



**TABLE OF CONTENTS**

Page

**RESPONSE TO ASSIGNMENT OF ERROR .....1**

**1. THE AMENDED INFORMATION CHARGING DEFENDANT WITH TELEPHONE HARASSMENT SUFFICIENTLY AND CONCISELY SETS FORTH ALL THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.....1**

**2. THE “TO CONVICT” INSTRUCTION FOR THE CRIME OF TELEPHONE HARASSMENT WAS ERRONEOUS AS IT MISSTATED AN ELEMENT OF THE CRIME, BUT SUCH ERROR WAS HARMLESS.....1**

**3. TRIAL COUNSEL’S PERFORMANCE WAS NOT DEFICIENT AND HIS FAILURE TO OBJECT TO EITHER THE CHARGING DOCUMENT OR THE “TO CONVICT” INSTRUCTION DID NOT PREJUDICE THE DEFENDANT. ....1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....1**

**1. DID THE CHARGING DOCUMENT SUFFICIENTLY STATE THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED?.....1  
DID THE SUPERFLUOUS “AND/OR KANDICE SCHULTE” LANGUAGE IN THE “TO CONVICT” INSTRUCTION CONSTITUTE REVERSIBLE ERROR IN VIOLATION OF DEFENDANT’S RIGHT TO DUE PROCESS? .....1**

**2. WAS THE DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT? .....1**

**STATEMENT OF THE CASE .....2**

**ARGUMENT .....2**

**1. THE AMENDED INFORMATION SUFFICIENTLY SETS FORTH ALL ESSENTIAL ELEMENTS OF THE CRIME CHARGED.....2**

**2. THE "TO CONVICT" INSTRUCTION FOR TELEPHONE HARASSMENT WAS ERRONEOUS AS IT MISSTATED AN ELEMENT OF THE CRIME, BUT SUCH ERROR WAS HARMLESS .....2**

**3. DEFENSE COUNSEL'S PERFORMANCE DID NOT PREJUDICE THE DEFENDANT .....4**

**CONCLUSION .....5**

**TABLE OF AUTHORITIES**

Page

**CASES**

*Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) .....3

*State v. Brown*, 147 Wash.2d 330, 58 P.3d 889 (2002) .....3

*State v. Goble*, 131 Wash.App 194, 126 P.3d 821 (2006) .....3

*State v. Shouse*, 119 Wash.App. 793, 83 P.3d 453 (2004) .....3

*State v. Smith*, 131 Wash.2d 258, 930 P.2d 917 (1997) .....3

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....4

**STATUTES**

RCW 9.61.230(3)(b).....2

**RESPONSE TO ASSIGNMENT OF ERROR**

1. **THE AMENDED INFORMATION CHARGING DEFENDANT WITH TELEPHONE HARASSMENT SUFFICIENTLY AND CONCISELY SETS FORTH ALL THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.**
2. **THE "TO CONVICT" INSTRUCTION FOR THE CRIME OF TELEPHONE HARASSMENT WAS ERRONEOUS AS IT MISSTATED AN ELEMENT OF THE CRIME, BUT SUCH ERROR WAS HARMLESS.**
3. **TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT AND HIS FAILURE TO OBJECT TO EITHER THE CHARGING DOCUMENT OR THE "TO CONVICT" INSTRUCTION DID NOT PREJUDICE THE DEFENDANT.**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. **DID THE CHARGING DOCUMENT SUFFICIENTLY STATE THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED?**
2. **DID THE SUPERFLUOUS "AND/OR KANDICE SCHULTE" LANGUAGE IN THE "TO CONVICT" INSTRUCTION CONSTITUTE REVERSIBLE ERROR IN VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS?**
3. **WAS THE DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT?**

## STATEMENT OF THE CASE

State agrees with the Statement of the Case found in Defendant's brief.

## ARGUMENT

1. **THE AMENDED INFORMATION SUFFICIENTLY SETS FORTH ALL ESSENTIAL ELEMENTS OF THE CRIME CHARGED.**

The State has nothing to add to its original argument contained in its motion brief previously filed in response to defendant's brief.

2. **THE "TO CONVICT" INSTRUCTION FOR TELEPHONE HARASSMENT WAS ERRONEOUS AS IT MISSTATED AN ELEMENT OF THE CRIME, BUT SUCH ERROR WAS HARMLESS.**

Based upon the facts of this case, defense is correct in asserting that RCW 9.61.230(3)(b) requires that the State prove that the defendant placed a call to Anna Sloan, with the intent to harass Anna Sloan, and in so doing communicated a threat to kill Anna Sloan. Erroneously, the "to convict" instruction submitted in this case would have allowed the jury to convict the defendant based upon a finding that he made the call to Kandice Schulte, instead of Anna Sloan. However, the facts presented in

this case firmly establish that while Ms. Shulte answered the phone, the call was placed to the residence of, and intended for, Anna Sloan.

An instruction that truly relieves the State of its burden to prove every element of a crime beyond a reasonable doubt requires automatic reversal. *State v. Smith*, 131 Wash.2d 258, 265, 930 P.2d 917 (1997). However, not every omission or misstatement in a jury instruction relieves the State of its burden. *State v. Brown*, 147 Wash.2d 330, 339, 58 P.3d 889 (2002). In cases reviewing instructions that have omitted essential elements, or misstated an element in some way, courts have applied the harmless error analysis. *State v. Brown*, 147 Wash.2d at 339, see also *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed2d 35 (1999), *State v. Shouse*, 119 Wash.App. 793, 83 P.3d 453 (2004), and *State v. Goble*, 131 Wash.App. 194, 126 P.3d 821 (2006). An error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Brown*, at 341.

The facts presented by the State in this case were that the defendant had placed a telephone call to Anna Sloan's residence, and that telephone was answered by Kandice Schulte, with Anna Sloan listening nearby. It can be said, beyond a reasonable doubt, that the jury would not

have found that the defendant placed a call to Kandice Schulte. The defendant claimed he did not place a call. The State's evidence was that a call had been placed to Anna Sloan's residence, with Ms. Schulte and Ms. Sloan both recognizing the caller's voice as that of the defendant. To whom the call was placed and intended was not at issue, instead, the issue was whether the defendant placed a call at all.

Consequently, it can be said beyond a reasonable doubt that the inclusion of the "and/or Kandice Schulte" language in the "to convict" instruction did contribute to the jury's finding of guilt. Instead, it is clear that the jury simply believed that the defendant had called Anna Sloan's residence to harass her, and did not believe the defendant's denial.

**3. DEFENSE COUNSEL'S PERFORMANCE DID NOT PREJUDICE THE DEFENDANT.**

In order to establish that trial counsel's assistance was ineffective, the defendant must show that counsel's performance was deficient, and that that deficient performance resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the present case, the defendant argues that trial counsel's performance was deficient for his failure to object to the charging document and the "to convict" instruction. The defendant, however, is

unable to establish even if there were errors in either of these documents,  
that those errors prejudiced the defendant, for reasons previously argued.

### CONCLUSION

For the above stated reasons, defendant's conviction should be  
affirmed.

Respectfully submitted this 18<sup>th</sup> day of July, 2008.

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