend as their ultimate goal." *Id.* at 427. The Court of Appeals has noted that if the statute required courts to look at whether a defendant intended to cause harm, "[s]talkers would be free to continue as long as they harbored the notion that they stood to win, rather than harm, their prey." *Id.* Because those who commit stalking often purport to contact their victims for legitimate reasons, the lack of a legitimate purpose "can be inferred" from other characteristics of the course of conduct in question. *People v. Coveney*, 50 Misc.3d 1, 7 (App. Term 2d Dept., 2d, 11th & 13th Jud. Dists. 2015); *see also People v. Dupont*, 107 A.D.2d 247, 252 (1st Dept. 1985) (noting that even unobjectionable communication may not be legitimate if directed at unwilling listener); *People v. Kitsikopoulos*, 47 Misc.3d 1220 (A) at 5-6 (Crim. Ct. N.Y. County 2015) (holding that a course of conduct likely to cause a victim fear cannot "at the same time also ha[ve] a legitimate purpose").

In *Stuart*, for instance, the defendant was convicted of stalking after approaching the victim, a stranger, and offering her a gift, asking her to dinner, and later following her. 100 N.Y.2d at 414-15. The Court of Appeals rejected the defendant's claim that the phrase "no legitimate purpose" was vague as applied to his conduct, concluding that the "defendant could not reasonably have failed to realize that his intentional course of conduct" was unlawful, and that he had not "show[n] that his intrusive behavior involved some valid purpose other than hounding her to the point of harm." *Id.* at 426-27, 429. In *Coveney*, the defendant worked as a substitute teacher, and the school's principal terminated her after the she was seen screaming in the school hallway in front of students. 50 Misc.3d at 5. The defendant then began writing letters to the principal and the principal's father in an attempt to get rehired, and sometimes showed up outside the principal's home. The court affirmed the defendant's stalking conviction, concluding that "despite the fact that defendant contends that she had a legitimate purpose in pursuing [the principal] in an effort to get her job back, the 'no legitimate purpose' element can be inferred from the frequency of the alleged course of conduct." *Id.* at 7.

Here, the trial judge properly found that defendant's actions were intentional and lacked any legitimate purpose. As in *Stuart* and *Coveney*, despite defendant's professedly pure motives, his actions would lead any reasonable factfinder to conclude that he hounded Shields, over an extended period of time, for no justifiable reason. In that regard, defendant had been obsessed with Shields for decades, since the 1980s.

Moreover, from November 2013 to May 2015, defendant made repeated efforts to contact Shields, despite her clear demands that he leave her alone. Late in 2013, he appeared at her door or near it at least four times, using various excuses in an effort to persuade her to talk to him. Even after he was told to stay away from her and her family, he came back. He also sent her messages online and attended one of her public events, delivering a monologue to her in a venue where she had no choice but to listen. Several months later, he decided to park in front of Shields's home and stayed put, approaching her in person and sending her Twitter messages all the while. In his online posts, defendant presented himself as having a personal relationship with Shields even though he did not. Then, he vented his anger to Shields and others when she made it clear that they had no relationship and his contact was unwelcome. After Shields finally complained to the police, and they told him to stop contacting her online or in person, he was enraged: he walked by her home in direct contravention of police orders, then tweeted about his Second Amendment rights. He even sent a rambling e-mail to her publicist that included a reference to an actress who had been murdered by a stalker. Defendant also, at various times, mentioned Shields's daughter by name.

Simply put, defendant sought out Shields in any way he could, approaching her home, sending messages online, following her as she left her house, attending a public event, and waiting in his car near her front door. His claims about the purpose of all of these attempts shifted — sometimes he claimed he wanted Shields's assistance with a charity, sometimes he wanted to express gratitude for her mother's alleged kindness

to him, sometimes he was purportedly trying to help her find parking, and sometimes he wanted to tell her he had seen her or admonish her for being rude to him. As the trial court found, these shifting explanations were clearly pretexts: each time defendant was rebuffed, he found a new reason to show up or contact Shields. Indeed, his actions showed that he was simply hounding Shields in a failed effort to make contact and establish some type of relationship, despite the clear message that his approaches were unwanted. The trial judge thus properly concluded that defendant's conduct was unjustified and that his explanations were self-serving. *See People v. Thron*, 237 A.D.2d 137, 137 (1st Dept. 1997) (the "jurors reasonably chose to reject defendant's illogical and self-serving testimony").

On appeal, defendant reiterates these same, failed arguments, insisting that he had a legitimate, decades-long relationship with Shields (DB: 29). But as discussed, a factfinder need not accept a defendant's claims about his purpose, because few defendants will admit that their purpose for stalking is illegitimate. Rather, lack of legitimate purpose is typically discerned from the circumstances of a defendant's conduct. *See Coveney*, 50 Misc.3d at 7. Here, after being focused on Shields for decades, defendant subjected her to multiple unwelcome contacts over a period of nineteen months, ignoring repeated warnings that he should cease his attempts to engage with her. The trial court reasonably concluded that defendant's constantly-changing reasons for contacting Shields were pretextual, and defendant still does not provide any reason to believe otherwise. Like in *Coveney*, the trial judge here was correct to conclude that

defendant's claimed "legitimate purpose" was not genuine. *Id.*; *see also Stuart*, 100 N.Y.2d at 429 (holding that defendant had not "show[n] that his intrusive behavior involved some valid purpose other than hounding her to the point of harm").

2.

The People were also required to show, as an element of both stalking counts, that defendant engaged in a "course of conduct" directed at Shields. Penal Law § 120.45. A course of conduct is "a series of acts over a period of time, however short, evidencing a continuity of purpose." *Kitsikopoulos*, 47 Misc.3d 1220 (A) at 3 (quoting *People v. Kelly*, 44 Misc.3d 1203 (A) at 4 (Crim. Ct. N.Y. County 2014)). For instance, in *Kelly*, the defendant approached the victim in a park and walked behind him, following him as he walked onto the street. The defendant did the same thing a month later, refusing the victim's request that she stop following him. 44 Misc.3d 1203 (A) at 1-2. The court found those facts sufficient to establish a course of conduct, because "twice within a six-week period, defendant approached the complainant in the park and followed him." *Id.* at 4. Likewise, in *People v. Westwood*, the Court held that the People had established a course of conduct after showing that the defendant mailed or dropped off four letters to the victim over a two-year period, each of which sought to start a relationship with the victim. 53 Misc.3d 74, 79-80 (App. Term 2d Dept., 2d, 11th & 13th Jud. Dists. 2016); *see also People v. Each*, 25 Misc.3d 1217 (A) at 5 (1st Dist. Nassau County 2009) (concluding that "driving past the complainant's home and sitting in front of the house two times and then following her vehicle on another day . . . may constitute

the requisite 'course of conduct' sufficient to support the charge of Stalking in the Fourth Degree").

Without a doubt, defendant's course of conduct here was more extensive than what occurred in *Kelly*, *Westwood*, and *Each*, and more clearly demonstrated a continuity of purpose. Once again, over a nineteen-month period, defendant approached Shields's home at least four times: he went to her front door at least twice, waited for her at her front gate, and followed her when she left her home. He also waited in his car outside her home multiple times, all while contacting her online, insulting her, praising her, and even referring to his Second Amendment rights. The evidence thus showed a continuity of purpose: to contact and develop a relationship with Shields in any way possible. Indeed, on multiple occasions, defendant became angry when informed that his attempts to contact Shields were unwelcome, showing his intense focus on forcing Shields to acquiesce to a relationship that she did not want.

In response, defendant argues that his conduct lacked a continuity of purpose, relying on *People v. Venson*, 47 Misc.3d 92 (App. Term 1st Dept. 2015). In that case, the defendant gave the victim two housewarming gifts and then, eighteen months later, approached her in their building's laundry room to complain about noise coming from her television. *Id.* at 94. The victim also later became aware that the defendant had taken nude photographs of her. This Court held that the defendant had not exhibited a continuity of purpose based on the "ambiguous behavior" of giving the victim two gifts (which she accepted) and making a noise complaint eighteen months later. *Id.* at

94. Here, in contrast, defendant did much more than give two gifts and make a noise complaint: he approached Shields or her home four times in November and December 2013, frequently wrote messages to or about her online, saw her "al[l] the time in the neighborhood" over the intervening months, attended a public event to see her in November 2014, parked in front of her house for days in May 2015, and then sent a barrage of tweets and a disturbing e-mail, which referenced an actress murdered by a stalker, after police told him to leave Shields alone. Far from "ambiguous" behavior, defendant undoubtedly engaged in a course of conduct directed at Shields. *See Westwood*, 53 Misc.3d at 80 (finding course of conduct when defendant sent four letters over two-year period all suggesting he sought to start relationship with victim).[6]

3.

Next, under § 120.45(1) (Count 1), defendant must have had reason to believe that his conduct was likely to cause Shields to reasonably fear for her safety or the safety of her family, acquaintances, or property. And under § 120.45(2) (Count 2), defendant's

[6] Much of defendant's argument about his course of conduct depends on his assertion that there were only "two incidents" after defendant was told to stay away from Shields by Henchy in March 2014 (DB: 32), and that Zarara's November 2013 warning was not sufficiently clear. Yet Zarara's warning was unmistakably clear, as discussed in Part A.3., *infra*, and regardless, defendant made more than two efforts to contact Shields between March 2014 and May 2015, as discussed in detail on pages 10-14, *supra*.

(Continued…)

conduct must have actually caused material harm to the victim's emotional or mental health. [7]

Critically, New York's stalking statutes "were enacted to cover a wide range of behavior," *People v. McDevitt*, 43 Misc.3d 1204 (A) at 3 (Crim. Ct. N.Y. County 2014). As the Legislature recognized when it enacted the stalking statutes, defendants who repeatedly confront or "'unacceptably intrude on their victims[] often inflict immeasurable emotional and physical harm,'" even if they do not make direct threats. *Stuart*, 100 N.Y.2d at 417 (quoting L. 1999, c. 635, § 2: Legislative intent). Thus, a reasonable fear may arise without a "threat of immediate and real danger." *People v. Paes*, 17 Misc.3d 1120 (A) at 5 (Crim. Ct. N.Y. County 2007); *see also McDevitt*, 43 Misc.3d 1204 (A) at 3 (listing stalking cases in which defendant made no direct threat). That fear is often created when "[t]he defendant is neither acquaintance nor colleague to the complainant" and the victim has "demonstrated [that communication is] unwanted." *People v. Romero*, 50 Misc.3d 1202 (A) at 2, 3 (Crim. Ct. N.Y. County 2015). Even if the words a defendant says are unobjectionable in the abstract, the requirement will be

[7] Subdivision 120.45(2) also requires that the defendant cause the requisite harm by "following, telephoning or initiating communication or contact with" the victim. Defendant undoubtedly initiated communication or contact with Shields by approaching her house, speaking with her just outside her home, tweeting messages to her about her whereabouts, and sending an e-mail intended for her. Defendant does not dispute this on appeal, and did not preserve any argument relating to this element at trial. *See People v. Gray*, 86 N.Y.2d 10, 19 (1995) ("[E]ven where a motion to dismiss for insufficient evidence was made, the preservation requirement compels that the argument be specifically directed at the alleged error.") (internal quotation marks omitted).

satisfied "'if the communication is directed to an unwilling listener under circumstances wherein substantial privacy interests are being invaded in an essentially intolerable manner.'" *People v. Wong*, 3 Misc.3d 274, 276 (Crim. Ct. N.Y. County 2004) (internal quotation marks omitted) (quoting *People v. Smith*, 89 Misc.2d 789, 791 (App. Term 2d Dept. 1977)). Further, mental or emotional harm may be caused by uninvited contact, because "the element of surprise . . . causes the harm to the victim's mental or emotional health." *Kitsikopoulos*, 47 Misc.3d 1220 (A) at 7; *see also People v. Chandler*, 20 Misc.3d 139 (A) (App. Term 1st Dept. 2008) (holding that factfinder could conclude letter was "likely to cause annoyance or alarm" even without victim's testimony).

Reasonable fear and actual harm have been found in a variety of contexts in which defendants follow, contact, or "otherwise unacceptably intrude on their victims." L. 1999, c. 635, § 2: Legislative intent. For example, in *People v. Carboy*, the defendant made provocative gestures toward the victim, and also made t-shirts that depicted the victim alongside "derogatory, vulgar, or suggestive comments." 37 Misc.3d 83, 84 (App. Term 2d. Dept., 9th & 10th Jud. Dists. 2012). After he wore one of the shirts at a bar in front of the victim, the defendant was convicted at a bench trial of stalking under § 120.45(2). The Appellate Term rejected the claim that the verdict was against the weight of the evidence, noting that the victim had testified as to how the gestures and t-shirts had caused harm to her mental and emotional health. *Id.* Similarly, in *Westwood*, the defendant sent two letters to the victim asking her to call him, and later left two notes at her front door, one of which used explicit sexual language. 53 Misc.3d

at 80. The Court upheld the fourth-degree stalking conviction, noting that in part because of "the final two letters which were delivered in so personal a manner," the defendant should have known his actions created a reasonable fear of harm. *Id.* And in *People v. E.P.*, the defendant sought to speak to Lorne Michaels to discuss his television program, *Saturday Night Live*. 20 Misc.3d 1119 (A) (Crim. Ct. N.Y. County 2008). He contacted Michaels six times over a period of ten months by telephone, letter, and personal appearances at Michaels's home. *Id.* at 2. The court denied the defendant's motion to dismiss, explaining that Michaels had "ample reason to be in fear," *id.* at 5, and that "defendant's communications would tend to indicate an interest in the complainant that was well on its way to becoming the kind of obsession that can only lead to more problems and possible danger." *Id.* at 4; *see also People v. Angel*, 37 Misc.3d 127 (A) at 1 (App. Term 1st Dept. 2012) (upholding finding of reasonable fear when defendant repeatedly posted flyers with nude photo and "disparaging text" in front of victim's workplace).

Here, as in *Carboy* and *Westwood*, defendant's persistent, unwelcome contacts unsurprisingly caused Shields emotional distress and made her fear for her safety and her daughters' safety. In fact, her fear led her to ask her husband and an employee to intervene and tell defendant to stay away, and to report defendant's contacts to her security team. Further, Shields's fear of defendant was demonstrated by the fact that she avoided interacting with him from the moment he approached her at her house in November 2013, just as she had for years prior. She refused to speak to him when he

came to her home, as she did in every other instance, both in person and online, and only at a public event did she tolerate his presence without quickly moving away. Defendant recognized this treatment himself, berating Shields online when he felt she was rude, and acknowledging to Henchy that he had "spooked" her. Yet even after he knew she was "spooked," he approached her house, waited outside the home in his car, watched her, and even wrote her name on his car when it was parked outside her gate, where she would inevitably see it.

Simply put, defendant ignored Shields's fear and discomfort, writing her messages indicating that he knew, or thought he knew, her whereabouts, when the only way he could have learned them was from stalking her and her family. He insulted her and her personal assistant, using a homophobic slur when Shields did not respond to his entreaties as he had hoped she would. He walked slowly by her house just hours after the police had told him to stay away from it. And finally, he made statements that appeared to be thinly-veiled threats, posting online about his Second Amendment rights while calling Shields a "bully" and writing an e-mail to her publicist referring to an actress who was killed by a stalker. Defendant's contacts were thus unnervingly "personal," *Westwood*, 53 Misc.3d at 80, and any reasonable person should have known that they created a climate of fear and intimidation. Indeed, Shields had "ample reason to be in fear" that defendant was developing "the kind of obsession that can only lead to more problems and possible danger." *E.P.*, 20 Misc.3d 1119 (A) at 4-5.

Further, trial testimony left no doubt that defendant's pursuit harmed Shields's mental or emotional health and that he should have been aware of that harm. *See* Penal Law § 120.45(2). As Shields testified, when she saw defendant outside and he mentioned her daughter's name, she felt "fearful [and] on edge," and that she was in a "vulnerable position" (Shields, Jun. 13: 148). Shields was worried for the safety of herself and her children, and on one occasion she even asked her assistant to spend two nights at her house so she would not be alone when defendant was close by (Shields, Jun. 13: 150-54; McCann, Jun. 14: 63). She would avoid coming home if she was with her daughters when she saw defendant lingering near their house. (Shields, Jun. 13: 147). She avoided defendant's attempts to speak to her, and left her house through a different door so he might not see her (Shields, Jun. 13: 155). Shields was distressed, too, because her daughter was afraid of being kidnapped, causing her mind to go "crazy" (Shields, Jun. 13: 155). Shields's husband confirmed the damage to his wife's emotional state. In fact, Henchy confronted defendant and explained that he had made her "unsettled and nervous and scared" (Henchy, Jun. 14: 193). And, Henchy testified that the e-mail defendant sent to Shields's publicist, was "extremely disturbing and really terrifying" (Henchy, Jun. 14: 197). Shields's assistant saw the emotional harm as well, explaining that Shields "got scared" when she returned home to find that defendant had written her name in the dust on his car window just outside her home, and was "freaked out" when defendant was waiting in the car in the same spot later that day (McCann, Jun. 14: 57-58).

This testimony, from multiple sources, was more than sufficient to establish the requisite harm to Shields's mental or emotional health, and the trial court was justified in finding that testimony credible. *See Carboy*, 37 Misc.3d at 84 (upholding stalking conviction under weight-of-the-evidence challenge based on victim's testimony about her emotional state).

Defendant maintains that Shields was "hypersensitiv[e]," a product of her experience with other fans (DB: 45). He asserts, therefore, that he had no reason to know she would be fearful (DB: 45). Instead, he contends that his actions were innocent and nonthreatening, and that there was no objective, reasonable basis for her fear (DB: 45-49). Defendant, however, ignores the obvious impact of his obsessive, angry, and sometimes threatening course of conduct. Indeed, defendant appears to assume that stalking behavior cannot create reasonable fear unless it includes direct threats of violence. But as discussed, case law and statutory language demonstrate otherwise. *See, e.g., Westwood*, 53 Misc.3d at 80; *Carboy*, 37 Misc.3d at 84; L. 1999, c. 635, § 2: Legislative intent (listing forms of stalking other than threats, such as following or writing to a victim, and stating that such conduct "often inflict[s] immeasurable emotional and physical harm" upon victims). Notably, an employee of Shields's security company confirmed the reasonableness of her fear, testifying that "there has never been a public figure stalker attack [in which the stalker] has threatened that person first" (Creter, Jun. 13: 123). Thus, defendant's assertions are at odds with the law and with the reality that Shields had good reason to believe she was in danger.

Still, in an attempt to downplay the climate of fear that he created, defendant claims that his actions "did not become more threatening" between 2013 and 2015 (DB: 39). But defendant's guilt does not hinge on whether his actions became progressively "more threatening." Rather, the critical question is whether defendant hounded Shields for no legitimate reason, placing her in fear and causing emotional harm. As demonstrated, he clearly did so.

Further, contrary to defendant's claim, his actions did in fact become more threatening over time. For one thing, defendant visited Shields's home at least four times in late 2013, something that he had not done previously, at least as far as Shields knew. Those visits were startling, but his several contacts in 2014 and his frequent presence near her home, followed by his erratic behavior in front of her home in early May 2015, were nothing short of alarming. Defendant's actions became more threatening yet when he subsequently called her assistant a "faggy henchman," then proceeded to tweet about his Second Amendment rights and send an e-mail referring to an actress murdered by a stalker.

Defendant responds that Shields must not have felt fear or endured harm because she never hired a bodyguard or sought counseling due to defendant's conduct (DB: 41). But Shields did in fact have a security team, and she frequently relied on her personal assistants to protect her from defendant. Moreover, a stalking victim is not required to hire a round-the-clock bodyguard or seek counseling to prove her own fear

and emotional anguish.[8] Rather, a victim's testimony about "how defendant's actions . . . caused material harm to her mental or emotional health" is sufficient. *Carboy*, 37 Misc.3d at 84; *see also Chandler*, 20 Misc.3d 139 (A) at 1 (holding that "trier of facts could reasonably conclude that the communication was likely to cause annoyance or alarm" even in "the absence of any direct testimony") (internal quotation marks omitted). Indeed, defendant overlooks cases such as *Westwood*, 53 Misc.3d at 80, and *Carboy*, 37 Misc.3d at 84-85, in which courts have affirmed findings of fear or harm based on repetitive contact or unwanted and distasteful communications far less serious than what occurred here.

Finally, defendant claims that "it would [have been difficult for him] to know that his contacts were unwanted" because Shields was never unkind to him (DB: 29-30). He maintains that the warnings from Zarara and Henchy were ambiguous, giving him no reason to believe his subsequent contacts would place Shields in fear. However, his characterizations of Shields's reaction to him, the warnings he received, and his own understanding of those warnings are flatly contradicted by the evidence. In that regard, when Shields saw defendant at her front steps on November 23, 2013, she said "No, no, no, no, no" and went quickly inside without speaking to him, despite the fact he was trying to give her a gift (Zarara, Jun. 14: 104). Just after that, Zarara instructed

[8] Notably, a member of Shields's security team testified that full-time security would cost about five hundred thousand dollars per year (Creter, Jun. 13: 124).

defendant "not to contact anyone in [Shields's] house, it was inappropriate" (Zarara, Jun. 14: 187). Contrary to defendant's claim, Zarara did not send "mixed messages" merely because he tried to act "friendly" to defendant (DB: 30). Rather, his words were straightforward, and rudeness was not required to convey his meaning. Further, the fact that the request did not come from Shields herself does not mean Zarara's instructions lacked clarity (*see* DB: 30). Shields's effort to avoid interaction with defendant should have only made her fear more apparent. And of course, the state's anti-stalking law is intended to protect stalking victims, and certainly does not require those victims to personally confront stalkers who are frightening them. *See* L. 1999, c. 635, § 2: Legislative intent.

Defendant's version of events is even more implausible because he posted on Shields's WhoSay page just a few days after the November 23 incident, saying he "was horrified to hear saying hello was inappropriate," and "I love you — but you're better than this" (People's Exhibit 10) (11/2013 WhoSay Posts). These statements show that defendant understood Zarara's message and that he correctly believed that the message came from Shields herself. To make things even plainer, defendant told Henchy several months later that he had "spooked" Shields when he last saw her, and Henchy told defendant to "leave Brooke alone." Contrary to defendant's argument, this was in fact "a clear, unequivocal warning" (DB: 31). And, defendant's own words show that he understood the warning: he later wrote that he decided not to attend several of Shields's

events because of what Henchy said (People's Exhibit 7) (5/15/15 E-mail to Fritzo). Thus, defendant's claim that the warnings lacked clarity is thoroughly unconvincing.

For those same reasons, the evidence proved the element under § 120.45(2) (Count 2) that defendant "was previously clearly informed to cease" his conduct. As discussed, there is no doubt that both Zarara and Henchy clearly warned defendant, and that he continued his actions after those warnings. Further, defendant was warned a third time by the police on May 6, 2015, and continued his course of conduct by walking by Shields's house, tweeting about his Second Amendment rights within a string of tweets that referred to Shields and her mother, and sending an emotional e-mail to Shields's publicist that referenced an actress's murder. Notably, too, defendant did not preserve any argument that the People failed to show he was clearly informed to cease his conduct, as he did not raise that claim in his motion for a trial order of dismissal (T Jun. 14: 263-85). *People v. Hawkins*, 11 N.Y.3d 484, 493 (2008) (sufficiency claim was unpreserved when trial counsel's general objection "did not alert the trial court to the argument now being advanced"); *Gray*, 86 N.Y.2d at 19 ("[E]ven where a motion to dismiss for insufficient evidence was made, the preservation requirement compels that the argument be specifically directed at the alleged error.") (internal quotation marks omitted).

B.

The same evidence soundly proved defendant's guilt of the two harassment counts. In that regard, to convict defendant of Harassment in the First Degree under

Count 3, the court had to find that he "intentionally and repeatedly harasse[d] another person . . . by engaging in a course of conduct or by repeatedly committing acts which place[d] such person in reasonable fear of physical injury." Penal Law § 240.25. In addition, defendant was guilty of second-degree harassment under Count 4 if he intended to "harass, annoy, or alarm" the victim and "engage[d] in a course of conduct or repeatedly commit[ted] acts which alarm[ed] or seriously annoy[ed] such other person and which serve[d] no legitimate purpose." Penal Law § 240.26(3).

As demonstrated above, defendant engaged in a "course of conduct" that served no legitimate purpose and placed Shields "in reasonable fear of physical injury" and "seriously annoy[ed]" her. The People also proved that defendant acted with the intent required for a harassment conviction.

A person acts intentionally when his "conscious objective" is to engage in the proscribed conduct or to cause a certain result. Penal Law § 15.05(1); *see also People v. Tiffany*, 186 Misc.2d 917, 921 (Crim. Ct. N.Y. County 2001). Further, the factfinder may "'infer that a defendant intended the natural and probable consequences of his acts.'" *People v. Barboni*, 21 N.Y.3d 393, 405 (2013) (quoting *People v. Bueno*, 18 N.Y.3d 160, 169 (2011)). Importantly, and pertinent here, "[i]ntent to harass, annoy, or alarm may, and often must be, inferred from the conduct complained of itself." *People v. Graziano*, 11 Misc.3d 137 (A) at 2 (App. Term 2d Dept., 9th & 10th Jud. Dists. 2006); *see also People v. Bracey*, 41 N.Y.2d 296, 301 (1977) (explaining that intent "can be inferred from the act itself" or "from the defendant's conduct and the surrounding circumstances")

(internal quotation marks omitted). For example, in *Reiss v. Reiss*, "intent to commit harassment in the second degree was properly inferred" when the respondent, a forty-four year old man, lay on his mother's living room floor for a day and a half. 221 A.D.2d 280, 280 (1st Dept. 1995). Likewise, in *People v. Little*, the Court upheld the defendant's harassment conviction when the evidence showed "he intended to harass, annoy, threaten or alarm [the victim] by communicating with her by telephone in a manner likely to cause her annoyance or alarm." 14 Misc.3d 70, 72 (App. Term 2d Dept. 2006); *see also People v. Hawkins*, 1 Misc.3d 905 (A) at 3 (Crim. Ct. N.Y. County 2003) (finding defendant acted "with intent to cause public inconvenience, annoyance, or alarm" when he was observing a dice game on the street and "obstructed pedestrian traffic by blocking the front door of the premises").

Here, the trial court properly found that defendant intended to harass Shields and her family. As discussed in Part A. above, defendant was told to stay away from Shields, her house, and her family. Though he knew she felt his approach was "inappropriate," he ignored the warnings and decided to continue to go to Shields's house. After more visits, he even acknowledged to Henchy that he had "spooked" Shields, and was told once more to leave her alone. But even after that, he invented reasons to see her, send messages to her, and speak to her outside her house, and he even walked by her house just hours after the police told him to stay away. His shifting reasons for these actions showed they were simply a ruse to get close to Shields, and

the trial court properly inferred that he acted with the requisite intent to be convicted of both counts of harassment.

Indeed, given defendant's anger at being rebuffed by Shields — and his repeated, continuous attempts to contact her nonetheless — the judge properly rejected defendant's contention that he "genuine[ly]" believed he had a connection with Shields (DB: 42).

Next, defendant cites several cases in support of his claim that Shields did not reasonably fear physical injury — an element of first-degree harassment (DB: 43-44). Those cases, however, are inapposite. For instance, in *People v. Demisse*, 24 A.D.3d. 118 (1st Dept. 2005), the defendant was convicted of first-degree criminal contempt and second-degree aggravated harassment for making "repeated declarations of love" (that were never hostile) on the telephone and in writing. The Court held that the evidence was insufficient to support the first-degree contempt conviction because it did not show that the declarations of love were intended to place the victim in reasonable fear of injury. *Id.* at 119. But critically, in *Demisse*, an element of the first-degree contempt charge under Penal Law § 215.51(b)(iii) was that the defendant intended or attempted to place the victim in fear of physical injury. Here, however, as is evident from the plain language of the first-degree harassment statute, Penal Law § 240.25, the trial court was required to find only that defendant intended to harass Shields, and that the harassment caused a reasonable fear of injury. *See* 35 N.Y. Jur. 2d Criminal Law: Principles and Offenses § 431 (noting that a harassment charge can be proven "irrespective of whether

the actor intended to cause such fear" of physical injury); William C. Donnino, McKinney's *Practice Commentaries*, § 240.25 (noting absence of intent to cause fear element in harassment statute, and that conviction "requires an intent to harass with a consequence of the actor's conduct being" reasonable fear). Thus, the analysis in *Demisse* about the defendant's intent to cause fear is irrelevant here. Notably, too, the *Demisse* Court upheld the defendant's conviction of second-degree aggravated harassment, which, similar to the second-degree harassment charge here, required the People to show that the defendant acted "with intent to harass, annoy, threaten, or alarm." Penal Law § 240.30 (2003); *see Demisse*, 24 A.D.3d at 119. In any event, here, unlike in *Demisse*, defendant approached the victim in person at her home on multiple occasions, and rather than simply declaring his love, he made hostile comments about Shields, used a homophobic slur, repeatedly brought up her daughter, and referred to his Second Amendment rights and to an actress killed by a stalker.

Similarly, this case contrasts starkly with *People v. Corichi*, where a first-degree harassment conviction was overturned because the defendant had never "directly approach[ed] or [spoken] to complainant," but merely danced and "bang[ed] drumsticks in the air as he listened to a Walkman" while standing twenty-five feet away from a store's window. 195 Misc.2d 518, 519 (App. Term 1st Dept. 2003). Here, of course, defendant approached and wrote to Shields on many occasions. His face-to-face

approaches to Shields, and his troubling communications, unequivocally proved that he intended to harass her.[9]

C.

Defendant also contends that his e-mail and other online messages should not have been considered as part of the proof of his guilt. He claims that his communications were speech protected by the First Amendment, and that they could not be used as evidence in a criminal case unless they rose to the level of "true threats" (DB: 33). This claim, however, is unpreserved. Moreover, defendant misunderstands the law.

First, defendant did not preserve his First Amendment claim at trial, so it should not be reviewed on this appeal. The preservation requirement is not lifted for constitutional claims, including First Amendment claims. *See People v. McDowd*, 22 A.D.3d 688 (2d Dept. 2005) (First Amendment challenge to harassment conviction unpreserved); *see generally People v. Smith*, 54 Misc.3d 141 (A) (App. Term 1st Dept. 2017) (""The unconstitutionality of a statute is not exempt from the requirement of preservation."") (quoting *People v. Scott*, 126 A.D.3d 645, 646 (1st Dept. 2015)).

[9] Defendant also cites *People v. Watson*, 32 A.D.3d 1199 (4th Dept. 2006), a case in which the Appellate Division affirmed the trial court's dismissal of two stalking charges. *Watson* is unhelpful to defendant because in that case, unlike here, the victims "testified that they were not afraid for their physical safety" and had never told the defendant to stop his behavior. *Id.* at 1201. Likewise, *Venson* is easily distinguishable from this case; as described above, the defendant there engaged in only a few ambiguous acts that lacked the disturbing and repetitive nature of defendant's acts that were proven at trial. 47 Misc.3d at 94.

Defendant's argument fails on its merits as well. The First Amendment does not give individuals a right to harass or intrude on the privacy of others simply because they use words to do so. In that regard, a statute that proscribes "conduct" does not infringe a defendant's First Amendment right simply because that conduct involves communication. *People v. Shack*, 86 N.Y.2d 529, 535 (1995). In *Shack*, the Court of Appeals upheld the defendant's conviction of Aggravated Harassment in the Second Degree for making repeated, harassing telephone calls that had no "legitimate" communicative purpose. *See id.*; Penal Law § 240.30(2). The Court explained that by excluding "legitimate" communication from its ambit, the statute appropriately penalized "conduct," which was not protected speech. *See Shack*, 86 N.Y.2d at 535.

Further, in *Shack*, the Court of Appeals explained that even if the statute could be construed to proscribe some speech, that would not render it overbroad. *See id.* at 535-36. The Court observed that the right to free speech does not "'give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses.'" *Id.* at 535 (quoting *Cohen v. California*, 403 U.S. 15, 19 (1971)). Rather, "a person's right to free expression may be curtailed" if another person's "'privacy interests are being invaded in an essentially intolerable manner.'" *Id.* at 535-36 (quoting *Cohen*, 403 U.S. at 21); *see People v. Seitz*, 44 Misc.3d 1226 (A) at 2 (Crim. Ct. N.Y. County 2014) (noting that the Court of Appeals has upheld laws that "criminalize conduct, even if speech might be a component of the offense").

By contrast, statutes that target "pure speech" — as opposed to "conduct" — must be limited to communications involving "fighting words, true threats, incitement, obscenity, child pornography, fraud, defamation or statements integral to criminal conduct." *People v. Marquan M.*, 24 N.Y.3d 1, 7 (2014). For that reason, statutes that potentially sweep a large amount of "pure speech" in their ambit have been invalidated as unconstitutionally vague or overbroad. *See id.* at 9-10 (cyberbullying statute swept up a "broad spectrum of speech" and "encroached on recognized areas of protected free speech"); *People v. Golb*, 23 N.Y.3d 455, 467 (2014) (second-degree aggravated harassment statute criminalized "any communication that ha[d] the intent to annoy"); *People v. Dietze*, 75 N.Y.2d 47, 52 (1989) (statute targeting "abusive language intended to annoy" did not include "constitutionally necessary limitations on its scope") (internal quotation marks omitted).

Here, applying these standards, defendant's newfound First Amendment challenge lacks merit. Of course, as discussed, the stalking and harassment statutes at issue here all required either repeated acts or a "course of conduct" — defendant was not convicted based on pure speech. And, critically, New York courts have upheld stalking and harassment convictions even when part of the criminal conduct at issue included speech or other expressive activity that did not rise to the level of true threats or "fighting words." For example, in *Carboy*, the defendant was convicted of stalking in part because he made t-shirts displaying degrading photographs of the victim accompanied by "derogatory, vulgar or suggestive comments." 37 Misc.3d at 84. The

Court rejected his First Amendment argument "because defendant's criminal liability arose not from his expression of speech but from his repetitive trespass upon the complainant's privacy." 37 Misc.3d at 86. In *People v. Dixon*, the defendant was charged with stalking and harassment after he repeatedly called the victim at her workplace and told her that he would come to speak to her in person if she would not speak to him on the phone. 44 Misc.3d 1216 (A) at 1 (Crim. Ct. N.Y. County 2014). The court denied the defendant's motion to dismiss, noting that his actions were "a form of stalking — akin to repeatedly making unwanted appearances outside another person's residence . . . that is clearly not protected by the First Amendment." *Id.* at 4; *see also Dennis v. Napoli*, 148 A.D.3d 446, 447 (1st Dept. 2017) (rejecting argument that comments concerning plaintiff's sexual habits were constitutionally protected, because they "unnecessarily intrude[d] upon [plaintiff's] right to privacy"); *People v. Brown*, 61 A.D.3d 1007, 1009 (3d Dept. 2009) (rejecting First Amendment challenge to stalking and harassment convictions based on phone call that did not include threats).

Here, as detailed exhaustively above, defendant's convictions arose from a course of conduct that involved intolerable intrusions on Shields's privacy. In that regard, he approached Shields's front door at least four times, camped out on her street with no purpose other than to see her, waited outside her home in his car, even writing her name on his car window, gave her unwanted gifts, and confronted her at one of her public events. Indeed, it is not surprising that defendant failed to raise a First Amendment challenge below, because, as in the cases discussed above, "his liability

arose not from his expression of speech but from his repetitive trespass upon the complainant's privacy." *Carboy*, 37 Misc.3d at 86.

Further, defendant's claim fares no better simply because his actions included some communications. Defendant had no First Amendment right to bombard Shields with a steady stream of public and private messages — some of which included abusive language and veiled threats. Notably, defendant was not expressing ideas on matters of public concern. Instead, his posts and messages were intensely personal: he claimed to know Shields's whereabouts, made repeated efforts to establish a personal relationship with her, and acted as if they did in fact have a personal bond. He expressed frustration and annoyance at Shields's rejection of him, publicly calling her a "bully." He even tweeted about his Second Amendment rights and referenced an actress murdered by a stalker. This was not protected speech; it was stalking and harassment, pure and simple.

Notably, too, defendant's online posts about Shields were properly received as evidence for an independent reason: they demonstrated that defendant knew his contacts were unwelcome and added to Shields's reasonable fear of harm. As explained, defendant's posts showed that he knew Shields had rejected him, and his angry rants created a climate of fear — whether or not his references to guns and a murdered actress qualified as a "threat." Of course, "the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *People v. Ferhani*, 37 Misc.3d 1232 (A) at 7 (Sup. Ct. N.Y. County 2012) (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)). Here, therefore, defendant's online

communications were properly used as evidence that his repeated efforts to approach Shields were intentional, unwelcome acts that created a climate of fear. *See also People v. Williams*, 45 Misc.3d 1202 (A) at 3 (Crim. Ct. N.Y. County 2014) (rejecting First Amendment challenge to using content of telephone call to prove harassment charge because "[i]t is no different than examining the content of a robbery note to determine whether the taking of property was forcible").

* * *

In sum, compelling evidence proved that defendant was guilty of stalking and harassment. Indeed, defendant repeatedly hounded Shields for no legitimate reason, for an extended period of time. Notably, too, on this Court's sufficiency and weight-of-the-evidence review, it must view the evidence in the light most favorable to the prosecution, and accord great deference to the factfinder below. Defendant's arguments all ask this Court to ignore that standard, and instead to simply believe his claims that each of his various excuses for contacting Shields was legitimate. Similarly, he asks the Court to discredit multiple witnesses' testimony about Shields's fear and believe that the multiple warnings were insufficient to convey a simple message: to "leave Brooke alone." Simply put, the trial court's factual findings were well supported by the evidence, and there is no basis for disturbing defendant's convictions.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

CYRUS R. VANCE, JR.
District Attorney
New York County
danyappeals@dany.nyc.gov

DAVID M. COHN
BRENT FERGUSON
Assistant District Attorneys
Of Counsel

January 2018