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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Harry McCarthy, Judge

SUPPLEMENTAL BRIEF OF PETITIONER WILLIAM FRANCE

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A. ISSUE

Whether the harassment convictions must be reversed due to insufficient evidence under the "law of the case" doctrine?

B. STATEMENT OF THE CASE

The State charged William France with three counts of felony harassment against Anita Paulsen (counts I, II and III), two counts of felony harassment against Lisa Dugaard (counts IV and V),¹ and one count of witness intimidation against Dugaard (count VI). CP 11-14. Paulsen was France's former public defender. 2RP² 23, 27. Dugaard was a supervising attorney in the public defense agency. 2RP 51-52.

At trial, the State produced evidence in support of the harassment charges showing France, while in custody, left voicemail messages in which he communicated his intent to physically harm Paulsen and Dugaard. 2RP 40-46, 64-71; Ex. 1. France also left a message in which he told Dugaard not to come to court, which formed the basis for the witness intimidation charge under count VI. Ex. 1; 2RP 73.

¹ The information also names Paulsen as a victim of harassment in count V, but the "to convict" instruction for that count only names Dugaard. CP 13-14, 46 (Instruction 15).

² The verbatim report of proceedings is referenced as follows: 1RP - 3/1/12; 2RP - 3/5/12 (trial testimony); 3RP - 3/5/12 (closing argument); 4RP - 3/23/12.

The jury was instructed "A person commits the crime of harassment when he, without lawful authority, knowingly threatens maliciously to do any act which is intended to substantially harm another person with respect to his or her physical safety and when he or she by words or conduct places the person threatened in reasonable fear the threat will be carried out." CP 37 (Instruction 6). Each of the five "to convict" instructions for harassment required the State to prove that France "knowingly threatened . . . maliciously to do any act which was intended to substantially harm [Paulsen/Daugaard] with respect to her physical health or safety[.]"³ CP 38, 43, 44, 45, 46.

The "to convict" instruction for witness intimidation required the State to prove that France, "by use of a threat against a current or prospective witness attempted to induce that person to absent herself from an official proceeding." CP 48.

The jury was also instructed on the meaning of "threat." Instruction 9 provides:

³ Under RCW 9A.46.020(1)(a)(iv), a person is guilty of harassment if, "[w]ithout lawful authority, the person knowingly threatens . . . [m]aliciously 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." The crime is elevated to a felony if the State proves the person has previously been convicted of any crime of harassment against the same victim. RCW 9A.46.020(2)(b)(i).

As used in these instructions, threat also means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

CP 40.

The State proposed the jury instructions and did not object to giving any of them. 1RP 19; 2RP 78. A jury returned guilty verdicts on all counts. CP 21-27. The court imposed an exceptional sentence of 120 months confinement. CP 54, 56.

On appeal, France argued the State failed to prove he made a "threat" necessary to sustain the felony harassment and witness intimidation convictions under the legal standard set forth in the jury instructions. See Brief of Appellant at 7-10; Reply Brief at 1-4. The Court of Appeals reversed the witness intimidation conviction but affirmed the harassment convictions. State v. France, 175 Wn. App. 1024, 2013 WL 3130408 at *1 (2013). The Court of Appeals held the "law of the case doctrine" only applies to the "to convict" instruction in a criminal case rather than all the instructions. Id. at *4. The Court of Appeals further held Instruction 9, which defines the term "threat," did not apply to the felony harassment counts. Id. at *5. This Court granted review. State v. France, 315 P.3d 531 (2013).

C. ARGUMENT

1. THE HARASSMENT CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE UNDER THE LAW OF THE CASE DOCTRINE.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Under "the law of the case" doctrine, what facts need to be proven depends on how the jury is instructed. The evidence is insufficient to sustain France's convictions for felony harassment under the instructions given to the jury, which constitute "the law of the case."

a. The Court Of Appeals Misapplied The Law Of The Case Doctrine In Refusing To Recognize The Doctrine Applies To All Jury Instructions, Including Instructions Defining Elements Of A Crime.

"The law of the case is an established doctrine with roots reaching back to the earliest days of statehood." State v. Hickman, 135 Wn.2d 97, 101, 954 P.2d 900 (1998). This doctrine refers to the "rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 L. Orland & K. Tegland, Wash.Prac., Judgments § 380, at 56 (4th ed. 1986)). In that

instance, the parties are bound by the law laid down by the court in its instructions. Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948). Whether an instruction is rightfully or wrongfully given, it is binding and conclusive upon the jury. Hickman, 135 Wn.2d at 102 n.2; see McGovern v. Greyhound Corp., 53 Wn.2d 773, 779-80, 337 P.2d 290 (1959) ("Although we do not approve of the language used in this part of the instruction, as given, since no exception was taken thereto, it became the law of the case into which we will not inquire.").

Where a party challenges the sufficiency of evidence on appeal, "[t]he sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions." Tonkovich, 31 Wn.2d at 225; accord Hickman, 135 Wn.2d at 102 ("to convict" instruction was law of the case); State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005) (special verdict instruction was law of the case); Williams v. Dep't of Labor & Indus., 56 Wn.2d 127, 129-30, 135, 351 P.2d 414 (1960) (sufficiency of evidence measured by jury instructions under law of case doctrine, including instruction defining a legal term); Simons v. Cissna, 60 Wn. 141, 148-49, 110 P. 1011 (1910) (erroneous instruction was law of the case, but evidence supported verdict under that instruction); see also United States v. Spletzer, 535 F.2d 950, 954 (5th Cir. 1976) (unnecessary specific intent requirement included in jury instructions became necessary

element of conviction under the "law of the case"); United States v. Nacchio, 519 F.3d 1140, 1157 (10th Cir. 2008) ("when asking what facts the jury had to find in order to convict, we look to the elements of the crime as defined by law, except that if the government did not object to jury instructions containing additional requirements, it is required to prove those too."), vacated in part on other grounds, 555 F.3d 1234 (10th Cir. 2009) (en banc).

Under the legal standard set forth in the jury instructions, the State failed to prove France made a "threat" necessary to sustain the felony harassment convictions. Instruction 9 defined "threat" as "to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." CP 40. The Court of Appeals acknowledged the convictions must be reversed if the sufficiency of the evidence is measured under Instruction 9 because France was in custody when he left the voicemails, and neither victim was present when the threats were made. France, 2013 WL 3130408 at *4.

The Court of Appeals, however, opined the "law of the case" doctrine in criminal cases extends no further than a single instruction — the "to convict" instruction. Id. The Court of Appeals remarked "France cites no Washington authority where the appellate courts have held that, in a criminal case, a definitional instruction, rather than a 'to convict'

instruction, creates an additional element of the crime. Several decisions by Washington Courts refute the premise that a definition may create an element of the crime." *Id.* (citing State v. Marko, 107 Wn. App. 215, 218, 27 P.3d 228 (2001); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999)).

France's sufficiency argument, however, does not rely on the false premise that a definition creates an element of the crime. The State must prove all elements of the crime, and those elements must be included in the "to convict" instruction. State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). Definitions of elements do not need to be included in the "to convict" instruction. State v. Lorenz, 152 Wn.2d 22, 35, 93 P.3d 133 (2004) (citing Marko, 107 Wn. App. at 219-20; Laico, 97 Wn. App. at 764).

But even where a definition of an element need not be included in the "to convict" instruction, the State is still required to prove the requirements embedded within that definition. State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006) (conclusion that the purpose of sexual gratification is not an essential element of first degree child molestation that must be included in the "to convict" instruction "does not . . . relieve the State of its burden to show sexual gratification as part of its burden to prove sexual contact."); State v. Gray, 124 Wn. App. 322,

324-25, 102 P.3d 814 (2004) (conviction for third degree assault reversed due to insufficient evidence because State failed to prove assault on a "health care provider" as defined by statute); State v. Jarvis, 160 Wn. App. 111, 119, 246 P.3d 1280 (looking to definition of "assault" to determine whether there was sufficient evidence to sustain a conviction for assault), review denied, 171 Wn.2d 1029, 257 P.3d 663 (2011).

The State therefore needed to prove the existence of a "threat," as defined by jury instruction, to sustain France's convictions for felony harassment. The distinction between an element and a definition of an element does not matter when it comes to determining whether the State has sustained its burden of proof. Stevens, 158 Wn.2d at 309-10. The meaning of an element contained in the "to convict" instruction depends on how the element is defined for the jury. Whether the State proved France made a "threat" to another as required by the "to convict" instructions depends on what "threat" means. If the State did not prove a "threat" was made as defined by the instructions, then the State did not prove France threatened another as required by the "to convict" instructions.

The trial court instructed the jury that it "must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case." CP 29 (Instruction 1). That instruction embodies

the premise behind the law of the case doctrine. The court on review, no more than the jury, is unable to pick and choose which instructions become the law of the case. They are all the law of the case in the absence of an objection below.

As the Court of Appeals recently recognized in another criminal case, the law of the case doctrine is a broad concept that applies not only to superfluous requirements contained in "to convict" instructions but also to definitional instructions. State v. Calvin, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 6332944 at *9 (amended slip op. filed Oct. 22, 2013).⁴ In State

⁴ See also State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010) (in determining sufficiency of evidence for unlawful possession of a firearm, definition of "constructive possession" was law of case); State v. Swanson, 16 Wn. App. 179, 186-87, 554 P.2d 364 (1977) (in determining sufficiency of evidence for crime of making and publishing a false report of a corporation, instruction defining "publish" was the law of the case); State v. Beaton, 34 Wn. App. 125, 130, 659 P.2d 1129 (1983) (instruction defining the term "deadly weapon" for the purpose of determining the elements of the crime charged was the law of the case); City of Spokane v. White, 102 Wn. App. 955, 964-65, 10 P.3d 1095 (2000) (in determining sufficiency of evidence, law of case doctrine applied to definition of assault contain in definitional instruction); State v. Braun, 11 Wn. App. 882, 884, 526 P.2d 1230 (1974) (instruction defining "deadly weapon" becomes the law of the case in determining sufficiency of the evidence), review denied, 85 Wn.2d 1001 (1975); State v. Becker, 80 Wn. App. 364, 370, 908 P.2d 903 (1996) (in determining sufficiency of evidence for school zone sentencing enhancement, law of the case doctrine applied to instruction defining "grounds"), rev'd on other grounds, 132 Wn.2d 54, 935 P.2d 1321 (1997); State v. Putzell, 40 Wn.2d 174, 180-81, 242 P.2d 180 (1952) (jury had duty to determine guilt or innocence by considering evidence and the law given in the court's instructions, including instruction on defense of insanity, which was law of the case); State v. Hames, 74

v. Dugger, for example, the Supreme Court held an instruction defining "breaking and entering" in a burglary prosecution was the law of the case and that the evidence was insufficient to convict as measured by that instruction. State v. Dugger, 75 Wn.2d 689, 690-92, 453 P.2d 655 (1969). Dugger decisively disposes of the issue. The Court of Appeals' contention here that the law of the case doctrine does not extend to definitional instructions in determining the sufficiency of the evidence finds no refuge in the case law.

The Court of Appeals tried to distinguish criminal cases from civil cases in this regard, but the distinction makes no sense. France, 2013 WL 3130408 at *4. The law of the case doctrine applies to both criminal and civil cases, even though no "to convict" instruction is present in civil cases. Washburn v. City of Federal Way, 169 Wn. App. 588, 600-02, 283 P.3d 567 (2012) (relying on Hickman in holding sufficient evidence supported jury's verdict under law of case doctrine), aff'd on other grounds, 178 Wn.2d 732, 310 P.3d 1275 (2013). It would be a curious and irrational rule that authorized the law of the case doctrine to control whether sufficient evidence sustained a jury's verdict in a civil case based on all

Wn.2d 721, 724-25, 446 P.2d 344 (1968) (applying law of case doctrine to instruction on the information as well as to instruction on what the State needed to prove).

instructions but limited application of that doctrine in criminal cases to the "to convict" instruction. "The doctrine is based on the premise that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury." Calvin, 2013 WL 6332944 at *9. The basic function of the doctrine serves to "ensure that the appellate courts review a case under the same law considered by the jury." Id.

The rationale behind the doctrine applies equally to criminal and civil cases, and there is no principled basis to limit its application to the "to convict" instruction in a criminal case. Instruction 9, which defined "threat" for the jury in France's case, was binding on the jury in determining whether there was sufficient evidence to support the harassment convictions under the law of the case doctrine.

b. Instruction 9 Is The Only Instruction That Defines The Term "Threat," And Whether The State Proved The Existence Of A "Threat" To Convict For Felony Harassment Must Therefore Be Measured By That Instruction.

In determining sufficient evidence supported the harassment convictions, the Court of Appeals claimed "11 WPIC 2.24 contains a definition for threat that was used in instruction 6 and the to convict instruction" for felony harassment. France, 2013 WL 3130408 at *4. That conclusion is mistaken. Under WPIC 2.24, "[t]hreat means to communicate, directly or indirectly, the intent" to do any number of

enumerated acts.⁵ The language of WPIC 2.24 is taken from RCW 9A.04.110(28), the general definition section of chapter 9A RCW.

Neither Instruction 6 (CP 37) nor the "to convict" instruction contain the operative language quoted above. CP 37, 38, 43, 44, 45, 46. Instruction 6, defining the crime of harassment, and the "to convict"

⁵ WPIC 2.24 provides in full: "Threat means to communicate, directly or indirectly, the intent

[to cause bodily injury in the future to the person threatened or to any other person]; [or]

[to cause physical damage to the property of a person other than the actor]; [or]

[to subject the person threatened or any other person to physical confinement or restraint]; [or]

[to accuse any person of a crime or cause criminal charges to be instituted against any person]; [or]

[to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule]; [or]

[to reveal any information sought to be concealed by the person threatened]; [or]

[to testify or provide information, or withhold testimony or information, with respect to another's legal claim or defense]; [or]

[to take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding]; [or]

[to bring about or continue a strike, boycott, or other similar collective action to obtain property that is not demanded or received for the benefit of the group which the actor purports to represent]; [or]

[to do any [other] act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.]

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument]."

instructions only contain the act threatened ("maliciously to do any act which is intended to substantially harm another person with respect to his or her physical health or safety"), but do not define what "threat" means ("[t]hreat means to communicate, directly or indirectly" the intent to do an enumerated act). WPIC 2.24.⁶

WPIC 2.24, insofar as it defines "threat" for the purpose of harassment, is missing from the jury instructions in France's case. The comment to WPIC 36.07.01 (defining crime of harassment) and WPIC 36.07.03 (the "to convict" instruction for felony harassment based on prior conviction) counsels practitioners to "use WPIC 2.24, Threat—Definition" with harassment instructions. Instruction 9 contains the "true threat" requirement in accordance with WPIC 2.24, but does not contain the dispositive language of "[t]hreat means to communicate, directly or indirectly," the intent to do one of the enumerated acts. The jury, in assessing whether the State proved its case, was only left with Instruction 9 to tell them what threat means: "As used in these instructions, threat also

⁶ It is ironic that the Court of Appeals purported to find a definition of the element "threat" in the "to convict" instruction for harassment in light of its repeated insistence in other cases that definitions of elements are not included in "to convict" instructions. See, e.g., State v. Saunders, ___ Wn. App. ___, 311 P.3d 601, 605-06 (2013) (citing Lorenz, 152 Wn.2d at 34-36); State v. Jain, 151 Wn. App. 117, 125, 210 P.3d 1061 (2009) (citing Fisher, 165 Wn.2d at 754-55).

means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." CP 40.

Seeking to give effect to the word "also" in Instruction 9, the Court of Appeals noted the language of Instruction 9 mirrors the model definition for threat as applied to witness intimidation in WPIC 115.52. France, 2013 WL 3130408 at *4. The notes to WPIC 115.52 explain the word "also" is to be used "[i]f this instruction is used with one or more of the definitions of threat contained in WPIC 2.24."⁷

The fatal problem in France's case is that the jury instructions did not in fact include a definition of "threat" contained in WPIC 2.24. The only definition of "threat" contained in the jury instructions is found in Instruction 9 and, as conceded by both the Court of Appeals and the State, the evidence is insufficient to sustain the harassment convictions under the definition of threat contained in Instruction 9. France, 2013 WL 3130408

⁷ RCW 9A.72.110(2) provides that in addition to the definitions of threat set forth in RCW 9A.04.110(28), threat also means in a witness intimidation case "[t]o communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." As the comment to WPIC 2.24 explains, "[s]everal statutes supplement RCW 9A.04.110 with an additional definition of threat: 'to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time.' See RCW 9A.76.180(3)(a) (intimidating a public servant); RCW 9A.72.160 (intimidating a judge); RCW 9A.72.130 (intimidating a juror); and RCW 9A.72.110 (intimidating a witness)."

at *4; Brief of Respondent (BOR) at 9. As far as the jury is concerned, the word "also" in Instruction 9 is a bridge to nowhere. The jury, of course, is unaware of what the pattern instructions envision.

The Court of Appeals contended the first paragraph of Instruction 9 only applied to the witness intimidation count. France, 2013 WL 3130408 at *5. The jury was not told this. A distinction must be drawn between what the State intended or wished it had done and what the instructions actually were. Instruction 9 on its face is not limited to the witness intimidation count. The jury was nowhere instructed that the definition of "threat" contained in Instruction 9 applied only to the witness intimidation charge. On the contrary, the jury was instructed to consider the instructions as a whole. CP 32 (Instruction 1); see also State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997) (jury instructions are to be read as a whole, and each one is read in the context of all others given), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). Considering the instructions as a whole, the jury was left with no choice but to apply the definition of the term "threat" in Instruction 9 to the harassment counts.

Even under the Court of Appeals' reading, the second paragraph in Instruction 9, which states the requirements for a true threat, applies to all the counts, including the harassment counts. That portion of Instruction 9

was intended to be read in conjunction with the instructions related to the harassment counts. Constitutional error would exist if it were not. See State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010) (failure to include an instruction defining true threat for felony harassment is constitutional error). The Court of Appeals dismembered Instruction 9, applying the totality of that instruction's requirements to the reversed intimidation count but not the harassment counts. Considered from the jury's perspective, its reading of Instruction 9 is arbitrary. In the absence of any instructional language directing the jury to consider the first paragraph of Instruction 9 only in relation to the intimidation count, there is no sound basis to conclude, under the law of the case doctrine, that only the second paragraph of Instruction 9 applied to the harassment counts.

The law of the case doctrine does not discriminate between cases. The doctrine applies to all cases, including France's case, regardless of whether the evidence would be sufficient to sustain the verdict if the jury had been properly instructed. The jury was not properly instructed due to the State's oversight. That is the reality of this case and its law. Neither does the law of the case doctrine discriminate between parties or desired outcomes. Often times the doctrine works to the benefit of the State and the verdict is sustained. Once in a great while the doctrine works to the benefit of the defendant and the verdict cannot be sustained. Such is the

case here. The evidence is insufficient to convict France of harassment under the jury instructions that were given.

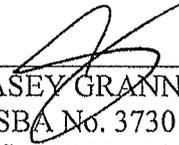
D. CONCLUSION

France respectfully requests reversal of the harassment convictions.

DATED this 23rd day of January 2014.

Respectfully Submitted,

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Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Respondent,)	
)	SUPREME COURT NO. 89235-1
v.)	
)	
WILLIAM FRANCE,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF PETITIONER WILLIAM FRANCE TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM FRANCE
DOC NO. 626275
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF JANUARY 2014.

X Patrick Mayovsky

OFFICE RECEPTIONIST, CLERK

From: Patrick Mayovsky <MayovskyP@nwattorney.net>
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Attachments: William France - Motion to Extend time to file Supplemental BOP.pdf; William France - Supplemental BOP.pdf

Attached for filing today is a motion to extend time to file supplemental brief for the case referenced below.

State v. William France

No. 89235-1

Motion to Extend Time to File Supplemental Brief

Filed By:
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