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OCT 31 2012

King County Prosecutor
Appellate Unit

COA NO. 68652-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Appellant.

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DIVISION ONE
OCT 31 2012
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Harry McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's convictions for felony harassment on counts I through V.

2. Insufficient evidence supports appellant's conviction for witness intimidation on count VI.

3. The information failed to notify appellant of every essential element of the crime of felony harassment under counts I, II, III, IV and V.

4. The information failed to notify appellant of every essential element of the crime of witness intimidation under count VI.

5. The court erred in failing to enter written findings of fact and conclusions of law justifying an exceptional sentence.

Issues Pertaining to Assignments of Error

1. Did insufficient evidence support the harassment counts under the law of the case doctrine, where jury instruction defined "threat" in a manner not established by the evidence?

2. Did insufficient evidence support the witness intimidation conviction because the evidence failed to establish the existence of a threat in the communication forming the basis for the charge?

3. Is reversal of the harassment and witness intimidation convictions required because the State failed to allege the "true threat" element of those crimes in the information?

4. RCW 9.94A.535 requires entry of written findings of fact and conclusions of law justifying an exceptional sentence. Is remand required for entry of written findings and conclusions in support of the exceptional sentence?

B. STATEMENT OF THE CASE

1. Procedural Facts

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 Daugaard (counts IV and V),¹ and one count of witness intimidation against Daugaard (count VI). CP 11-14. Before trial, the State withdrew the aggravating circumstance allegation that the acts were done as part of retaliation against members of the criminal justice system. 1RP² 1-2, 11. A jury returned guilty verdicts on all counts. CP 21-27. The court imposed an exceptional sentence by running counts I, II and III consecutive to counts IV, V and VI, for a total of 120 months confinement. CP 54, 56. This appeal follows. CP 63-72.

¹ The information also names Paulsen as a victim of harassment in count V, but the "to convict" instruction for that count only names Daugaard. 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.

2. Trial

Anita Paulsen is a public defense lawyer at The Defender Association (TDA). 2RP 22-23. Paulsen was appointed to represent France in 2009. 2RP 27. During the course of that representation, France displayed angry outbursts, which lessened over time after he was told such behavior was unacceptable. 2RP 28-29. The case resolved in a manner that Paulsen believed was beneficial to France. 2RP 30-31. Paulsen next heard from France in late 2010, when he called and left a phone message that he was coming for her in eight months and "I'm coming to lick your pussy." 2RP 31. Through the middle of 2011, France left a number of phone messages threatening sexual assault and injury. 2RP 32-34, 43.

Lisa Dugaard, TDA's deputy director, sent a cease and desist letter to France. 2RP 33-34, 51, 58-59. France continued to leave messages for Paulsen. 2RP 34. He also started leaving messages for Dugaard that involved threats of harm to herself and her family, including threats of sexual violence. 2RP 60, 62. Dugaard took the threats seriously. 2RP 62.

Around December 2010, Dugaard and Paulsen reported France's behavior to police and he was charged with multiple counts of felony harassment. 2RP 34-35, 60. Dugaard and Paulsen appeared in court on November 10, 2010 for France's sentencing hearing on those charges and

spoke to the judge. 2RP 35, 60. Paulsen addressed the court to express her sense of fear and concern over France's conduct. 2RP 35-36. Daugaard hoped France would be incapacitated for a long time. 2RP 63. France received a 15-year sentence. 2RP 74. Daugaard and Paulsen believed he would actually serve 10 years in prison. 2RP 47-48, 74.³

France called within hours of sentencing and left a phone message for Daugaard on November 10. 2RP 64-67. That message, which formed the basis for count IV, was as follows:

Hey bitch. You fucked up by coming into the courtroom today. You think for one fucking minute nothing's going to happen to you? You worthless mother fucking slut. Give a message to Rita, Anita Paulsen, same thing, eight years, you'd better find a new job, bitch, you better find a new fucking job.

2RP 65-67.

Daugaard felt the same fear as before, except now she realized France had a reason to be mad at her. 2RP 68.

Paulsen received three phone messages from France after November 10. 2RP 40. The following message left on November 11 formed the basis for count I:

Hello honey. Glad to hear your voice. What you did in the courtroom was outstanding. That was a marvelous fucking act. I never heard [inaudible] in my whole life. I called up

³ The parties stipulated in the present case that France had previously been convicted of felony harassment against Paulsen and Daugaard. 2RP 83.

friend, I called up a few of my friends. I told them about. They'll be paying you a visit. Have a nice fucking life, you worthless fucking bitch.

Ex. 1.⁴

This message caused Paulsen to be afraid. 2RP 42-43.

The following message left on November 17 formed the basis for

count II:

Hello Anita. That was spectacular you being in the courtroom. That was great. I like that, you was really concerned about my welfare. Just want to let you know there's a couple of, that a couple of my buddies are coming to see ya. They're gonna take you out for lunch. You know. Show you appreciation. Just to let know. It's gonna be okay. I told them to take care of ya. [inaudible] treat you really good.

Ex. 1.

Paulsen perceived this message as a threat. 2RP 44-45.

The following message left on December 5 formed the basis for

count III:

Anita Paulsen, I don't have a phone number for you to call me back. The only way I can call you, the only way I can get a hold of you is if I call you. But I do want to say one thing. You were spectacular in that courtroom on the 10th of this last month. Goddamn you were good. But there's one thing I do want to do though, I want to put a bullet up your fucking ass.

⁴ There is no written transcript for the recorded messages contained in Exhibit 1. Undersigned counsel, in listening to the recording and setting forth its contents in this brief, has made a good faith attempt at accuracy.

Ex. 1.

After approximately 40 seconds of silence, France continues "But before I do that, I'm gonna lick your pussy. Stick my dick in your pussy, then I'm gonna stick a broom up your ass. How you gonna feel about that, little girl?" Ex. 1. Based on the calls she received, Paulsen believed it was only a matter of time before France came after her. 1RP 46.

The following message left on December 14 formed the basis for count V:

Lisa, this is your favorite fucking person in the whole world. I like how you, uh, expressed yourself in the courtroom on the 10th of last month. Yeah, I liked that. It's been a fucking month, little lady. It's been a month. But see in 10 years, I want you to understand something real fuckin quick, I'm still gonna get ya. What you said in the courtroom wasn't called for. You come to the courtroom, coming to court, wasn't called for. You understand? Now I'm gonna do, I'm gonna do 96 fuckin months because of you. All because of you. But when I get out, I'm gonna get you in the fuckin elevator. I'm gonna fuck you in your ass, bitch. I'm gonna pull your fuckin pants down right in the elevator and I'm gonna let it have it. I'll pin it up and in ya, you little slut bitch.

Ex. 1.

Daugaard felt extreme apprehension, explaining she was not sure if France would do any of these things. 2RP 71. She was afraid. 2RP 71.

The following message left on December 27 formed the basis for count VI: "Don't come to court, girl. Don't come to court." Ex. 1. By that

time, France had been rearrested and jailed on new charges stemming from the new round of post-sentencing calls. 2RP 73. Daugaard understood France to be referencing an upcoming proceeding in that new case. 2RP 73. She interpreted France as saying, "don't cooperate with the new case." 2RP 73.

C. ARGUMENT

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

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. The convictions under counts I through V must be reversed and the charges dismissed with prejudice due to insufficient evidence.

Due process under the Fourteenth Amendment of the United States Constitution 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). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

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." RCW 9A.46.020(1)(a)(iv). 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). The "to convict" instructions for the harassment counts and the instruction defining harassment omitted the "mental health" aspect but otherwise tracked the statutory language.⁵ CP 37, 38, 43, 44, 45, 46.

Under the law of the case doctrine, "the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage."⁶ Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948); accord State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). 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

⁵ The term "mental health" in the harassment statute is unconstitutionally vague. State v. Williams, 144 Wn.2d 197, 201, 26 P.3d 890 (2001).

⁶ The State proposed the jury instructions and did not object to giving any of them. 1RP 19; 2RP 78. Defense counsel endorsed the State's instructions. 2RP 78.

instructions."⁷ Tonkovich, 31 Wn.2d at 225; accord Hickman, 135 Wn.2d at 102.

The harassment convictions must be reversed for insufficient evidence under the law of the case doctrine. The jury was instructed on the meaning of "threat." Instruction 9 provides:

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.

"Threat" was nowhere else defined in the jury instructions.⁸ As a result, whether the State proved the existence of a threat in relation to the harassment convictions must be measured under the standard set forth in Instruction 9.

Looking at the evidence in the light most favorable to the State, there is no evidence that the messages left for Paulsen and Daugaard that formed the basis for the harassment charges communicated the intent to

⁷ The jury was instructed, as it is in all cases, 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).

⁸ The first sentence in Instruction 9 contains the word "also" but there is no other instruction where threat is defined.

immediately use force against any person who was present at the time the communication was made. There was no person present at the time of the communications. France left recorded phone messages that were later retrieved by Daugaard and Paulsen. 2RP 39-41, 64-65, 67. France was in custody when he left those messages. 2RP 37, 42, 44-45, 47-48, 68-69, 73. And the messages, to the extent they exhibited a temporal element, referred to what would happen in the future rather than intent to use immediate force. 2RP 67; Ex. 1 (messages from Nov. 10, Nov. 17, Dec. 5 and Dec. 14).

The evidence is insufficient to prove the "threat" element of the crime of harassment based on the manner in which the jury was instructed under the law of the case doctrine. The harassment convictions must be reversed and the charges dismissed with prejudice because there is insufficient evidence to prove the "threat" element of the crimes. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy for conviction unsupported by sufficient evidence). The prohibition against double jeopardy forbids retrial. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); Hickman, 135 Wn.2d at 103.

2. THE WITNESS INTIMIDATION CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

The State failed to prove France made a "threat" necessary to sustain the witness intimidation conviction. The conviction must be reversed and the charge dismissed with prejudice due to insufficient evidence.

Again, due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. Winship, 397 U.S. at 364. A person is guilty of intimidating a witness "if a person, by use of a threat against a current or prospective witness, attempts to . . . induce that person to absent himself or herself from such proceedings." RCW 9A.72.110(1)(c).

The basis for the witness intimidation conviction is the phone message left by France on December 27 in which he told Daugaard, "Don't come to court, girl. Don't come to court." Ex. 1. The issue is whether the evidence is insufficient to establish that communication qualifies as a "threat" necessary to sustain the witness intimidation conviction.

Under one definition, the term "threat" in the witness intimidation statute means "[t]o communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." RCW 9A.72.110(3)(a)(i). There is no evidence here that Daugaard was

"present" when the words were said, nor was there a communication of intent to use immediate force.

The term "threat" in the witness intimidation statute is also defined by reference to RCW 9A.04.110(28). RCW 9A.72.110(3)(a)(ii).⁹ A "threat" under RCW 9A.04.110(28) is defined in different ways, only two of which are potentially relevant to this case. One such definition is "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(28)(a). The second potentially relevant definition is "To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships." RCW 9A.04.110(28)(j).

In threat cases, words are important. They form the basis for conviction. It is therefore appropriate to scrutinize them. France told Dugaard "Don't come to court, girl. Don't come to court." Ex. 1. The statement itself reveals no threat of bodily injury or of substantial harm to health or safety.

It is true that jurors are "required to consider the inferential meaning as well as the literal meaning of [communications]. The literal

⁹ RCW 9A.72.110(3)(a)(ii) actually references "RCW 9A.04.110(27)," but the code reviser notes RCW 9A.04.110 was amended by Laws of 2011, ch. 166 § 2, changing subsection (27) to subsection (28).

meaning of words is not necessarily the intended communication." State v. Gill, 103 Wn. App. 435, 445, 13 P.3d 646 (2000) (quoting State v. Scherck, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973)).

But here, France's words must be taken literally because their literal meaning provides a basis for a rational trier of fact to conclude France attempted to induce Daugaard not to come to court. This is not a situation where the jury is interpreting the veiled meaning of words, as it did in relation to the felony harassment counts.

The State may argue on appeal, as it did below, that the context of the message allowed for an inference that France was threatening Daugaard with harm if she came to court. 2RP 80. Other evidence in the case showed France had threatened bodily injury to Daugaard in the past and, so the argument goes, the jury could infer that France was threatening bodily injury or substantial harm again in telling Daugaard not to come to court.

The problem with that approach is that it substitutes what could have been said in the communication for what was said. Reasonable inferences only stretch so far before they become unreasonable. Under the State's logic, where a person threatens to inflict bodily injury on a previous occasion, that person is liable for committing a threat-based crime any time he subsequently tells the other person to do or not do something. The

plain language of the witness intimidation statute shows the legislature intended the threat, whether it be literal or veiled, to be contained within the communication itself. RCW 9A.72.110(1)(c).

Even Daugaard interpreted France as simply saying, "don't cooperate with the new case, basically." 2RP 73. She did not mention anything about interpreting the message as a threat to inflict bodily injury or substantial harm.

France, in leaving the December 27 message at issue here, clearly committed the crime of witness tampering. A person is guilty of witness tampering "if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding . . . to . . . [a]bsent himself or herself from such proceedings[.]" RCW 9A.72.120(1)(b).

But the State did not charge France with witness tampering. It overreached by charging witness intimidation. Were this Court to hold sufficient evidence supports the witness intimidation conviction, then the distinction between the separate offenses of witness tampering and witness intimidation would be largely obliterated.

Even if the evidence were sufficient to prove the existence of a "threat" in relation to how that term is statutorily defined, the conviction must still be reversed for insufficient evidence under the law of the case

doctrine. The parties are bound by the law set forth in the jury instructions and the sufficiency of evidence is measured in relation to those instructions. Tonkovich, 31 Wn.2d at 225; Hickman, 135 Wn.2d at 102. As set forth in section C. 1., supra, the jury was instructed that "threat" meant "to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." CP 40 (Instruction 9). Under the law of the case doctrine, whether the State proved the existence of a threat must be measured under the standard set forth in that instruction.

There is no evidence that the message on December 27 in which France told Daugaard not to come to court communicated the intent to immediately use force against any person who was present at the time. There was no person present at the time of the communication. France left a phone message. France was in custody. 2RP 37, 42, 44-45, 47-48, 68-69, 73. Not only was no person present at the time of the threat, there was no communication of an intent use immediate force against such a person. The evidence is insufficient to prove the "threat" element based on the manner in which the jury was instructed under the law of the case doctrine. The witness intimidation conviction must be reversed and the charge dismissed with prejudice because there is insufficient evidence to prove the "threat" element of the crime. DeVries, 149 Wn.2d at 853.

3. THE INFORMATION IS DEFECTIVE BECAUSE IT LACKS AN ESSENTIAL ELEMENT OF THE CRIMES OF FELONY HARASSMENT AND WITNESS INTIMIDATION.

A charging document is constitutionally defective if it fails to include all essential elements of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). France's convictions must be reversed because the charging document does not set forth the "true threat" element of the crimes.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

a. The Information Fails To Include The True Threat Element Of Felony Harassment.

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute must be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused France of committing the crime of felony harassment in count I as follows:

That the defendant William Neal France in King County, Washington, on or about November 11, 2011,

having previously been convicted on November 10, 2011, of the crime of Felony Harassment against Anita Paulsen, a person specifically named in a no contact or no harassment order, without lawful authority, knowingly did threaten to maliciously do an act intended to substantially harm Anita Paulsen with respect to her physical health or safety; and the words or conduct did place Anita Paulsen in reasonable fear that the threat would be carried out;

Contrary to RCW 9A.46.020(1), (2), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant William Neal France of committing the offense against a public official or officer of the court in retaliation of the public official's performance of her duties to the criminal justice system under the authority of RCW 9.94A.535(2)(c)(3)(t).

CP 11.¹⁰

The charging language is the same for counts II and III, except that the date of the crime is alleged to be November 17, 2011 and December 5, 2011, respectively. CP 12-13. Counts IV and V contain the same boilerplate charging language. CP 13-14. Count IV alleged the date of the crime as November 10, 2011 and the target of the threat as Lisa Daugaard. CP 13. Count V alleged the date of the crime as December 14, 2011 and named Daugaard and Paulsen as the targets of the threat. CP 13-14.

¹⁰ Before trial, the State withdrew the aggravating circumstance allegation. IRP 1-2, 11.

The information fails to allege France made a "true threat." It is silent as to the required mens rea that France be negligent as to the result of the hearer's fear.

This Court has held the "true threat" allegation need not be included in the charging document because it is merely definitional rather than an essential element. State v. Allen, 161 Wn. App. 727, 753-56, 255 P.3d 784, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011)¹¹; State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010); State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court, however, stated, "It suffices to say that, to convict, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement accords with Kilburn, where the Court held a harassment conviction must be

¹¹ The Supreme Court granted review of this issue in Allen. Oral argument took place on March 1, 2012.

reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment, which consists of negligence as to the result of the hearer's fear. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an essential element of felony harassment. The State's information is deficient because it omits the "true threat" requirement.

b. The Information Fails To Include The True Threat Element Of Witness Intimidation.

The same analysis applies to the crime of witness intimidation. The information accused France of committing this crime as follows: "That the defendant William Neal France in King County, Washington, on or about December 27, 2011, by use of a threat against Lisa Daugaard, a current or prospective witness, did knowingly attempt to induct that person to absent herself from an official proceeding; Contrary to RCW 9A.72.110(1)(a), (b), (c), (3), and against the peace and dignity of the State of Washington." CP 14.

The "true threat" requirement is missing from the information on the witness intimidation charge. As argued above, the existence of a "true threat" is an essential element of threat crimes involving speech. Harassment is an example of one such offense. Schaler, 169 Wn.2d at 284. Other statutory offenses are likewise limited to "true threats." See State v. Johnston, 156 Wn.2d 355, 357, 363-64, 127 P.3d 707 (2006) (threats to bomb or injure property); State v. Brown, 137 Wn. App. 587, 591, 154 P.3d 302 (2007) (threats involving intimidating a judge); State v. Smith, 93 Wn. App. 45, 49 n.3, 966 P.2d 411 (1998) (threats to bomb a government building); State v. Stephenson, 89 Wn. App. 794, 800-01, 966 P.2d 411 (1997) (threats involving intimidating a public servant).

The true threat requirement is imposed so that criminal statutes prohibiting threats do not encompass constitutionally protected speech. State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001). The witness intimidation statute, which likewise criminalizes speech, must therefore be construed to prohibit only true threats. State v. King, 135 Wn. App. 662, 666, 145 P.3d 1224 (2006), review denied, 161 Wn.2d 1017, 171 P.3d 1056 (2007). "Intimidation in the constitutionally prescribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Virginia v. Black, 538 U.S. 343, 360, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

Division Three in King held an instruction defining "true threat" is not needed for the crime of intimidating a former witness because the witness intimidation statute by its very language encompasses "true threats." King, 135 Wn. App. at 671-72. It reasoned "[t]he statute prohibiting harassment covers a virtually limitless range of utterances and contexts, any of which might be protected. Both the speech and context of witness intimidation, by contrast, are limited by the language of the statute. The statute requires the State to prove that the defendant communicated an intent to harm a person who has appeared, presumably against him, in a legal proceeding." Id. at 669-70. That reasoning implies the language of

the witness intimidation statute itself is sufficient to convey the true threat requirement.

But that reasoning is infirm. A person can utter a threat against a witness that rises no further than the level of jest, idle talk, or hyperbole. See Kilburn, 151 Wn.2d at 43 ("A true threat is a serious threat, not one said in jest, idle talk, or political argument."); Schaler, 169 Wn.2d at 283 ("The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole."). Common sense tells us that a person may jokingly direct a threat to a witness or use hyperbole in so doing. In fact, the trial court here instructed the jury on the definition of a true threat in relation to all the charges, including the witness intimidation charge. CP 40 (Instruction 9).

This Court should reject King's ill-reasoned premise that the language of the witness intimidation statute necessarily conveys the true threat requirement. The information charging France with witness intimidation is defective in failing to include the "true threat" element of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; Hamling, 418 U.S. at 117; Vangerpen, 125 Wn.2d at 787.

c. The Remedy Is Reversal Of The Convictions.

Courts presume prejudice and reverse conviction where a necessary element is neither found nor fairly implied from the charging document. McCarty, 140 Wn.2d at 425; State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). This Court must therefore presume prejudice and reverse the convictions because the necessary "true threat" element is neither found nor fairly implied in the information for all three counts.

4. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS AND CONCLUSIONS JUSTIFYING AN EXCEPTIONAL SENTENCE.

The trial court must enter written findings of fact and conclusions of law supporting an exceptional sentence. Its failure to do so here necessitates remand for entry of written findings and conclusions.

Exceptional sentences "may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). The court imposed an exceptional sentence under RCW 9A.535(2)(c) (some current offenses going unpunished). CP 54. The judgment and sentence states, "Findings of Fact and Conclusions of Law are attached in Appendix D." CP 54. But there is no Appendix D.

RCW 9.94A.535 requires that "[w]henver a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." "An

exceptional sentence may be imposed only where the trial court finds substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence." State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262 (2001). A trial court imposing an exceptional sentence has an independent statutory duty to make findings that show the sentence imposed is consistent with the goals of the Sentencing Reform Act. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).

The fact that leaving some current offenses unpunished may be a substantial and compelling reason justifying an exceptional sentence does not relieve the sentencing court of its duty to enter findings of fact and conclusions of law explaining the reasons for the sentence. See Breedlove, 138 Wn.2d at 310 ("The fact that a stipulation may be a substantial and compelling reason justifying an exceptional sentence does not relieve the sentencing court of its duty to enter findings of fact and conclusions of law which explain the reasons for the sentence."). RCW 9.94A.535 "requires a trial court to enter written findings of fact and conclusions of law to justify its imposition of *any* sentence outside the standard range. The statutory language is clear and the trial court must enter findings and conclusions justifying its exceptional sentence." State v. Hale, 146 Wn. App. 299, 306, 189 P.3d 829 (2008).

"Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." Breedlove, 138 Wn.2d at 311. Furthermore, "[t]he purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made." In re Det. of LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986).

The remedy for a trial court's failure to issue findings of fact and conclusions of law is remand for entry of findings and conclusions supporting the exceptional sentence. Breedlove, 138 Wn.2d at 311, 313. France reserves the right to challenge any written findings and conclusions entered after the filing of this brief.

D. CONCLUSION

France requests reversal of the convictions.

DATED this 31st day of October 2012.

Respectfully Submitted,

NIELSEN, ~~B~~ROMAN & KOCH, PLLC.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68652-6-I
)	
WILLIAM FRANCE,)	
)	
Appellant.)	

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 31ST DAY OF OCTOBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM FRANCE
DOC NO. 626275
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONORE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2012.

x Patrick Mayovsky