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COA No. 68629-1-I

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

STATE OF WASHINGTON,

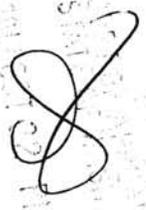
Respondent,

v.

ALFRED KIEFER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF WHATCOM COUNTY

The Honorable Ira J. Uhrig

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Kiefer was convicted of misdemeanor harassment as an uncharged offense.

2. The evidence was insufficient to prove misdemeanor harassment.

3. Mr. Kiefer's right to jury unanimity was violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are reversal and a new trial required where Mr. Kiefer was convicted of misdemeanor harassment, which was an uncharged offense, and was not a lesser included crime as to which the prosecutor was entitled to a "to-convict" instruction?

2. Was the evidence insufficient to prove misdemeanor harassment where there was no evidence that Mr. Kiefer threatened to injure the complainant, or threatened to damage her property?

3. Are reversal and a new trial required where Mr. Kiefer's right to jury unanimity was violated, in the absence of substantial evidence to prove every alternative of misdemeanor harassment?

C. STATEMENT OF THE CASE

1. **Procedural history.** Alfred Kiefer was charged with felony harassment (threat to kill) pursuant to "[RCW] 9A.46.020(1)(a)(i) and (2)(b)," and fourth degree assault, by an information filed January 25, 2012, naming Laura Rawes as victim. CP 59-60. The charges arose after a Whatcom County Sheriff's Deputy responded to a 911 call at the couple's residence in Whatcom County on January 22, 2012, where Ms. Rawes stated that Mr. Kiefer had hit her and threatened to kill her. CP 57-58.

Ms. Rawes claimed that during that day, Mr. Kiefer had punched and physically abused her, and threatened to kill her. He then left the home for several hours to walk the dogs. When Mr. Kiefer returned, he allegedly again assaulted her, including by using a strobe light flashed in her face to try to induce a seizure. He also physically struck her again. In addition, Mr. Kiefer threw Ms. Rawes' computer on the floor and damaged it. See Part C.2., infra.

The State rested its prosecution case on April 3, 2012. 1RP 235. The following day, the prosecutor asked that the jury be instructed on a charge of misdemeanor harassment as a lesser

included offense within the charged count of felony harassment (threat to kill). 2RP 254-56. The trial court granted the request, over the defendant's objections that (1) the information had not been amended, (2) that there had been no evidence of Mr. Kiefer making any threats toward Ms. Rawes except to kill her, (3) that there was no evidence of Mr. Kiefer making any threats to harm her property, only the fact that he did harm her computer, and (4) that the prosecutor was not entitled to jury instructions on misdemeanor harassment. 2RP 255-57.

The jury was instructed that, if it found Mr. Kiefer not guilty or could not agree on the charge of felony harassment (threat to kill), it was to consider whether he was guilty of misdemeanor harassment. CP 33. The jury instructions on misdemeanor harassment included three of the four statutory alternative means of committing misdemeanor harassment, stating that this crime is committed

- by threatening "to cause [the complainant] bodily injury," or
- by threatening "to cause physical damage to [her] property," or
- by threatening "maliciously to do any act which was intended to substantially harm [her] with respect to her physical health or safety."

See CP 34, see CP 35.

The jury found Mr. Kiefer guilty of fourth degree assault, not guilty of felony harassment, and guilty, by general verdict, of misdemeanor harassment. CP 19, CP 20.

Mr. Kiefer appeals. CP 4.

2. Trial testimony. Laura Rawes testified that she and Alfred Kiefer had a tumultuous relationship over the course of several years. 1RP 112. On January 22, 2012, from the home in which they resided, Ms. Rawes dialed 911 and claimed she had been assaulted by the defendant during the day. 1RP 75. In the recorded 911, call, Ms. Rawes begins by stating that she needs the defendant to be jailed; she then states that Mr. Kiefer had been hitting her all day, that he threatened to kill her, and that he broke her computer. Supp. CP ____, Sub # 29 (State's Exhibit 1).

Ms. Rawes testified at trial that she and the defendant began the day of the 22nd arguing about the fact that he was texting friends as he sat on the bed, telling them he needed a ride to the casino because Rawes had taken his truck away. 1RP 115-16. Yelling ensued from both parties, and then Mr. Kiefer, while the couple were in the bedroom, allegedly pulled Ms. Rawes' hair and

punched her in the back of the neck. 1RP 118-20. He also threw a beer on her, and spit in her face. 1RP 122. Yelling continued back and forth. 1RP 120-21.

Mr. Kiefer then announced that he was leaving the house, and that he was taking the family dogs with him because Ms. Rawes was scaring them with her yelling. 1RP 121. Ms. Rawes stated that Mr. Kiefer took the dogs for a two-hour walk. 1RP 205.

During the time while Mr. Kiefer was gone, Ms. Rawes took a shower, got dressed, spoke with a friend on the telephone, and sent text messages to one Priscilla. 1RP 121-22. In one such message, she stated, "Alfred hit me and he is going to kill me." 1RP 143. When asked when Mr. Kiefer threatened to kill her, she responded that "[h]e says it a lot," and then claimed that Mr. Kiefer said it when he pulled her hair. 1RP 143. Mr. Kiefer also allegedly said that he would kill her if she called the police. 1RP 144. Ms. Rawes testified that she thought "he was going to follow through" with his threat to kill. 1RP 144.

At some point while he was gone from the home, Mr. Kiefer sent Ms. Rawes a text message that said:

I have a question. What have you ever got a job and earned -- what did you ever have to show for what you have owned or owe. Take free money away from you. What have you got.

1RP 147. Ms Rawes testified that when she saw this text, she "knew he was going to take my money from me . . . [b]ecause he always gets my money." 1RP 147. Ms. Rawes stated she gets her money from SSI (Social Security Insurance). 1RP 147.

When Mr. Kiefer returned, Mr. Kiefer and Ms. Rawes continued to argue, and Mr. Kiefer then told her he did not believe she had a seizure disorder. 1RP 149. While sitting on one edge of their bed, he then flashed a strobe light, which was apparently a part of his cellular telephone, toward Ms. Rawes, who was at the other end of the bed. 1RP 149-50. Ms. Rawes hid her eyes while he continued to flash the strobe light, for 5 or 10 minutes, while "saying I don't believe you have seizures." 1RP 149-50.

Mr. Kiefer then picked up Ms. Rawes' computer and smashed it on the floor. 1RP 150-51. Mr. Kiefer also said that he would kill Ms. Rawes if she called the cops on him, and Ms. Rawes, when asked if she was afraid he would follow through with that

threat, responded, "I am afraid that he is going to follow through with it." 1RP 151-52.

Ms. Rawes then ran out the door and called 911 using her phone. 1RP 150, 152. She also took Mr. Kiefer's phone, "[b]ecause it would piss him off." 1RP 152.

Ms. Rawes admitted that during their turbulent relationship, she had used a "tazer" or shock gun on Mr. Kiefer, she was convicted for damaging his property, she had several orders prohibiting her from contacting him, and she was convicted several times for violating those orders. 1RP 208-09.

D. ARGUMENT

1. MR. KIEFER'S CONVICTION FOR MISDEMEANOR HARASSMENT MUST BE REVERSED BECAUSE HE WAS CONVICTED OF AN UNCHARGED OFFENSE.

a. A defendant cannot be convicted of an uncharged crime. Instructing the jury on an uncharged crime violates the defendant's right to notice of the crime charged. State v. Doogan,

82 Wn. App. 185, 188, 917 P.2d 155 (1996); Wash. Const. art. 1, section 22;¹ U.S. Const. amend. 6.²

When limited to an allegation of a threat to cause bodily injury under RCW 9A.46.020(1)(a)(i), a charge of misdemeanor harassment is a lesser offense within felony harassment charged as a threat to kill. State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003).³

However, as the offense of misdemeanor harassment was put to the jury in the instructions, employing two additional

¹ Article I, section 22 provides in relevant part: "In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him [and] to have a copy thereof."

² The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

³ In general, the trial court may permit the State to amend the information at any time before verdict if the defendant's substantial rights are not prejudiced. CrR 2.1(d). But in State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987), the Supreme Court stated that charging a new crime, after the State rests, violates the defendant's right to notice. Pelkey, 109 Wn.2d at 487. Thus the rule is:

A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.

Pelkey, 109 Wn.2d at 491. The harassment statute is not an offense distinguished by degrees; rather, there are several means of harassment defined (including threats to injure), and the statute later provides that threats to kill constitute a felony. RCW 9A.46.020(1), 2).

alternative means of committing the crime, the offense was not a lesser included offense of the charged crime of felony harassment.

In order to determine whether an offense is a lesser included crime within a charged offense, “first, each of the elements of the lesser offense must be a necessary element of the offense charged; second, the evidence in the case must support an inference that the lesser crime was committed.” State v. Gamble, 154 Wn.2d 457, 463, 114 P.3d 646 (2005) (quoting State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997)).

b. Mr. Kiefer was convicted of an uncharged crime.

Here, both RCW 9A.46.020(1)(a)(ii) (threat to cause physical damage to a person's “property”), and subsection (1)(a)(iv) (threat to “maliciously” do any act intended to harm a person's physical health or safety) include elements that are not necessary to felony harassment, and they are therefore not lesser included offenses.

The State charged Mr. Kiefer with felony harassment contrary to RCW 9A.46.020(2)(b). The elements of that offense are that a person: (1) without lawful authority; (2) knowingly; (3) threatens to cause bodily injury immediately or in the future to the person threatened or to any other person; by (4) threatening to kill

the threatened person or to kill any other person. RCW 9A.46.020(2)(b).

But RCW 9A.46.020(1)(a)(ii) requires a defendant to threaten to harm the person's property, and RCW 9A.46.020(1)(a)(iv) requires a defendant to have acted "maliciously." Both of these offenses contain an element not necessary for felony harassment. They each therefore fail the "legal prong" of the lesser included offense test. See also State v. Doogan, 82 Wn. App. at 188-90; State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (both stating that if an information alleges only one alternative means of committing a crime, it is error for the factfinder to consider uncharged alternatives, regardless of the range of evidence presented at trial).

Furthermore, each of the alternative means upon which the jury was instructed in this case fails the second, or "factual" prong of the lesser included offense analysis, and the prosecutor, on that basis, was also not entitled to the misdemeanor harassment instruction. In order to be entitled to a lesser included offense jury instruction, even if the offense in question meets the "legal" prong, "the evidence must raise an inference that only the lesser included

. . . offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000); see State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

Here, the only evidence of any threats made by Mr. Kiefer was of threats to kill her. There is no factual entitlement to a lesser offense instruction where the argument in favor of the instruction is only that the fact-finder may disbelieve the evidence proffered to support the charged, greater crime. State v. Pettus, 89 Wn. App. 688, 700, 951 P.2d 284 (1998). In this case, there was no affirmative evidence of threats to cause solely bodily injury. Therefore the evidence at trial did not raise an inference that only the lesser crime of misdemeanor harassment under RCW 9A.46.020(1)(a)(i) (bodily injury) was committed. Fernandez-Medina, 141 Wn.2d at 455.

Additionally, there was no evidence that Mr. Kiefer made any threats to harm Ms. Rawes' property, only that he did break her computer by throwing it on the floor. 2RP 294-95. Ms. Rawes stated that the defendant claimed she was wrongly accepting SSI payments, and Ms. Rawes feared Mr. Kiefer would take money

from her, but there was no evidence of any threat, “true” or otherwise, by Mr. Kiefer to that effect. 1RP 147; State v. Mills, 154 Wn.2d 1, 12, 109 P.3d 415 (2005) (felony harassment). Finally, there was no “threat” to harm Ms. Rawes’ safety or welfare in any other respect. The State was not entitled to the jury instruction on misdemeanor harassment.

c. The remedy is reversal. Reversal is required because Mr. Kiefer's jury was instructed upon, and it appears he was convicted of, an uncharged crime. Doogan, 82 Wn. App. at 188. The prosecutor was per se not entitled to an instruction on uncharged alternatives. Doogan, 82 Wn. App. at 188-90; Severns, 13 Wn.2d at 548; see also State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). An error of instructing the jury on an uncharged alternative means is prejudicial, requiring reversal, if it is possible the jury convicted the defendant under the uncharged alternative. Id. On the record of trial below, this Court of Appeals cannot determine, from the general verdict, any sole proper basis for the jury's conviction of Mr. Kiefer for misdemeanor harassment. Reversal is required.

2. MR. KIEFER'S CONVICTION FOR MISDEMEANOR HARASSMENT MUST BE REVERSED FOR INSUFFICIENCY OF THE EVIDENCE.

a. The State must prove the offense charged. Mr. Kiefer's conviction for misdemeanor harassment must be reversed for insufficiency of the evidence. Pursuant to RCW 9A.46.020(1), and as the jury was instructed, a person is guilty of harassment when:

Without lawful authority, the person knowingly threatens:

- to cause bodily injury immediately or in the future to the person threatened; or
- to cause physical damage to the property of the person threatened; or
- maliciously to do any act which is intended to substantially harm the person threatened with respect to her physical health or safety;

[and] the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

See RCW 9A.46.020(1)(a)(i),(ii), (iv); see CP 34, 35 (jury instructions 11, 12). A threat is a direct or indirect communication of the intent to do the act threatened. RCW 9A.04.110(27). There must be an actual, knowing threat, and a "true threat" must be communicated to the victim. See, e.g., State v. Mills, 154 Wn.2d at 12; CP 36 (jury instruction 13).

The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

It is true that a challenge to the sufficiency of the evidence admits all inferences that reasonably can be drawn from the evidence adduced at trial. State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980).

However, these statutory and constitutional standards are not met in this case, wherein the State's sole evidence of any communicated threats was that Mr. Kiefer threatened to kill Ms. Rawes. 1RP 44, 1RP 51-52. In this case, the jury found Mr. Kiefer not guilty of felony harassment. CP 20 (verdict form A).

b. The State failed to present sufficient evidence. There were no other physical threats communicated to Ms. Rawes by Mr. Kiefer, other than the alleged threats to kill, an allegation which the jury rejected. But the harassment statute plainly requires proof of a communicated threat. The evidence below did not support a conviction for harassment by threats to injure under RCW 9A.46.020(1)(a)(i). Nor was there any evidence of any threat to

harm Ms. Rawes' physical health or safety, other than the threats to kill, which the jury entirely disbelieved. RCW 9A.46.020(1)(a)(iv).

Finally, there was no evidence sufficient to satisfy subsection (1)(a)(ii) of the harassment statute. Mr. Kiefer never communicated any threat to harm Ms. Rawes' property. Although Mr. Kiefer damaged Ms. Rawes' computer by suddenly knocking it over, Ms. Rawes never testified that Mr. Kiefer had threatened to do so, or threatened any other property damage. 1RP 150-51. Ms. Rawes stated that she feared Mr. Kiefer would take money from her, but there was no evidence of any threat by Mr. Kiefer that he would do so. 1RP 147.

c. Remedy. Entry of a judgment of conviction in the absence of sufficient evidence is a violation of Due Process. U.S. Const. amend. 14. Mr. Kiefer's conviction for misdemeanor harassment must be reversed.

3. MR. KIEFER'S RIGHT TO JURY UNANIMITY WAS VIOLATED WHERE THERE WAS NOT SUBSTANTIAL EVIDENCE ON EACH OF THE ALTERNATIVE MEANS OF COMMITTING MISDEMEANOR HARASSMENT.

In Washington, criminal defendants have a constitutional right to a unanimous jury verdict. Wash. Const. art. I, section 21. A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). Further, due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14.

“Alternative means” statutes identify a single crime and provide more than one means of committing that crime. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). If the legislature has defined a crime such that it may be committed by alternative means, then the jury must only be unanimous that the

defendant committed the crime in one or another of the alternative ways provided by the legislature. Schad v. Arizona, 501 U.S. 624, 632, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991); Williams, 136 Wn. App. at 497–98 (citing Kitchen, 110 Wn.2d at 410)). The State is not required to elect a means nor does the jury need to be instructed that it must agree on the means – so long as substantial evidence supports each. Kitchen, 110 Wn.2d at 410.

Thus the requirements of unanimity and proof beyond a reasonable doubt are safeguarded, in an alternative means case, by this substantial evidence review. The appellate court must be able to conclude that the evidence at trial was sufficient to prove each of the alternative means presented to the jury, because absent a unanimity instruction or a special verdict, the reviewing court cannot know which means the jurors relied upon. See State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976).

The absence of substantial evidence as to even a single one of the means upon which the jury was instructed therefore requires reversal. Here, Mr. Kiefer's conviction for misdemeanor harassment must be reversed because there was no evidence on the alternative means, as argued supra. As noted, for example,

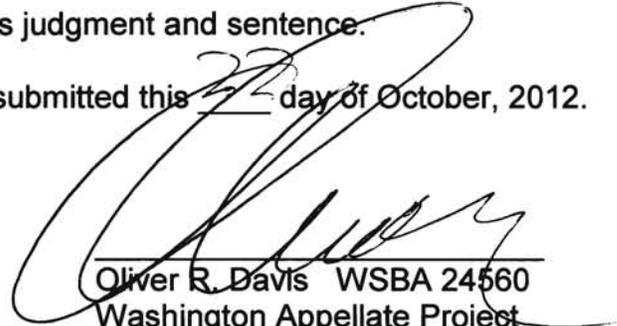
Mr. Kiefer never threatened to harm Ms. Rawes' property. The "substantial evidence" that is required on each alternative means, in order to affirm a general verdict, is evidence which is adequate to convince the appellate court that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d at 410-11. This standard is equated to that required to affirm on a sufficiency challenge. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

Here, in addition to the lack of evidence to prove a threat to Ms. Rawes' welfare, the evidence on the "threats to harm property" means, per RCW 9A.46.020(1)(a)(ii) was legally insufficient. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. 14. Ms. Rawes never testified that Mr. Kiefer threatened to harm or take her property, only that he did harm her property (the computer) and that he had told her she was not deserving of her SSI payments from the government. This is inadequate and reversal is required.

F. CONCLUSION

Based on the foregoing, Mr. Kiefer respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 22 day of October, 2012.



Oliver R. Davis WSBA 24560
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Attorneys for Appellant

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

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| STATE OF WASHINGTON, |) | |
| |) | |
| RESPONDENT, |) | |
| |) | |
| v. |) | NO. 68629-1-I |
| |) | |
| ALFRED KIEFER, JR., |) | |
| |) | |
| APPELLANT. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> | SHANNON CONNOR, DPA WHATCOM COUNTY PROSECUTOR'S OFFICE 311 GRAND AVENUE BELLINGHAM, WA 98225 | <input checked="" type="checkbox"/> | U.S. MAIL |
| | | <input type="checkbox"/> | HAND DELIVERY |
| | | <input type="checkbox"/> | _____ |
| | | | |
| <input checked="" type="checkbox"/> | ALFRED KIEFER, JR. 1986 YES ST. RD BELLINGHAM, WA 98229 | <input checked="" type="checkbox"/> | U.S. MAIL |
| | | <input type="checkbox"/> | HAND DELIVERY |
| | | <input type="checkbox"/> | _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF OCTOBER, 2012.

X _____ 

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