

NO. 68652-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY J. McCARTHY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the defendant's felony harassment convictions are supported by ample evidence that the defendant knowingly and maliciously threatened to do any act that was intended to substantially harm the victims with respect to their physical health or safety.

2. Whether the defendant's witness intimidation conviction should be reversed because the evidence produced at trial did not support the jury's verdict that the defendant had made a "threat" as defined in the jury instructions.

3. Whether this Court should hold, as it has previously held, that the definition of a "true threat" is not an essential element that must be alleged in the charging document.

4. Whether the defendant's request for a remand for entry of findings of fact and conclusions of law regarding the defendant's exceptional sentence is moot, because the findings and conclusions have been filed.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, William France, with five counts of felony harassment and one count of intimidating a witness based on a series of telephone messages that France left for Anita Paulsen, his former public defender, and Lisa Daugaard, Paulsen's supervisor, in November and December 2011. CP 1-14. A jury trial on these charges took place in March 2012 before the Honorable Harry J. McCarthy.

At the conclusion of the trial, the jury found France guilty of all counts as charged. CP 21-27. At sentencing, the trial court imposed an exceptional sentence totaling 120 months in prison based on France's high offender score (20 points) coupled with his multiple current offenses, which would otherwise result in no additional punishment for all but one current offense. CP 53-61, 73-74.

France now appeals. CP 63-72.

2. SUBSTANTIVE FACTS

Anita Paulsen has worked as a public defender in King County for over 20 years. RP (3/5/12) 23. She was assigned to represent France in August 2009. RP (3/5/12) 27. France's temper was an issue during Paulsen's representation. Paulsen is used to clients venting their frustrations, but France's outbursts were "beyond the pale." RP (3/5/12) 28-29. During one such outburst, France's behavior was so out of control that Paulsen abruptly ended their meeting and left. After that incident, France made more of an effort to control himself. RP (3/5/12) 29.

Eventually, Paulsen was able to obtain a very favorable plea agreement for France. However, after obtaining this favorable resolution and closing the case, Paulsen received a voice mail message from France in October 2010, in which he stated he was going to come after her and "lick [her] pussy closed." RP (3/5/12) 30-31.

Over the next several months, Paulsen estimated that she received at least a dozen threatening voice mail messages from France. RP (3/5/12) 32. Paulsen contacted her supervisor, Lisa Dugaard, and they discussed the situation. RP (3/5/12) 33. Dugaard decided to send France a letter instructing him not to

contact Paulsen again. RP (3/5/12) 33-34. But after Daugaard sent the letter, France's voice messages to Paulsen got even worse; France threatened physical assault and sexual assault "in the most vile language" that Paulsen had ever heard. RP (3/5/12) 34. France also started leaving messages for Daugaard. In these messages, France threatened both Daugaard and her family members with physical and sexual violence. RP (3/5/12) 60.

Paulsen and Daugaard reported these threats to the police in late 2010. RP (3/5/12) 34-35. As a result, France was eventually convicted of felony harassment against both Paulsen and Daugaard, and he was sentenced to a prison term on November 10, 2011. RP (3/5/12) 35. Both Paulsen and Daugaard spoke at France's sentencing hearing to express their fear of France. RP (3/5/12) 36, 60-62.

Daugaard hoped that the calls would stop after France was sentenced. RP (3/5/12) 63. However, both Paulsen and Daugaard received messages from France shortly after the sentencing hearing. RP (3/5/12) 37, 63-64. France left a message for Paulsen that he had "called up a few of [his] friends" and that they would be

“paying [her] a visit,” and he called her a “worthless fucking bitch.”¹

Ex. 1. France left a message for Daugaard that she had “better find a new fucking job,” and asked, “You think for one fucking minute nothing’s going to happen to you?”² RP (3/5/12) 65-67.

Approximately a week later, Paulsen received a message in which France told her that “a couple of [his] buddies are coming to see” her to “take [her] out for lunch” and “[s]how [her] appreciation.”³ France’s tone of voice was both sarcastic and menacing. Ex. 1. About two weeks after that, France left another message for Paulsen in which he threatened to “put a bullet up [her] fucking ass,” “[s]tick [his] dick in [her] pussy,” and “stick a broom up [her] ass.”⁴ Ex. 1.

On December 14, 2011, Daugaard received a message in which France said that he was going to “get” her when he got out of prison. Ex. 1. France told her he would trap her in the elevator at her office and “fuck [her] in [her] ass, bitch.”⁵ Ex. 1. France left a

¹ This call was the basis for count I.

² This call was the basis for count IV.

³ This call was the basis for count II.

⁴ This call was the basis for count III.

⁵ This call was the basis for count V.

message for Daugaard again on December 27, 2011; he said, "Don't come to court, girl. Don't come to court."⁶ Ex. 1.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS FRANCE'S CONVICTIONS FOR FELONY HARASSMENT.

France first argues that the evidence presented at trial is insufficient to support his convictions for felony harassment. More specifically, France argues that under the definitional instruction for "threat" that was given in this case, the State was required to prove that France threatened to use force immediately and that the victims were present when the threats were made. France argues that the evidence does not support that France threatened to use immediate force or that the victims were present when the threats were made, and thus, that the felony harassment counts must be reversed and dismissed. Brief of Appellant, at 7-10.

This claim should be rejected. Although the definitional instruction in question included a definition of "threat" that does not apply in this case, other instructions describing the elements of the crime (including the "to convict" instructions) contained a definition

⁶ This call was the basis for count VI.

of what constitutes a threat that was amply supported by the evidence. Accordingly, the jury's verdict is supported by substantial evidence, and this Court should affirm.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational juror could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992).

An appellate court considering a sufficiency challenge must defer to the jury's determination as to the weight and credibility of the evidence, and to the jury's resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. In addition, circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In sum, under these deferential

standards, any question as to the meaning of the evidence should be resolved in favor of the conviction whenever such an interpretation is reasonable.

France presents this sufficiency claim under the rubric of the “law of the case” doctrine. Brief of Appellant, at 8-10. Under this doctrine, the State assumes the burden of proving otherwise unnecessary “elements” of a crime when surplus “elements” are included without objection in the jury instructions. See State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (although venue is not an element of insurance fraud, the State assumed the burden of proving that the crime occurred in Snohomish County when that “element” was included in the “to convict” instruction). If the State has assumed an otherwise unnecessary burden under the “law of the case” doctrine, the conviction must be reversed and dismissed if there is insufficient evidence to support the surplus “element” in question. Id.

In this case, France asserts that his convictions for felony harassment must be reversed and dismissed because a definitional instruction defined the word “threat” in a manner that was not supported by the evidence. The instruction at issue (instruction 9) stated as follows:

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. Accordingly, based on the first paragraph in this instruction, France argues that the evidence produced at trial was insufficient to establish that he threatened the immediate use of force, or that the victims were present at the time the threats were made. Although France would be correct if this were the only instruction given to the jurors to inform them as to what constitutes a threat for purposes of felony harassment, such is not the case here.

The definitional instruction for the crime of harassment (instruction 6) stated as follows:

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 health or safety* and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

CP 37 (emphasis supplied). In accordance with this definitional instruction, each "to convict" instruction for counts I through V

established that the elements of felony harassment are: 1) that the defendant knowingly made a threat; 2) that the threat in question was a malicious⁷ threat *to do any act intended to substantially harm the victims' physical health or safety*; 3) that the victim reasonably feared that the threat would be carried out; 4) that the defendant acted without lawful authority; and 5) that the defendant had previously been convicted of felony harassment against the same victim. RCW 9A.46.020(1), (2)(b); CP 38, 43-46 (instructions 7, 12, 13, 14, and 15).

In both the definitional instruction for the crime of harassment and the "to convict" instructions for each count of felony harassment, the jurors were expressly informed that they needed to find beyond a reasonable doubt that France had threatened the victims maliciously to do any act intended to substantially harm their physical health or safety. This essential element of the crime, which was set forth in six separate jury instructions, was sufficient in and of itself to inform the jurors as to what a "threat" means. Therefore, the first paragraph of the additional definitional instruction was rendered superfluous, particularly in light of its use of the word "also." See CP 40 ("As

⁷ "Malice and maliciously" was further defined as "an evil intent, wish, or design to vex, annoy, or injure another person." CP 41.

used in these instructions, threat *a/so* means . . .”) (emphasis supplied). Indeed, other than the definition of a “true threat,” which is also contained in instruction 9, no further definition of “threat” was required in this case, because France’s threats fell within the common understanding of the word “threat.” See State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988) (definitional instructions are not required unless the word at issue is used as a technical legal term rather than in accordance with its ordinary meaning).

Under the definition of “threat” expressly contained in the essential elements of the crime, there was ample evidence produced at trial supporting the jury’s guilty verdicts for five counts of felony harassment. France told Anita Paulsen that his “friends” or “buddies” would be coming to “visit” and “take care of” her, and that he would “put a bullet” in her “ass,” sexually assault her, and anally rape her with a broom. Ex. 1. France told Lisa Dugaard that she had “fucked up by coming into the courtroom,” that she should “find a new job, bitch,” and that he was going to anally rape her in the elevator. RP (3/5/12) 65-67; Ex. 1. All of these statements constituted threats to maliciously do acts intended to harm Paulsen’s and Dugaard’s personal health and safety. In accordance with this definition of “threat” as set forth in the

essential elements of felony harassment, the jury's verdicts are plainly supported by substantial evidence and should be affirmed.

2. THE STATE CONCEDES THAT FRANCE'S CONVICTION FOR WITNESS INTIMIDATION SHOULD BE REVERSED.

In a related claim, France argues that the evidence presented at trial is insufficient to support his conviction for witness intimidation. More specifically, France argues that the definitional instruction for the word "threat" triggered a burden on behalf of the State to prove that France threatened the immediate use of force against a victim who was present at the time for purposes of witness intimidation as charged in count VI, and that the State failed to meet this burden. Brief of Appellant, at 11-15. Unlike the crime of felony harassment, the crime of witness intimidation does not contain a definition of "threat" within its essential elements. Accordingly, the State concedes that France is correct that count VI must be reversed and dismissed.

As noted above, the first paragraph of instruction 9 stated that "threat also means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." CP 40. Although this definition of "threat" is

superfluous with regard to the felony harassment charges, because “threat” is already defined within the essential elements of that crime, such is not the case with regard to witness intimidation.

The elements of witness intimidation as charged in this case are: 1) the use of a threat; 2) against a current or prospective witness; 3) in an attempt to induce the witness to absent herself from an official proceeding. RCW 9A.71.110(1)(c). Accordingly, the elements of this crime were set forth in the “to convict” instruction as follows:

(1) That on or about December 27, 2011, the defendant *by use of a threat* against a current or prospective witness attempted to induce that person to absent herself from an official proceeding and

(2) That the act occurred in the State of Washington.

CP 48 (emphasis supplied). Again, unlike felony harassment, there is no further definition of “threat” contained within the essential elements of witness intimidation.

Therefore, although the jurors did not need the first paragraph of instruction 9 in order to define “threat” for purposes of felony harassment, the jurors had to refer to instruction 9 in order to define “threat” for purposes of witness intimidation. The evidence supporting France’s witness intimidation conviction is a voice mail

message in which he told Lisa Daugaard, "Don't come to court, girl. Don't come to court." Ex. 1. Accordingly, because the evidence produced at trial did not establish that France threatened the immediate use of force against a person who was present at the time, the evidence is insufficient to sustain France's conviction for witness intimidation. Therefore, the State concedes that this conviction should be reversed and dismissed.

3. THIS COURT HAS ALREADY REJECTED THE ARGUMENT THAT THE DEFINITION OF A "TRUE THREAT" IS AN ELEMENT THAT MUST BE ALLEGED IN THE CHARGING DOCUMENT.

France next argues that the definition of a "true threat" is an essential element of both felony harassment and witness intimidation that must be alleged in the charging document. On this basis, France argues that his convictions should be reversed and dismissed without prejudice. Brief of Appellant, at 16-24. This Court has already rejected this claim, and it should be rejected in this case as well.

Felony harassment is a crime that criminalizes speech; accordingly, in order to protect free speech rights under the First Amendment, the threats at issue in a felony harassment case must

be “true threats,” meaning that a reasonable person would foresee that the threats in question would be interpreted as serious threats, rather than as jokes or puffery. State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). However, this Court has repeatedly rejected the argument that the definition of a “true threat” is an essential element of felony harassment that must be charged in the information; rather, it is sufficient to instruct the jury on the definition of a “true threat.”⁸ State v. Tellez, 141 Wn. App. 479, 483-84, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 806, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784, rev. granted, 161 Wn.2d 1014 (2011). This Court should reject France’s claim based on these dispositive cases.

Nonetheless, France argues that these cases are incorrectly decided based on State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010). Brief of Appellant, at 19-20. This Court expressly rejected that argument in Allen, 161 Wn. App. at 755-56. Accordingly, unless the Washington Supreme Court reaches a different conclusion, France’s claim fails.

France further argues that Division Three’s decision in State v. King, 135 Wn. App. 662, 145 P.3d 1224 (2006), rev. denied, 161

⁸ The jury was so instructed in this case. CP 40.

Wn.2d 1017 (2007) (holding that the jury need not be instructed on “true threats” in cases of witness intimidation, because a true threat is inherent in this crime) is wrongly decided. Brief of Appellant, at 27-28. This argument should be rejected for two reasons. First, King’s reasoning is sound, given that the crime of witness intimidation (unlike the crime of harassment) proscribes a very specific, narrow class of threats that are, by definition, “true threats.” See id. Second, even if this Court were to disagree with King, the holdings in Tellez, Atkins, and Allen still control.⁹ Either way, France’s arguments are without merit.

4. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING FRANCE’S EXCEPTIONAL SENTENCE HAVE BEEN FILED.

Lastly, France argues that his case should be remanded for entry of findings of fact and conclusions of law regarding his exceptional sentence. This argument is moot because the trial court entered written findings on December 13, 2012, and France cannot show prejudice resulting from the delayed entry of these findings.

⁹ Moreover, assuming that this Court accepts the State’s concession that France’s witness intimidation conviction should be reversed and dismissed, this claim is moot.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), rev. denied, 153 Wn.2d 1028 (2005).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, the court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, the trial court entered findings that have not delayed the resolution of France's appeal. France also cannot establish prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal, and the language of the findings is consistent with the trial court's oral ruling. CP 73-74; RP (3/23/12) 14-16.

In light of the above, France cannot demonstrate an appearance of unfairness or prejudice, and his claim is moot. The

trial court's findings of fact and conclusions of law regarding the exceptional sentence are properly before this Court.

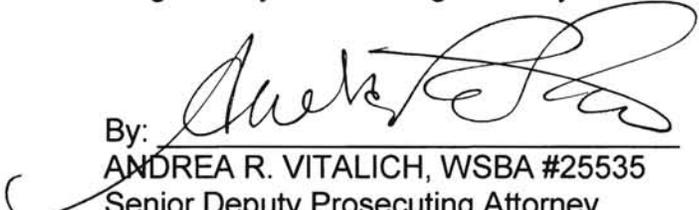
D. CONCLUSION

The State concedes that France's witness intimidation conviction should be reversed and dismissed. In all other respects, this Court should affirm.

DATED this 24th day of December, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. WILLIAM FRANCE, Cause No. 68652-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

12-24-12

Date