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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County

Thomas L. Hughston, Jr., Circuit Court Judge

RECEIVED
MAR 31 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHARLES MOODY BRANDENBURG,

APPELLANT

APPELLATE CASE NO. 2013-002655

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by finding first-degree harassment is a lesser included offense of stalking?

STATEMENT OF THE CASE

Appellant was indicted for stalking at the December 2013 term of the Abbeville County Grand Jury. He proceeded to trial on December 4 – 5, 2013, before the Honorable Thomas J. Hughston, Jr. and a jury. Appellant was convicted of first degree harassment. A three (3) year sentence was imposed, suspended upon service of sixteen (16) months and five (5) years' probation thereafter. Patricia Bolen, Esquire, and Jana Nelson, Esquire, were the trial attorneys. Elizabeth White, Esquire, and Yates Brown, Esquire, were the assistant solicitors.

Appellant filed an Anders brief on June 13, 2014, addressing the issue in substantially the same form that is here presented pursuant to the court's order dated March 17, 2015, directing the parties to brief the issue.

This brief follows.

ARGUMENT

The trial court erred by finding first-degree harassment is a lesser included offense of stalking.

The indictment charging appellant with stalking alleged the following:

That Charles Moody Brandenburg, in Abbeville County, between the dates of September 1, 2012 and February 28, 2013, did willfully and unlawfully stalk Angela Brandenburg, by using a pattern of words or conduct that was intended to cause and did cause the targeted person and would have caused a reasonable person in the said targeted person's position to fear: death; assault; bodily injury; kidnapping, and/or damage to property, of the said targeted victim and/or a member of her family, in violation of the provisions of Section 16-3-1700 and Section 16-3-1730 of the South Carolina Code of Laws, 1976, as amended.

S.C. Code § 16-3-1700 defines the crime of stalking as follows:

(C) "Stalking" means a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear:

- (1) death of the person or a member of his family;
- (2) assault upon the person or a member of his family;
- (3) bodily injury to the person or a member of his family;
- (4) criminal sexual conduct on the person or a member of his family;
- (5) kidnapping of the person or a member of his family; or
- (6) damage to the property of the person or a member of his family.

Angela Brandenburg was the alleged victim in this case and the State's key witness. She testified she left her husband, appellant, on June 28, 2012, in Dorchester

hometown in Abbeville with her two children. She lived temporarily with her father until she could find a place of her own. Appellant started calling her, texting her, driving up to Abbeville to see her, following her to work, and he went to her children's school to try to see them. Some of this was corroborated by the victim's father, the children's school principal, and a local sergeant with the Abbeville Police Department. (R. p. 89, line 19 – p. 90, line 25; R. p. 95, line 11 – p. 100, line 12; R. p. 103, line 19 – p. 120, line 15; R. p. 134, line 7 – p. 141, line 20.)

At the end of the State's case, the assistant solicitor realized that her case was not that strong on the stalking charges and asked that the jury be instructed on first-degree harassment as a lesser included offense. Defense counsel objected. The trial court said three times that it was not inclined to make first-degree harassment a lesser included offense because he did not think it was a lesser included offense. Then he said he would think about it overnight. (R. p. 206, line 11 – p. 260, line 4.) The next day the trial court said that it decided it would charge on first-degree harassment as a lesser included offense of stalking. Defense counsel again objected and noted that there were elements in first-degree harassment that were not contained in stalking. The trial court again said it was going to charge on first-degree harassment. (R. p. 211, line 7 – p. 217, line 5.) That ruling was in error.

S.C. Code § 16-3-1700 defines first degree harassment as follows:

(A) "Harassment in the first degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the first degree may include, but is not limited to:

- (1) following the targeted person as he moves from location to location;
- (2) visual or physical contact that is initiated, maintained, or repeated after a person has been provided oral or written notice

- (2) visual or physical contact that is initiated, maintained, or repeated after a person has been provided oral or written notice that the contact is unwanted or after the victim has filed an incident report with a law enforcement agency;
- (3) surveillance of or the maintenance of a presence near the targeted person's:
 - (a) residence;
 - (b) place of work;
 - (c) school, or
 - (d) another place regularly occupied or visited by the targeted person, and
- (4) vandalism and property damage.

In State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (Ct. App. 2000), the court wrote:

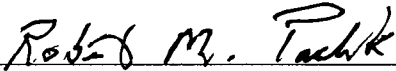
There is essentially a two-part test for determining whether to charge a lesser included offense. First, the court must determine if the proposed charge is legally a lesser included offense. In this regard, an indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. *State v. Fennell*, 263 S.C. 216, 209 S.E.2d 433 (1974). The test for determining when a crime is a lesser included offense of the crime charged is whether the greater offense includes all the elements of the lesser offense. *State v. Suttles*, 279 S.C. 87, 302 S.E.2d 338 (1983). If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. *Id*

First degree harassment includes an “unreasonable intrusion into the private life of a targeted person” that is not included in stalking. “Emotional distress” is also included in harassment, but it also is not included in stalking. Therefore, harassment is not a lesser included offense of stalking. (R. p. 215, line 16 - p. 216, line 18.)

CONCLUSION

Appellant's conviction for first degree harassment should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of March, 2015.

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APPELLATE CASE NO. 2013-002655

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Charles Moody Brandenburg, 1375 Palm Cove Dr., Charleston, SC 29492, this 31st day of March, 2015.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of March, 2015.

Brendy Robinson Brown (L.S.)

Notary Public for South Carolina
My Commission Expires: December 9, 2024.