

COA NO. 74507-7-I

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

IN RE PERSONAL RESTRAINT PETITION OF WILLIAM FRANCE:

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Petitioner.

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Court of Appeals
Division I
State of Washington

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

The Honorable Steven Gonzalez, Judge

PETITIONER'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. FRANCE'S MULTIPLE CONVICTIONS FOR FELONY HARASSMENT VIOLATE DOUBLE JEOPARDY UNDER THE UNIT OF PROSECUTION TEST.

a. No waiver.

The State asserts France waived his double jeopardy claim by engaging in the affirmative act of negotiating a voluntary plea agreement. State's Response (SR) at 11-18. Precedent dictates otherwise. In re Pers. Restraint of Francis, 170 Wn.2d 517, 522, 242 P.3d 866 (2010); State v. Knight, 162 Wn. 2d 806, 811, 174 P.3d 1167 (2008). Guilty pleas by definition include agreement to the having committed the current offenses and routinely include agreement to the accuracy of criminal history, just like the plea agreement in Francis.¹ The State in Francis made the same kind of waiver argument that the State brings here.² That argument lost. Francis, 170 Wn.2d at 522.

The plea agreement does not waive the double jeopardy violation because "it is not the guilty plea itself that offends double jeopardy but

¹ See Francis Personal Restraint Petition and Opening Brief, plea agreement at 39-43 (available at www.courts.wa.gov/content/Briefs/A08/826196%20%20prp.pdf).

² See Francis State's Supplemental Brief at 2-6 (arguing defendant waived double jeopardy objection through an affirmative act: he bargained for a reduction in the number and level of charges, resulting in a lower offender score and shorter sentence) (available at www.courts.wa.gov/content/Briefs/A08/826196%20supp%20br%20of%20respondent.pdf).

rather the entry of the convictions that violates double jeopardy." State v. Hughes, 166 Wn.2d 675, 681 n.5, 212 P.3d 558 (2009) (citing Knight). "[U]nder the general rule that a plea waives appeal even of constitutional violations occurring *before* the plea (unless related to the plea itself or to the power of the government to prosecute), a double jeopardy violation occurring only upon conviction, as is claimed here, is not waived." State v. Martin, 149 Wn. App. 689, 696, 205 P.3d 931 (2009) (footnote citation omitted). The State's reliance on the plea agreement as a bar to the double jeopardy claim is therefore misplaced. "Correctly understood, the plea agreement has no bearing on the ability of the court to vacate a conviction entered pursuant to the guilty plea itself, because the plea itself need not be disturbed." Martin, 149 Wn. App. at 698 (quoting Knight, 162 Wn.2d at 812).

The State also contends the issue is waived because it is not clear from the record that a double jeopardy violation occurred. When the courts say the double jeopardy violation must be clear from the record in a plea case, they mean the record cannot be *expanded* to prove a double jeopardy claim; the record before the trial judge must be sufficient to decide the issue. Knight, 162 Wn.2d at 811-12 1 (citing United States v. Broce, 488 U.S. 563, 575-76, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989) (a

guilty plea prevents a defendant from expanding the record to prove two convictions actually stem from a single conspiracy)).

Thus, "a guilty plea can waive double jeopardy protections where the violation is not apparent from the appellate record." Knight, 162 Wn.2d at 812. The petitioner must demonstrate a double jeopardy violation "on the face of the record" at the time of his plea. In re Pers. Restraint of Newlun, 158 Wn. App. 28, 29, 240 P.3d 795 (2010). But where the appellate court finds a double jeopardy violation based on the record, the remedy must follow. Knight, 162 Wn.2d at 812.

In Martin, for example, this Court recognized "[a]n indivisible plea of guilty does not prevent a double jeopardy challenge based on the same offense theory where the violation is clear from the record and was not otherwise waived." Martin, 149 Wn. App. at 691. The Court proceeded to find a double jeopardy violation by applying settled legal analysis to the facts in the record, to which the defendant had stipulated as part of the plea. Id. at 698-700 & n.48. Conversely, in Newlun, this Court held a double jeopardy claim was waived and denied the personal restraint petition because the record before the trial court in accepting the plea was insufficient to determine whether a double jeopardy violation occurred. Newlun, 158 Wn. App. at 35-36.

As argued in the opening brief and as set forth below, the record is sufficient to find a double jeopardy violation. France's double jeopardy claim is confined to the record on appeal, which is the record that was before the trial judge. See App. A-F, attached to opening brief. France did not waive his right to challenge his convictions on double jeopardy grounds.

b. The statutory unit of prosecution for harassment is the course of threatening conduct directed toward a particular victim.

There is a multistep approach to determine the unit of prosecution: "we first look to the statute to glean the intent of the legislature. Then we look to the statute's history, and finally to the facts of the particular case. If there is still doubt, we apply the rule of lenity in favor of a single unit." State v. Hall, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010). In accord with that sequential analysis, this reply first turns to legislative intent and history in determining whether the statutory unit of prosecution for harassment is an act or a course of conduct.

State v. Morales, 174 Wn. App. 370, 298 P.3d 791 (2013) provides the foundation for France's statutory unit of prosecution argument. The facts are different from France's case. But whether the facts of a particular case show a course of conduct is different from the threshold question of whether legislative intent and statutory history show the statutory unit of

prosecution for a crime is a course of conduct. State v. Leyda, 157 Wn.2d 335, 350, 138 P.3d 610 (2006).

Morales supports France's position that the statutory unit of prosecution for harassment is a course of conduct rather than each individual threat. There is no dispute on this point. Faced with this precedent, the State disagrees with Morales but its criticism does not withstand scrutiny.

The State finds fault with the Morales court's determination that "[t]he language used to define the operative criminal conduct in RCW 9A.46.020 — to 'knowingly threaten' — is not inherently a single act." Morales, 174 Wn. App. at 387. That is, the plain, operative language of the statute does not unambiguously show the unit of prosecution for harassment is every single act rather than a course of conduct. Yet the State posits the legislature, had it intended the crime to encompass a course of threatening conduct, would have used a phrase such as "repeatedly threatens" or "repeatedly harasses" rather than "knowingly threatens." SR at 34-35. Morales rightly recognized the same kind of argument was rejected in Hall: "In Hall, the Supreme Court was not persuaded by an argument that if the legislature intended a single unit of prosecution based on a course of conduct, it could have said so plainly.

What matters is not what it did not say, but what it did say." Morales, 174 Wn. App. at 386-87.

The State nevertheless beats the drum, repeatedly claiming the legislature would have specified harassment consists of "repeatedly harasses," a "course of conduct" or similar terminology if it had intended harassment to be a course of conduct crime, citing the civil unlawful harassment statute that contains such language. SR at 30-32, 35. Relying on State v. Alvarez, 74 Wn. App. 250, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995) and its comparison to the civil harassment statute, the State advanced the very same argument in Hall, where it claimed the unit of prosecution for witness tampering is per act, not per course of conduct. Hall, 168 Wn.2d at 733. The Supreme Court dispensed with this argument by noting "the Alvarez court was answering a very different question than the one posed here: whether the court should 'override the unambiguous elements section of a penal statute' by adding language from a statement of intent." Hall, 168 Wn.2d at 733 (quoting Alvarez, 74 Wn. App. at 258). "Here, we are simply interpreting the words set forth in the statute itself." Hall, 168 Wn.2d at 733. France engages in the same inquiry and asks no less of this Court.

Akin to its argument in France's case, the State in Hall argued if the legislature intended witness tampering to be an ongoing offense, it

would have used phrases similar to those used in the stalking statute, such as "engages in a pattern or practice" or "repeatedly harasses or repeatedly follows." Hall, 168 Wn.2d at 733 (citing RCW 9A.32.055 (homicide by abuse); RCW 9.46.0269 (gambling activity); RCW 26.50.110(5) (felony violation of a no contact order)). While the Supreme Court agreed "the language could have been more precise, in the statutes cited, repetition is an element of the substantive crime. By contrast, as the State properly notes, '[t]amper is a choate crime, complete when a single attempt of tampering is made.' . . . No repetition is necessary. But that does not reveal the unit of prosecution." Hall, 168 Wn.2d at 733-34 (internal citation omitted).

The elements section of the harassment statute, RCW 9A.46.020, unambiguously requires only one act for conviction, rather than multiple acts or threats. State v. Alvarez, 128 Wn.2d 1, 12-13, 904 P.2d 754 (1995). The elements section, however, does not answer the unit of prosecution question. Harassment, like witness tampering, is a choate crime. Like the witness tampering statute at issue in Hall, for harassment "[n]o repetition is necessary. But that does not reveal the unit of prosecution." Hall, 168 Wn.2d at 734. As in Hall, the legislature's failure to be more precise in the use of its language in the harassment statute does not mean it intended the unit of prosecution to be per act as opposed to per course of conduct.

Morales also pointed out the Court of Appeals in Alvarez relied on the fact that the venue provision (RCW 9A.46.030) treats a "harassment offense" as including a single threat to support its holding that the legislature intended a single threat could support conviction. Morales, 174 Wn. App. at 386 (citing Alvarez, 74 Wn. App. at 259). The provision, in treating a "harassment offense" as also including multiple threats ("threat or threats"), supports the conclusion that the unit of prosecution encompasses multiple threats. Morales, 174 Wn. App. at 386.

The State claims the venue provision gives no insight into the unit of prosecution analysis for harassment. SR at 35-36. The State wants to have its cake and eat it, too. It's fine with relying on the venue provision as an indicator of legislative intent for harassment when it suits its purpose, as in Alvarez. But when confronted with that same provision in this unit of prosecution case, the State protests the venue provision offers nothing of value. Standard principles of statutory construction are used to determine the legislature's intent. Leyda, 157 Wn.2d at 345. To this end, the entire statute is considered, as well as related statutes or other provisions in the same act that disclose legislative intent. Anderson v. Dep't of Corrections, 159 Wn.2d 849, 858, 154 P.3d 220 (2007). The venue provision of the harassment statute is a piece to be considered. The State complains the venue provision dictates venue for stalking, which

requires multiple acts. SR at 35-36. The venue provision covers harassment as well, and makes no distinction between stalking and harassment when using the language of "threat or threats." RCW 9A.46.030.

The unit of prosecution analysis looks to the statute as a whole. RCW 9A.46.010, the intent section of the harassment statute, "speaks in the plural, declaring the aim of 'making unlawful the repeated invasions of a person's privacy by acts and threats' showing a 'pattern of harassment.'" Alvarez, 74 Wn. App. at 257 (quoting RCW 9A.46.010). That intent section covers not only stalking but also harassment. The intent section's use of the plural "acts and threats" supports a conclusion that the legislature intended the crime of harassment to encompass not only a single act (which is sufficient to convict), but also multiple threats comprising a course of threatening conduct. Morales, 174 Wn. App. at 385.

Ironically, the Court of Appeals in Alvarez noted "the practical difficulties inherent in distinguishing a pattern of threatening conduct from a single act or threat."³ Alvarez, 74 Wn. App. at 260. It condemned the "hairsplitting" that would result if it interpreted the harassment statute to

³ In one of the cases on appeal in Alvarez, the defendant made several threats against the victim but the King County Prosecutor's Office charged only one count of harassment. Alvarez, 74 Wn. App. at 254-55, 260.

require proof of repeated threats demonstrating a pattern of harassment because the dividing line between one threat and multiple threats could be difficult to draw. Id. Now the State twists that case to argue there is no such thing as a pattern of threatening conduct but only a series of single acts or threats, each of which are separately punishable under a unit of prosecution standard. Alvarez itself counsels against that approach in assessing legislative intent.

The State's comparison to no-contact order violations is inapt. SR at 32 n.10. The operative language in the provision defining that crime punishes "a violation" of a no-contact order. RCW 26.50.110(1). "The Supreme Court 'has consistently interpreted the legislature's use of the word 'a' in a criminal statute as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously.'" State v. Brown, 159 Wn. App. 1, 11, 248 P.3d 518 (2010), review denied, 171 Wn.2d 1015, 249 P.3d 1029 (2011) (quoting State v. Ose, 156 Wn.2d 140, 147, 124 P.3d 635 (2005)). In contrast, the statute defining the crime of harassment contains no comparative language clearly denoting singularity, such as commission of "a threat." RCW 9A.46.020.

In its response, the State spends a good deal of effort in characterizing France's argument as "absurd" because it allows only one

conviction for more than one threat. The State's effort is long on rhetoric and short on substantive analysis.

"A unit of prosecution can be either an act or a course of conduct." Hall, 168 Wn.2d at 731. But by the State's logic, the unit of prosecution should always be an act and never a course of conduct because treating a crime as a course of conduct lets criminals off the hook and emboldens them to continue committing the same offense without additional consequence. Setting aside the doubtful premise that offenders typically study the law books before committing a crime to see what they can get away with, the State's real problem is with the very concept that a unit of prosecution could ever be a course of conduct for any crime.

The State's absurdity argument could be and has been lobbed at any crime where the unit of prosecution is a course of conduct rather than a single act. Consider assault, for example. The State attempts to show the "absurdity" of the notion that the unit of prosecution for harassment is a course of conduct by contending how silly it would be to treat assault as a course of conduct crime. SR at 23-24. But the unit of prosecution for assault is the course of conduct, not the act. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 984, 329 P.3d 78 (2014). By the State's logic, assault should not be a course of conduct crime because that approach lessens the deterrent effect of the statutory prohibition, i.e., it emboldens criminals to

commit repeated acts of assault knowing only a single assault will be punished. That argument lost.

Or consider the crime of possessing stolen property. A continuous possession of various pieces of stolen property belonging to different persons during a period of 15 days constitutes a single unit of prosecution. State v. McReynolds, 117 Wn. App. 309, 336, 340, 71 P.3d 663 (2003). By the State's logic, the unit of prosecution for possessing stolen property should not be a course of conduct because it emboldens criminals to accumulate the property of an infinite number of individuals knowing that he or she can be convicted of only a single count. That argument lost.

Consider also the crime of witness tampering. The State's argument in France's case mirrors the State's brief in Hall.⁴ As it does in France's case, the State in Hall lamented how absurd it would be to treat the unit of prosecution for witness tampering as a course of conduct because it would embolden an offender to commit infinite acts of tampering with impunity while only being subject to one conviction.⁵ The State lost that argument. Hall, 168 Wn.2d at 728, 734.

⁴ See Supplemental Brief of Respondent in Hall (available at www.courts.wa.gov/content/Briefs/A08/825581%20supp%20br%20of%20respondent.pdf).

⁵ Comparing the two briefs, it is apparent the King County Prosecutor's Office, in responding to France's argument, copied liberally from its losing brief in Hall.

The State suggests the legislature's subsequent amendment of the witness tampering statute in response to Hall vindicates its position. It does not. The unit of prosecution analysis changed because the statute changed. The statute as it now exists is not the one that the Supreme Court in Hall interpreted. The unit of prosecution holding in Hall is sound. It is the function of the judiciary to interpret the legislature's intent. Williamson, Inc. v. Calibre Homes, Inc., 147 Wn.2d 394, 401, 54 P.3d 1186 (2002). And "[i]t is a well-settled rule of statutory construction that when the highest court in the state has interpreted a statute, that interpretation operates as if it were originally written into it." State v. Dean, 113 Wn. App. 691, 699, 54 P.3d 243 (2002).

The Supreme Court in Hall interpreted the statute as written. Subsequent disagreement by the legislature does not change the validity of that interpretation, which is why the amended statute cannot operate retroactively. See Dean, 113 Wn. App. at 698 ("Curative amendments cannot be applied retroactively if they contravene a judicial construction of the original statute."). The legislature has since amended the statute, and if another unit of prosecution analysis were done based on the amended statute, then the outcome would be different because it is apparent that legislative intent on the unit of prosecution has changed.

The State draws the wrong lesson from Hall. In 2010, the Supreme Court, interpreting the witness tampering statute, held the unit of prosecution was the "ongoing attempt to persuade a witness not to testify in a proceeding." Hall, 168 Wn.2d at 734. The legislature swiftly responded by amending the witness tampering statute to specify "[f]or purposes of this section, each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120(3) (Laws of 2011 ch. 165 § 3, eff. July 22, 2011).⁶ The legislature does not hesitate to act when it perceives the judicial branch has misinterpreted its intent on the unit of prosecution.

For another example, in 2009 the Supreme Court in State v. Sutherby, 165 Wn.2d 870, 882, 204 P.3d 916 (2009) held the unit of prosecution under the statute criminalizing possession of child pornography was "one count per possession of child pornography, without regard to the number of images comprising such possession or the number of minors depicted in the images possessed." The legislature quickly responded to Sutherby by amending the statute in 2010, making plain that the unit of prosecution for first degree possession was per image or

⁶ See also Laws of 2011 ch. 165 § 1 ("In response to State v. Hall, 168 Wn.2d 726 (2010), the legislature intends to clarify that each instance of an attempt to intimidate or tamper with a witness constitutes a separate violation for purposes of determining the unit of prosecution under the statutes governing tampering with a witness and intimidating a witness.").

depiction, while the unit for second degree possession remained per possession. See State v. Polk, 187 Wn. App. 380, 390-92, 348 P.3d 1255 (2015) (detailing legislature's response to Sutherby).

The legislature knows how to act when it disagrees with a court's unit of prosecution analysis.⁷ It did so in response to Sutherby. It did so in response to Hall. But it has *not* amended the harassment statute in response to Morales. "This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). If the unit of prosecution analysis of the harassment statute in Morales is flawed, as the State contends, then we would expect the legislature to have already responded by amending the statute to clarify the unit of prosecution for harassment is

⁷ In 2006, the Supreme Court held the prosecution unit for identity theft to be any one act of obtaining, possessing, using, or transferring a single piece of another's identification or financial information, so that once the accused engaged in any one of the statutorily proscribed acts against a particular victim, the unit of prosecution includes any subsequent proscribed conduct. Leyda, 157 Wn.2d at 342-43. The legislature disagreed and amended the identity theft statute in 2008 to clarify that the "unit of prosecution . . . is each individual unlawful use of any one person's means of identification or financial information." Laws of 2008, ch. 207 § 1. That is the longest period of time that passed before the legislature amended a statute based on its disagreement with a court's unit of prosecution holding.

per individual threat. The legislature's failure to act supports France's argument that Morales correctly interpreted legislative intent.

The State says France's interpretation renders the stalking statute a nullity. SR at 30. Not so. If a person commits multiple acts of harassment, then that person can be charged and convicted of stalking. RCW 9A.46.110(1). The stalking statute remains operative and fulfills its purpose of protecting victims against repeated acts of harassment. The State could have charged France with three counts of stalking, the more serious crime, and left it at that. See RCW 9.94A.515 (for sentencing purposes, stalking has a seriousness level of V, harassment has seriousness level of III). Indeed, the State originally charged France with three counts of felony stalking; one count each for Paulsen, Daaugard and Beach. App. A. By amended information, the State replaced the stalking charges with 16 counts of felony harassment. App. B. The State opted to charge multiple counts of harassment in an effort to maximize punishment. France's case illustrates the danger of arbitrary charging practices.

The Washington Supreme Court has noted the U.S. Supreme Court "has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges." State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998) (citing Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) ("The Double

Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."); In re Snow, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887) (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

The unit of prosecution inquiry is "necessary to assure that the prosecutor has not been arbitrary in dividing ongoing criminal conduct into units in order to facilitate separate charges." State v. Anthone, 184 Wn. App. 92, 95, 336 P.3d 1166 (2014). In charging two or more violations of the same statute, the prosecutor will always attempt to distinguish the charges by dividing the evidence supporting each charge into distinct segments. Adel, 136 Wn.2d at 633-34. That's what prosecutors, in their nearly unbridled charging discretion, do. The State's argument that France can be convicted multiple times because he made multiple threats over a period of time "rests on a slippery slope of prosecutorial discretion to multiply charges." Id. at 636.

"Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges." State v. Korum, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). Prosecutorial discretion is not

limited by statute. Korum, 157 Wn.2d at 626. Due process is no bar to a prosecutor overcharging a defendant to secure a guilty plea or increasing the number or severity of charges in the event a defendant proceeds to trial. Id. at 627-31. The check on prosecutorial overreach is the prohibition on double jeopardy under the unit of prosecution analysis.

The State jacked up the charges against France when he did not plead guilty to the original set of three stalking charges. Instead of three counts of stalking, he faced 16 counts of felony harassment (with aggravators tacked on for good measure). See App. A, B (attached to opening brief). Indeed, the State threatened to add 27 counts. See App. I, J (attached to this brief). That it ultimately chose not to do so exposes the arbitrariness of its charging decision. The State in its trial memo noted France made more calls than those charged in the information. App. K at 2 (attached to this brief). The State represented it "could have charged these additional counts, but there was little to be gained in light of the large number of calls which are so easily proved through the voicemail/email system." Id. at p. 2 n.1. The State at the trial level recognized one conviction per threat was not needed.

The fact that the State could have chosen to charge France with even more counts of harassment but decided not to reveals the emptiness behind the State's insistence on appeal that nothing short of one conviction

for each individual threat is needed to protect victims from harassment and ensure the aim of the harassment statute is fulfilled. The State increased the charges from three stalking counts to 16 harassment counts because France did not accept a plea deal to the stalking charges, not because 16 counts of harassment was needed to honor the purpose behind the anti-harassment statute. App. I. The State could not increase the number of charged counts by sticking with stalking — a crime that encompasses repeated acts of harassment as an element. RCW 9A.46.110(1). So it switched over to felony harassment. The number of charges it chose is arbitrary, and dividing up France's ongoing threat campaign into separate charges for each threat is arbitrary under a unit of prosecution analysis.

In a footnote, the State claims the "continuing course of conduct" theory ensures only a single count of harassment will be filed when several acts occur close in time, suggesting this is a check on prosecutorial overreach. SR at 38 n.15 (citing State v. Handran, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989); State v. Marko, 107 Wn. App. 215, 231-32, 27 P.3d 228 (2001)). Untrue. The "continuous course of conduct" theory applies to questions of jury unanimity. Handran, 113 Wn.2d at 17-18; Marko, 107 Wn. App. at 231-32. Where there is no jury trial, as in France's case, there is no question of jury unanimity.

Further, a "continuous course of conduct" is exempt from the jury unanimity requirement. State v. Doogan, 82 Wn. App. 185, 191, 917 P.2d 155 (1996). If a prosecutor chooses to charge a single count rather than multiple counts, a continuous course of conduct adhering to that single count presents no unanimity problem. See State v. Stockmyer, 83 Wn. App. 77, 87, 920 P.2d 1201 (1996) ("a continuing course of conduct may form the basis of one charge in an information"). But there is nothing to stop the prosecutor from dividing up what would otherwise be considered a continuous course of conduct for unanimity purposes and charging multiple counts instead. That is prosecutorial discretion at work. That is what happened in France's case.

"[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts." State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). The continuous course of conduct can extend for a long period of time, so long as a series of acts were done with the same objective. See State v. Dyson, 74 Wn. App. 237, 249-50, 872 P.2d 1115, review denied, 125 Wn.2d 1005, 886 P.2d 1133 (1994) (for one charged count of telephone harassment, 50 calls made between January 8-11 and 15 calls between February 7-8 collectively comprised a continuous course of conduct);

State v. Craven, 69 Wn. App. 581, 588-89, 849 P.2d 681, review denied, 122 Wn.2d 1019, 863 P.2d 1353 (1993) (assaults occurring over three week period were a continuous course of conduct).⁸

There is no question France, in repeatedly calling his victims and uttering threats, engaged in a series of actions intended to secure the same objective of causing them to fear for their safety. In light of the cases cited above, especially Dyson, France's course of conduct would be deemed continuous as to each victim. So if we take the State at its word that it will charge only one count for a continuous course of conduct, then the State should have charged France with one count of harassment for each of the three victims, not 16 counts, and not the 9 counts to which France ultimately pled guilty. The prohibition on double jeopardy under the unit of prosecution analysis remains the check on the arbitrary exercise of prosecutorial discretion.⁹ See State v. Furseth, 156 Wn. App. 516, 520-22, 233 P.3d 902, review denied, 170 Wn.2d 1007, 245 P.3d 227 (2010)

⁸ See also State v. Knutz, 161 Wn. App. 395, 407-09, 253 P.3d 437 (2011) (multiple acts of theft committed over two years against single person was a continuous course of conduct); State v. Barrington, 52 Wn. App. 478, 481, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989) (multiple acts of promoting prostitution over a period of almost three months was a continuous course of conduct); State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988) (promoting prostitution over a 10-day period was a single ongoing offense, despite evidence of multiple acts of promotion of prostitution during the charging period).

⁹ Morales was decided after the trial proceedings in France's case.

(State could not charge more than single count for possession of child pornography under the unit of prosecution holding in Sutherby, thereby averting jury unanimity problem). The statutory unit of prosecution is per course of threatening conduct directed towards a person, not each individual threat.

c. There is one unit of prosecution for each victim on the facts of France's case.

All of which brings us to the unit of prosecution on the facts of France's case. "Once the statutory unit of prosecution is determined, an analysis is necessary to decide whether, under the facts of the case, more than one unit of prosecution is present." Leyda, 157 Wn.2d at 350.

The State describes France's argument as being a defendant can be convicted only once for innumerable threats made over an infinite period of time. That is an overblown mischaracterization. France's argument is that harassment is a course of conduct crime for double jeopardy purposes. If multiple threats directed over time toward a single target constitute a single course of conduct, double jeopardy prevents conviction for each threat.¹⁰

¹⁰ If a victim is in fear after a single threat, then the victim is free to report the threat to police and the State is free to arrest and prosecute the offender immediately, in this way preventing the initial threat from becoming a continuous course.

A number of factors can interrupt the course of conduct. For example, the course of conduct may be broken if the perpetrator changes the mode of transmission, if the State briefly stops the threats but the perpetrator then resumes them, or if a substantial amount of time passes between one set of threats and another. See Hall, 168 Wn.2d at 737-38 (in addressing witness tampering was single course of conduct on facts of case, recognizing separate units may be present where perpetrator changes his strategy by employing different modes of transmission, or if he is stopped by the State briefly and found a way to resume his witness tampering campaign, or a substantial period of time elapsed between the tampering communications).

That is precisely why France does not seek to vacate all of the convictions in the related personal restraint petition under 74508-5-I. The threats that formed the basis for those convictions constitute a new course of conduct because they were resumed following a prosecution and conviction for the original set of threats, and there is a substantial lapse of time between the two threat campaigns. The State complains there is nothing in the statutory language that shows the legislature intended the unit of prosecution to be dependent on the mode or manner of the threat. SR at 37 n.13. There doesn't need to be. The State improperly conflates the threshold determination of what constitutes the statutory unit of

prosecution with whether there is one unit of prosecution on the facts of the particular case.

In passing, the State asserts the threats are different. SR at 34. The trial prosecutor did not see it that way. In its trial memorandum, the State aptly described France's criminal conduct in relation to Paulsen and Beach: "In virtually each call France referenced that he was getting out of prison soon and he described the physical and sexual violence he intended to inflict on each victim when released." App. K at 2. The series of calls to Daugaard "were of the same character as those left for her associates." Id. at 3. In fact, the trial prosecutor described the calls as "highly repetitive" and that "there are certain themes, there are certain words, phrases that make them, frankly, in many respects, almost indistinguishable from one another." RP (10/18/11) 10.

The unit of prosecution does not turn on factual minutiae. It turns on what matters. The threats directed to the victims were of the same character: threats of violent, sexual assault after he got out of prison. The threats comprise an ongoing campaign of terror. It is that campaign that constitutes the unit of prosecution for each of the three victims.

d. The rule of lenity operates in France's favor.

Finally, if "the legislature has failed to specifically define the unit of prosecution in the statute or if its intent in that regard is not clear, we

must resolve the ambiguity in favor of the criminal defendant, thus preventing the State from turning a single transaction or course of conduct into multiple offenses." Leyda, 157 Wn.2d at 342-43. At the very least, the harassment statute is ambiguous on the unit of prosecution. It is, at the very least, susceptible to two reasonable interpretations, one of which is France's interpretation. And to the extent there is any ambiguity on whether the facts of France's case show one course of conduct, that ambiguity must operate in favor of France as well. Hall, 168 Wn.2d at 737.

B. CONCLUSION

For the reasons stated above and in the opening brief, France requests that this Court grant his personal restraint petition, vacate six of the nine convictions, and remand for resentencing.

DATED this 14th day of July 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Petitioner

APPENDIX I

FILED
KING COUNTY, WASHINGTON
APR 22 2011
SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING**

STATE OF WASHINGTON Plaintiff,

NO. 11-1-01715-6 SEA

vs.

**STIPULATED ORDER TO CONTINUE
OMNIBUS HEARING
(FOR COMB)**

William France
Defendant

The parties having stipulated that the omnibus hearing be continued to 4-29-2011 at 8:30 AM. D is charged with Felony Stalking. He will answer information to 29 counts of Felony Harassment. D needs to consult with his attorney before information is answered and the case proceeds to trial with the possibility of an exceptional sentence. D is 5'2"

IT IS HEREBY ORDERED that the omnibus hearing is continued to 4-29-2011 at 8:30 AM in E1201

DATED: 4-22-2011


JUDGE

 22467
Deputy Prosecuting Attorney
 22436
Attorney for the Defendant

Stipulated Order to Continue Omnibus Hearing
04/20/11

1/6

APPENDIX J

FILED
KING COUNTY, WASHINGTON
APR 29 2011
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
Plaintiff,)	NO. 11-1-01715-6 SEA
v.)	ORDER CONTINUING TRIAL
<u>William France</u>)	(ORCTD)
Defendant.)	(Clerk's Action Required)
CCN 66674)	

This matter came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 5-2-2011 is continued to 7-18-2011 *Upon agreement of the parties [CrR 3.3(f)(1)] or required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

plaintiff's counsel in trial; defense counsel in trial; other: first trial date - set for trial immediately off of calendar, it is necessary to amend to 27 counts of felony harass.

It is further ORDERED: time needed to continue to prepare

Omnibus hearing date is 6-17-2011
 Expiration date is 8-17-2011

DONE IN OPEN COURT this 29th day of April, 2011.

[Signature]
JUDGE

Approved for entry.

[Signature]
Deputy Prosecuting Attorney WSBA No.

Jim Farrell #24314

[Signature] add 29436
Attorney for Defendant WSBA No.

I agreed to the continuance:

[Signature]
Defendant [signature required only for agreed continuance]

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Interpreter
Trial Continuance
(Effective 1 September 2003)

14

APPENDIX K

FILED

KING COUNTY, WASHINGTON

OCT 18 2011

**SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY**

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 11-1-01715-6 SEA

vs.

TRIAL MEMORANDUM

WILLIAM FRANCE,

Defendant.

I. FACTS

In 2009 the defendant was convicted in King County Superior Court on a charge of Felony Violation of a Protection Order (09-1-05185-9). By a conservative count, this was the defendant's fiftieth criminal conviction (combined misdemeanor and felony history).

The current offense arises out of the defendant's unhappiness with his legal representation after his last conviction in King County Superior Court. In that case, the defendant was represented by Ms. Anita Paulsen, an attorney with The Defender Association (TDA) in Seattle Washington. In the course of the representation, Ms. Paulsen was assisted by a social worker in her office, Ms. Nina Beach. Beginning in late 2010, the defendant began what is best described as a campaign to terrorize Ms. Paulson and Ms. Beach.

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72A

1 Beginning in November, the defendant began leaving phone messages on the voice mail
2 systems of both Ms. Paulsen and Ms. Beach. In virtually each call France referenced that he
3 was getting out of prison soon and he described the physical and sexual violence he intended to
4 inflict on each victim when released. The authenticity of the calls cannot be questioned. Records
5 from TDA demonstrate that the defendant initiated the calls from his location within the State
6 Department of Corrections and each was received at the offices of TDA. From the main phone
7 number at TDA, the defendant was able to access the phone directory system to find the
8 extension for his intended victims. In each call, the defendant was able to locate the voicemail
9 account of Paulsen and Beach whereupon he would leave his message - to be found latter when
10 ever the victims checked their voicemail accounts.

11 Each of the calls charged in the information was indeed "found" by the victims. The calls
12 were also saved in a permanent archive in TDA. TDA has a system in which voicemail
13 messages (the audio file) can be saved to an email account which records the date and time. As a
14 result, each call from the defendant is preserved and available to be heard by the jury. On the
15 issue of authentication, in addition to the above, the victim's had no difficulty identifying
16 France's voice in each message. Further, the defendant made no effort to hide his identity. To
17 the contrary, virtually every call begins with "Hey, this is France callin' ya" - or some slight
18 variation (however, he does claim to be "Ray Stevens" in at least one call).

19 A third Victim was targeted soon after the calls to Ms. Paulsen and Ms. Beach began in
20 November. Once Ms. Beach and Ms. Paulsen reported the terrorizing phone calls to the
21 leadership of TDA, Assistant Director, Ms. Lisa Daugaard, wrote a letter (dated 11-24-10) to the
22 defendant asking him to "cease and desist..." from his "threatening and harassing" phone call's.
23
24

1 This triggered a series of calls from the defendant to Daugaard that were of the same character as
2 those left for her associates.

3 Recordings of the calls are already filed with the court as an exhibit. The exhibit is a disk
4 that was filed with the amended information at Omnibus. The purpose of the exhibit is to match
5 up each call (actually an audio file - plus the email and transcript of each call) with the
6 corresponding count in the information - to clarify which call/act by the defendant constitutes
7 which count. The information is arranged to center on each victim and is not chronological. That
8 is to say, counts I-VI reflect the various calls made to Ms. Paulsen. Counts VII-XI reflect the
9 calls made to Ms. Daugaard. Counts XII-XVI reflect calls made to Ms. Beach. One note about
10 timing and the charged counts: the calls that have been charged in the information (there were
11 many more than those charged) where those that were saved into the voicemail/email system at
12 TDA. The first calls were not saved into this system until approximately December 1, 2010.
13 After December 1, 2010, most calls were saved. Although a number of the initial calls were not
14 saved, testimony about these calls will be offered to establish why Ms. Daugaard wrote the letter
15 to the defendant in late November and as further evidence supporting the reasonableness of the
16 victim's fear¹.

17 The state has also alleged the existence of aggravating factors. As to the calls made to
18 the two lawyers, the state is alleging that these offenses were committed "against an officer of
19 the court ...in retaliation of the public official's performance of her duty to the criminal justice
20 system." In addition, every count includes an allegation that the offense "manifested a deliberate
21 cruelty to the victim."

22
23
24 ¹ Although the state could have charged these additional counts, there was little to be gained in
light of the large number of calls which are so easily proved through the voicemail/email system.

1 Alleging deliberate cruelty may seem unusual since the crime itself requires that the
2 defendant "knowingly did threaten to cause bodily injury." However, the calls at issue in this
3 case go far beyond what is required for the commission of the crime as charged. While it is
4 necessary to actually listen to the calls to get the full impact (there is simply no substitute)
5 excerpts give the court some idea of the proof supporting this allegation:

6 FRANCE: Hey Nina bitch. Yeah, this is France calling ya.... You got nightmares coming,
7 bitch. Because you're a fuckin' snitch. I don't like snitchin' bitches. You
8 understand? When I see you, I'm going to knock you out and fuck you
9 in your ass....I don't like snitchin' bitches. You're nothing worthless, worthless
10 mother fucking cunt. I'm going to get you.

11 This is France again. Did you get my message this morning? Were you, were you in the
12 closet over at the King County, King County Courthouse. In the closet with some mother
13 fucker sucking, sucking more cock so you can make more money?
14 Huh? ...You're a good dick sucking bitch, aren't ya? Plus, you're a snitch bitch. Yeah.
15 Well I got a surprise for you when I'm getting out of jail, bitch.

16 this is France again. Just remember I got a surprise for you
17 when I get out of prison. I'm thinking about putting a stick up your
18 fucking ass and rip your fucking blouse off so everybody can see those
19 brown tits right on the street. You got a surprise coming, you fucking
20 snitching bitch, nigger

21 FRANCE: Hey Lisa, this is France. In nine months you're going to be available
22 because you got a bullet with your' fucking name on it, bitch. Don't
23 interfere with anything I'm doing on the phone with fucking Paulsen.
24 You got that? Or Nina Beach. Got that? You got, you got that? Get it
up your cunt, bitch. Get wise. Don't be stupid.

this is France again. I'm trying to get a hold of you....
I got nine fucking months. And I got a surprise for you. Okay. Like I
said, you got a fucking bullet with your fucking name on it, bitch. So
does Paulsen. Okay. She's going to eat a shit sandwich first because
I'm going to put it right in the fuckin' kneecap. And I'm going to cut
your bra off when I see you in the mother fucking hallway or in the
fucking elevator. When I first put sights on you, bitch, I'm cutting your
bra right off you. And I'm going to do it. I don't give a fuck what the
consequences.

Daugaard, this is France again. Just remember all what I said to
you on your, on your voicemail will come true. Do you understand?

1 My dreams come true when I hit the bricks. I make them happen
2 because I'm a villain. I'm a good for nothing mother fucking white boy.... So beware,
3 bitch. I'm going to get you one way or another.

4 The defendant is a chronic criminal offender who has been in and out of jail and prison
5 throughout most of his adult life. In addition to the remarkably long criminal history, France's
6 convictions demonstrate his complete contempt for authority (including convictions for
7 attempting to elude police, resisting arrest and obstructing a public servant). Further, he has
8 shown his contempt for the community (6 DWI convictions, hit and run, malicious mischief
9 assault, robbery, etc). More disturbing is the fact that the defendant's criminal history includes a
10 large number of convictions relating to harassment and violations of various protection orders.

11 These convictions include the following:

- 12 • Felony Harassment 02-1-96390-6
- 13 • Felony Telephone Harassment 05-104985-1
- 14 • Harassment 99-1-04173-5
- 15 • Attempted Harassment 02-1-10116-6
- 16 • Telephone Harassment (DV) 05-1-04985-1
- 17 • Protection Order Violation 06-1-02578-1
- 18 • Harassment 394834 SP
- 19 • Violation of DV Protection Order 59456 KC
- 20 • Harassment 990303899 KC
- 21 • Harassment 990066952 BU
- 22 • Menacing 852170015 SP

23 For all of the above reasons, the state views this current series of crimes as an act of
24 psychological terrorism, far above the more customary conduct associated with felony

1 harassment. Upon conviction, the state will seek a punishment that is fully commensurate with
2 the defendant's criminal conduct.

3 II. TRIAL ISSUES

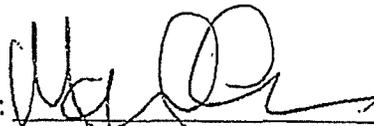
4 This trial is anticipated to take 1.5 to 2 days. The State will introduce the phone calls
5 through the three victims, each of whom will testify. The defense has indicated orally and in the
6 Omnibus Order that they have no witnesses to present (save the defendant, should he choose to
7 testify). Similarly, they have no motions for the trial court in the nature of a CrR 3.5 or CrR 3.6
8 motion. Similarly, the state is prepared to begin jury selection immediately

9
10 III. CONCLUSION

11 This memorandum has been prepared solely to acquaint the trial court with the issues as
12 they will be presented at trial.

13 DATED this 18 day of October, 2011.

14 Daniel T. Satterberg
15 King County Prosecuting Attorney

16
17 By: 
18 Mark Larson, WSBA #15328
19 Chief Deputy Prosecuting Attorney