

68629-1

68629-1

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 APR - 8 PM 1:21

No. 68629-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

ALFRED KIEFER, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By Kimberly Thulin
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007
ADMIN. #91075**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS
OF ERROR..... 1

C. FACTS 1

D. ARGUMENT 3

 1. **There is sufficient evidence in the record to support a
misdemeanor harassment conviction where the
evidence reflects the jury could have found beyond a
reasonable doubt that a person in Kiefer’s shoes
would reasonably expect the threats he made to be
construed as a true threat of bodily harm and that a
reasonable person in Rawes’ circumstances would
reasonably fear bodily injury as a result of Keifer’s
threats.....3**

E. CONCLUSION 10

TABLE OF AUTHORITIES

Washington State Supreme Court

State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003) 7, 9

State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) 3

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004) 6

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 6

State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010)..... 6

Rules and Statutes

RCW 9A. 46.020(1)..... 6, 4

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether there is sufficient evidence in the record to support a conviction for misdemeanor harassment.

C. FACTS

On March 6th 2013, this Court requested the State to file a supplemental brief addressing the sufficiency of the evidence argument made by Kiefer.

On January 22nd 2012 L. Rawes called 911 and reported that her boyfriend had threatened to kill her. RP 151, 154. At trial Rawes testified she had been in a relationship with Kiefer for six years, that they lived together and owned a few dogs. RP 112-13. On January 22nd, 2012 Kiefer became agitated with Rawes, accusing her of taking his truck and telling her she was never going to borrow his truck again until she paid him back. RP 116. Rawes was scared that Kiefer was going to hurt her again because he hit her on the back of the head, then punched her in the back of the neck and later poured beer on her. RP 120-21. When Kiefer left their residence during the day, Rawes frantically tried to text a friend telling her Kiefer

was going to kill her. RP 144. When asked why, Rawes explained via text, Kiefer threatened to kill her because she called the police. RP 145.

When Kiefer returned home later that afternoon he was still upset with Rawes. RP 148. According to Rawes, in addition to sending a snarky text to her before he returned home demanding to know what Rawes had ever done to get a job or earn money, Kiefer came home, grabbed her face and accused her of having sex with someone else. RP 148. Kiefer also used a strobe light in Rawes' face for ten minutes trying to prove that Rawes did not have a seizure disorder. RP 150. Finally, Kiefer picked up Rawes' computer and smashed it on the floor. RP 150. At this point, despite Kiefer's threats to kill her, Rawes ran out the door with Kiefer's phone and called the police. RP 154.

Rawes testified she was afraid Kiefer would follow through on his threats. RP 151. Rawes testified she was afraid Kiefer would hurt her again and also testified that amidst their argument, Kiefer threatened to kill her. RP 143, 144, 151. While Kiefer was in jail he sent a letter to his dogs explaining to them that he forgave them and how to get him out of jail. RP 169. Rawes understood this letter, while addressed to their dogs, was

meant for her. RP 169. Following a jury trial, Kiefer was convicted of misdemeanor harassment. CP 19, 20.

D. ARGUMENT

- 1. There is sufficient evidence in the record to support a misdemeanor harassment conviction where the evidence reflects the jury could have found beyond a reasonable doubt that a person in Kiefer's shoes would reasonably expect the threats he made to be construed as a true threat of bodily harm and that a reasonable person in Rawes' circumstances would reasonably fear bodily injury as a result of Keifer's threats.**

Kiefer was originally charged with felony harassment pursuant to RCW 9A.46.020(1)(a)(i), (2)(b) and fourth degree assault. CP 59-60. At the prosecutor's request, the jury was given lesser included instructions pertaining to misdemeanor harassment. A lesser offense is included within a charged offense when each of the elements of the lesser offense are necessary elements of the charged offense and the evidence in the case supports an inference that only the lesser crime was committed. State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005).

Rather than limit the lesser included instructions to the lesser included alternative allegation of a threat to cause bodily injury pursuant to RCW 9A.46.020(1)(a)(i), the court erroneously instructed the jury on two

additional alternative means, threat to cause physical damage to a person's property and threat to maliciously do any act intended to harm a person's health or safety. *See*, RCW 9A.46.020(1)(a)(ii), (iv). Both of these additional alternatives contain elements that are not encompassed by a felony harassment offense; and as such, are not lesser included offenses to felony harassment. Therefore, Kiefer's conviction for misdemeanor harassment should be vacated and this matter remanded for retrial on the appropriate lesser included offense of misdemeanor harassment predicated on a threat to cause bodily injury.

Kiefer argues, nonetheless, his conviction should be vacated and dismissed because the evidence is insufficient to support a misdemeanor harassment conviction. Specifically, he asserts that because the only evidence of communicated threat was the threat to kill and the jury rejected this felony harassment allegation, there is no other evidence to support a lesser included harassment conviction. Br. of App. at 14.

Keifer's analysis is flawed. Kiefer fails to sufficiently explain why the same evidence that the jury determined was insufficient to support a verdict for felony harassment could not be used to convict Kiefer of misdemeanor harassment as a lesser included where the jury could have

determined beyond a reasonable doubt the true threat amounted, notwithstanding the words used, to an intentional threat to commit substantial bodily harm.

In order to convict Kiefer of a lesser included offense of misdemeanor harassment (as a lesser included offense to felony harassment) the State is required to prove beyond a reasonable doubt:

(a) without lawful authority, the person knowingly *threatens*:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct placed the person threatened in reasonable fear that the threat will be carried out. "Words or conduct"

includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A. 46.020(1) (emphasis added).

Generally, when a sufficiency of the evidence challenge is raised on appeal, the reviewing court determines whether the evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the charged crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In reviewing a sufficiency claim, any facts that support the State's case and all reasonable inferences that a trier of fact can draw from the evidence, are construed in favor of the State. *Id* at 201.

The First Amendment limits the harassment statute however, to proscribing only 'true threats.' State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004). A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person. State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010). Therefore, to support a

sufficiency challenge, the State must be able to show beyond a reasonable doubt that a reasonable speaker would expect his statement to be taken as a serious expression of a threat to inflict bodily injury, and that the victim was placed in reasonable fear that the threat made would be carried out. State v. Kilburn, 151 Wn.2d at 43; State v. C.G., 150 Wn.2d 604, 609-612, 80 P.3d 594 (2003).

In this case, there is sufficient evidence in the record to show that Kiefer made a true threat to cause bodily injury immediately or in the future and that the victim, Rawes, was placed in reasonable fear that Kiefer would follow through on his threat. State v. C.G., 150 Wn.2d at 609. Rawes testified Keifer threatened to kill her on January 22nd if she called the cops on him. RP 143, 145,151. Rawes' allegation was corroborated by Rawes' texts to her friend the afternoon of January 22nd wherein Rawes was pleading for help, crying and scared, telling her friend she was worried Kiefer would come back and kill her. RP 143, 145. Keifer's text message to Rawes that afternoon asking her what she had ever done to get a job or earn money also reflected Rawes and Kiefer were fighting, further corroborating Rawes' testimony and allegations. RP 147.

Kiefer would reasonably expect his threat to kill Rawes to be taken seriously either as a threat to kill or as a threat to inflict substantial bodily injury in light of his past abusive relationship with Rawes, his anger and his assaultive behavior earlier that day when he hit her on the back of the head and punched her in the neck.

Moreover, Rawes' fear that Kiefer would kill her or hurt her was reasonable and supported by the evidence in the record. Kiefer had been beating on and berating Rawes most of the day and the two had an ongoing dysfunctional, abusive relationship. Kiefer's previous abuse of Rawes, Kiefer's verbal assault and cruel treatment of her and her belongings on January 22nd, gave Rawes reasonable basis to fear Kiefer would follow through on his threats. Under these circumstances, there is sufficient evidence in the record to support beyond a reasonable doubt a conviction for misdemeanor harassment.

Kiefer argues that because the only evidence of a threat was a *threat to kill Rawes* and that since the jury rejected such evidence for purposes of convicting Kiefer for felony harassment, Kiefer cannot otherwise be convicted of misdemeanor harassment absent other evidence that Rawes merely feared Kiefer would hurt her. Br. of App. at 14. In

State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003) the court rejected

Kiefer's logic, concluding:

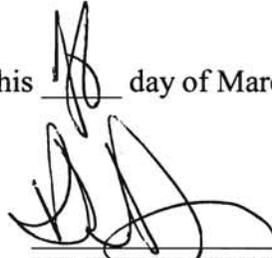
Finally, we observe that the State will still be able to charge one who threatens to kill with threatening to inflicting bodily injury, in the nature of a lesser included offense, thus enabling the misdemeanor charge even if the person threatened was not placed in reasonable fear that the threat to kill would be carried out, but was placed in fear of bodily injury.

C.G., 150 Wn.2d at 609. In this case, Rawes testified Kiefer had been hitting her during the day, threatened to kill her, specifically, that he would kill her if she called the police. RP 151, Rawes also testified that she was scared and afraid Kiefer "would hurt her again." RP 119. There is sufficient evidence, therefore, that Keifer's threat could be construed as a true threat to commit bodily injury rather than a true threat to kill under the facts and circumstances in this case, and that Rawes reasonably feared bodily injury given the context and manner of the true threat and Rawes' response to the alleged threat wherein she reached out for help from a friend but didn't ever leave her residence. Kiefer's conviction for misdemeanor harassment should be reversed and remanded for re-trial for misdemeanor harassment.

E. CONCLUSION

For the reasons set forth above, the State requests Kiefer's conviction for misdemeanor harassment be reversed¹ for retrial on the lesser included offense of misdemeanor harassment predicated on bodily injury.

Respectfully submitted this 18 day of March, 2013.



KIMBERLY THULIN, WSBA #21210
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Oliver Davis, addressed as follows:

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Wa 98101

Audrey A. Kuss 03/28/2013
Legal Assistant Date

¹ Kiefer has not appealed his assault in the fourth degree conviction.