68629-1 68629-1

No. 68629-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

ALFRED KIEFER, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether Kiefer's conviction for misdemeanor harassment should be reversed because the trial court instructed the jury on all alternative means of misdemeanor harassment as a lesser included offense of felony harassment even though two of the alternative means instructed contain elements that are not necessary elements of the charged crime, felony harassment.

C. FACTS

The State accepts the facts presented by Kiefer for purposes of this appeal.

D. ARGUMENT

1. The State concedes Kiefer's conviction for misdemeanor harassment should be reversed.

Kiefer asserts his conviction for misdemeanor harassment should be reversed because the jury was erroneously instructed on all alternative means of misdemeanor harassment as a lesser included offense to felony harassment, threat to kill.

A lesser offense is included within a charged offense when each of the elements of the lesser offense are a 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).

Kiefer was 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. Rather than limit the lesser included instructions to the lesser included alternative allegation of a threat to cause bodily injury pursuant to 9A.46.020(1)(a)(i), the court also 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 not necessary for felony harassment and therefore fail the legal prong of the lesser included offense test. The trial court therefore erred giving the lesser included instructions pertaining to all alternative means of committing misdemeanor harassment. The State respectfully concedes error. Kiefer's conviction for misdemeanor harassment should be reversed.

E. CONCLUSION

For the reasons set forth above, the State requests Kiefer's conviction for misdemeanor harassment be reversed[1].

Respectfully submitted this 18 day of December, 2012.

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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

Sydney A. Kuo 12/19/2012
Legal Assistant **Date**

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