

SUPREME COURT NO. 89235-1
COA NO. 68652-6-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Petitioner.

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Appellate Unit

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

The Honorable Harry McCarthy, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>COURT OF APPEALS DECISION</u>	1
C. <u>ISSUE PRESENTED FOR REVIEW</u>	1
D. <u>STATEMENT OF THE CASE</u>	1
E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u>	4
1. WHETHER THE "LAW OF THE CASE" DOCTRINE APPLIES TO DEFINITIONAL INSTRUCTIONS IN A CRIMINAL CASE, NOT JUST THE "TO CONVICT" INSTRUCTION, IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND THE COURT OF APPEALS DECISION CONFLICTS WITH EXISTING PRECEDENT ON THE ISSUE... ..	4
a. <u>The Court Of Appeals Misapplied The Law Of The Case Doctrine In Refusing To Recognize It Applies To Jury Instructions Defining Elements Of A Crime.</u>	4
b. <u>Instruction 9 Is The Only Instruction That Defines The Term "Threat," And Whether The State Proved The Existence Of A "Threat" To Convict For Felony Harassment Must Therefore Be Measured By That Instruction.</u>	10
F. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Spokane v. White,
102 Wn. App. 955, 10 P.3d 1095 (2000)..... 9

State v. Beaton,
34 Wn. App. 125, 659 P.2d 1129 (1983)..... 9

State v. Becker,
80 Wn. App. 364, 908 P.2d 903 (1996),
rev'd on other grounds, 132 Wn.2d 54, 935 P.2d 1321 (1997)..... 9

State v. Bowen,
157 Wn. App. 821, 239 P.3d 1114 (2010)..... 9

State v. Braun,
11 Wn. App. 882, 526 P.2d 1230 (1974),
review denied, 85 Wn.2d 1001 (1975) 9

State v. Brown,
132 Wn.2d 529, 940 P.2d 546 (1997),
cert. denied,
523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)..... 13

State v. Calvin,
__ Wn. App. __, 302 P.3d 509 (2013)..... 9, 10

State v. Fisher,
165 Wn.2d 727, 202 P.3d 937 (2009)..... 7

State v. Gray,
124 Wn. App. 322, 102 P.3d 814 (2004)..... 7

State v. Hickman,
135 Wn.2d 97, 954 P.2d 900 (1998)..... 5, 9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Jarvis</u> , 160 Wn. App. 111, 246 P.3d 1280, <u>review denied</u> , 171 Wn.2d 1029, 257 P.3d 663 (2011)	8
<u>State v. Laico</u> , 97 Wn. App. 759, 987 P.2d 638 (1999).....	7
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	7
<u>State v. Marko</u> , 107 Wn. App. 215, 27 P.3d 228 (2001).....	7
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	14
<u>State v. Smith</u> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	4
<u>State v. Stevens</u> , 158 Wn.2d 304, 143 P.3d 817 (2006).....	7, 8
<u>State v. Swanson</u> , 16 Wn. App. 179, 554 P.2d 364 (1977).....	9
<u>Tonkovich v. Dep't of Labor & Indus.</u> , 31 Wn.2d 220, 195 P.2d 638 (1948).....	4, 5
<u>Washburn v. City of Federal Way</u> , 169 Wn. App. 588, 283 P.3d 567 (2012), <u>review granted</u> , 176 Wn.2d 1010, 297 P.3d 709 (2013).....	9

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 4

United States v. Nacchio,
519 F.3d 1140 (10th Cir. 2008),
vacated in part on other grounds,
555 F.3d 1234, 1236 (10th Cir. 2009) 5

United States v. Spletzer,
535 F.2d 950 (5th Cir. 1976) 5

RULES, STATUTES, CONSTITUTIONS

RAP 13.4(b)(2) 6

RAP 13.4(b)(3) 6

RCW 9A.46.020(1)(a)(iv)..... 2

RCW 9A.46.020(2)(b)(i) 2

U.S. Const. amend. XIV 4

WPIC 2.24 10-12

WPIC 36.07.01 12

WPIC 36.07.03 12

WPIC 115.52 12, 13

A. IDENTITY OF PETITIONER

William France, the appellant below, asks this Court to accept review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

France requests review of the decision in State v. William France, Court of Appeals No. 68652-6-I (slip op. filed June 17, 2013), attached as appendix A. The Order Denying Motion for Reconsideration and Amending Opinion entered on July 23, 2013 is attached as appendix B.

C. ISSUE PRESENTED FOR REVIEW

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

D. STATEMENT OF THE CASE

The State charged William France with three counts of felony harassment against Anita Paulsen (counts I, II and III), two counts of felony harassment against Lisa Daugaard (counts IV and V),¹ and one count of witness intimidation against Daugaard (count VI). CP 11-14.

The jury was instructed "A person commits the crime of harassment when he, without lawful authority, knowingly threatens maliciously to do any act which is intended to substantially harm another

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).

person with respect to his or her physical safety and when he or she by words or conduct places the person threatened in reasonable fear the threat will be carried out." CP 37 (Instruction 6). Each of the five "to convict" instructions for harassment required the State to prove that France "knowingly threatened . . . maliciously to do any act which was intended to substantially harm [Paulsen/Daugaard] with respect to her physical health or safety[.]"² CP 38, 43, 44, 45, 46.

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

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

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

² Under RCW 9A.46.020(1)(a)(iv), a person is guilty of harassment if, "[w]ithout lawful authority, the person knowingly threatens . . . [m]aliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety." The crime is elevated to a felony if the State proves the person has previously been convicted of any crime of harassment against the same victim. RCW 9A.46.020(2)(b)(i).

interpreted as a serious expression of intention to carry out the threat. CP 40.

The State proposed the jury instructions and did not object to giving any of them. 1RP 19; 2RP 78.

At trial, the State produced evidence in support of the harassment charges showing France, while in custody, threatened physical harm against Paulsen and Daugaard in phone messages left on voicemail. 2RP 40-46, 64-71; Ex. 1. The following message formed the basis for the witness intimidation charge under count VI: "Don't come to court, girl. Don't come to court." Ex. 1; 2RP 73.

A jury returned guilty verdicts on all counts. CP 21-27. The court imposed an exceptional sentence of 120 months confinement. CP 54, 56.

France raised several issues on appeal, including the argument that the State failed to prove he made a "threat" necessary to sustain the felony harassment and witness intimidation convictions under the legal standard set forth in the jury instructions. See Brief of Appellant at 7-10; Reply Brief at 1-4.

In response, the State conceded the evidence was insufficient to convict France of the witness intimidation count under the "law of the case" doctrine, but contended the jury instructions still allowed the jury to

convict France on the felony harassment counts. Brief of Respondent at 6-14.

The Court of Appeals accepted the State's concession and reversed the witness intimidation conviction, but affirmed the harassment convictions. Slip op. at 1. The Court of Appeals held the "law of the case doctrine" only applies to the "to convict" instruction in a criminal case rather than all the instructions. Slip op. at 7-8. The Court of Appeals further held Instruction 9, which defines the term "threat," did not apply to the felony harassment counts. Slip op. at 8-9. Following the denial of his motion for reconsideration, France seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE "LAW OF THE CASE" DOCTRINE APPLIES TO DEFINITIONAL INSTRUCTIONS IN A CRIMINAL CASE, NOT JUST THE "TO CONVICT" INSTRUCTION, IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND THE COURT OF APPEALS DECISION CONFLICTS WITH EXISTING PRECEDENT ON THE ISSUE.

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

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). 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." Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948).

Where a party challenges the sufficiency of evidence on appeal, "[t]he sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions."³ Tonkovich, 31 Wn.2d at 225; accord State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); see also United States v. Spletzer, 535 F.2d 950, 954 (5th Cir. 1976); (unnecessary specific intent requirement included in jury instructions became necessary element of conviction under the "law of the case"); United States v. Nacchio, 519 F.3d 1140, 1157 (10th Cir. 2008) ("W]hen asking what facts the jury had to find in order to convict, we look to the elements of the crime as defined by law, except that if the government did not object to jury instructions containing additional requirements, it is required to prove those too."), vacated in part on other grounds, 555 F.3d 1234 (10th Cir. 2009) (en banc).

³ The jury in France's case 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).

Under the legal standard set forth in the jury instructions, the State failed to prove France made a "threat" necessary to sustain the felony harassment convictions. Instruction 9 defined "threat" as "to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." CP 40. The Court of Appeals acknowledged the convictions must be reversed if the sufficiency of the evidence is measured under Instruction 9 because France was in custody when he left the voice mails, and neither victim was present when the threats were made. Slip op. at 7.

The Court of Appeals, however, opined the "law of the case" doctrine in criminal cases extends no further than a single instruction — the "to convict" instruction. Slip op. at 7-8. Review is warranted because the scope of the doctrine in determining the sufficiency of evidence to sustain conviction is a significant question of constitutional law under RAP 13.4(b)(3). The Court of Appeals' decision also conflicts with other Court of Appeals' decisions on the matter. Review is therefore warranted under RAP 13.4(b)(2).

The Court of Appeals remarked "France cites no Washington authority where the appellate courts have held that, in a criminal case, a definitional instruction, rather than a to convict instruction, creates an additional element of the crime. Several decisions by Washington Courts

refute the premise that a definition may create an element of the crime." Slip op. at 7 (citing State v. Marko, 107 Wn. App. 215, 218, 27 P.3d 228 (2001); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999)).

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

But even where a definition of an element does not need to be included in the "to convict" instruction, the State is still required to prove the requirements embedded within that definition. See State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006) (conclusion that the purpose of sexual gratification is not an essential element of first degree child molestation that must be included in the "to convict" instruction "does not . . . relieve the State of its burden to show sexual gratification as part of its burden to prove sexual contact."); State v. Gray, 124 Wn. App. 322, 324-25, 102 P.3d 814 (2004) (conviction for third degree assault reversed due to insufficient evidence because State failed to prove assault on a

"health care provider" as defined by statute); State v. Jarvis, 160 Wn. App. 111, 119, 246 P.3d 1280 (looking to definition of "assault" to determine whether there is sufficient evidence to sustain a conviction for assault), review denied, 171 Wn.2d 1029, 257 P.3d 663 (2011).

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

As the Court of Appeals recently recognized in another criminal case, the "law of the case" doctrine is a broad concept that applies not only to superfluous requirements contained in "to convict" instructions but also to definitional instructions. State v. Calvin, __ Wn. App. __, 302 P.3d 509,

519-20 (2013).⁴ The decision in France's case squarely conflicts with Calvin on this point. Slip op. at 7-8.

The Court of Appeals tried to distinguish criminal cases from civil cases in this regard, but the distinction makes no sense. Slip op. at 7. The law of the case doctrine applies to both criminal and civil cases, even though no "to convict" instruction is present in civil cases. Washburn v. City of Federal Way, 169 Wn. App. 588, 600-02, 283 P.3d 567 (2012) (relying on Hickman in holding sufficient evidence supported jury's verdict under law of case doctrine), review granted, 176 Wn.2d 1010, 297 P.3d 709 (2013).

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

It would be a curious and irrational rule that authorized the law of the case doctrine to control whether sufficient evidence sustained a jury's verdict in a civil case based on all instructions but limited application of that doctrine in criminal cases to the "to convict" instruction. "The doctrine is based on the premise that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury." Calvin, 302 P.3d at 520. The basic function of the doctrine serves to "ensure that the appellate courts review a case under the same law considered by the jury." Id.

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

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

Hedging its bets, the Court of Appeals claimed "11 WPIC 2.24 contains a definition for threat that was used in instruction 6 and the to convict instruction" for felony harassment. Slip op. at 8. That conclusion

is mistaken. Under WPIC 2.24, "[t]hreat means to communicate, directly or indirectly, the intent" to do any number of enumerated acts.⁵ Neither Instruction 6 (CP 37) nor the "to convict" instruction contain the operative language quoted above. CP 37, 38, 43, 44, 45, 46. Instruction 6, defining the crime of harassment, and the "to convict" instructions only contain the

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

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

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

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

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

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

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

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

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

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

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

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

act threatened ("maliciously to do any act which is intended to substantially harm another person with respect to his or her physical health or safety"), but do not define what "threatened" means ("[t]hreat means to communicate, directly or indirectly, the intent" to do an enumerated act). WPIC 2.24.

WPIC 2.24, insofar as it defines "threat" for the purpose of harassment, is missing from the jury instructions given in France's case. The comment to WPIC 36.07.01 (defining crime of harassment) and WPIC 36.07.03 (the "to convict" instruction for felony harassment based on prior conviction) counsels practitioners to "use WPIC 2.24, Threat—Definition" with harassment instructions. Instruction 9 contains the "true threat" definition in accordance with WPIC 2.24, but does not contain the dispositive language of "[t]hreat means to communicate, directly or indirectly, the intent" to do one of the enumerated acts. The jury, in assessing whether the State proved its case, was only left with Instruction 9 to tell them what threat means: "As used in these instructions, threat also means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." CP 40.

Seeking to give effect to the word "also" in Instruction 9, the Court of Appeals noted the language of Instruction 9 mirrors the model definition for threat as applied to witness intimidation in WPIC 115.52.

Slip op. at 8. WPIC 115.52 explains the word "also" is to be used "[i]f this instruction is used with one or more of the definitions of threat contained in [11] WPIC 2.24 [, at 7.]" Slip op. at 8.

The problem is that there was not in fact another definition of threat contained in the jury instructions. The only definition of "threat" contained in the jury instructions is found in Instruction 9 and the evidence is insufficient to sustain the harassment convictions under the definition of threat contained in Instruction 9. The word "also" in Instruction 9 leads nowhere.

Instruction 9 on its face is not limited to witness intimidation. The jury was nowhere instructed that the definition of threat contained in Instruction 9 applied only to the witness intimidation charge. On the contrary, the jury was instructed to consider the instructions as a whole. CP 32 (Instruction 1); see also State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997) (jury instructions are to be read as a whole, and each one is read in the context of all others given), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

Furthermore, the court's opinion ignores that the "true threat" definition found in Instruction 9 applies to all the counts, including the harassment counts. The definition of threat in Instruction 9 therefore must be read in conjunction with the instructions related to the harassment

counts. Constitutional error would exist if it did not. See State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010) (failure to include an instruction defining true threat for felony harassment is constitutional error). The court's opinion dismembers Instruction 9, applying the totality of that instruction's requirements to the reversed intimidation count but not the harassment counts. Its reading of Instruction 9 is arbitrary. The evidence is insufficient to convict France of harassment under the jury instructions that were given.

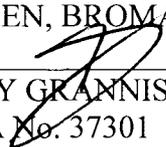
F. CONCLUSION

For the reasons stated above, France respectfully requests that this Court grant review.

DATED this 22nd day of August 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 WILLIAM NEAL FRANCE,)
)
 Appellant.)

No. 68652-6-I
DIVISION ONE
UNPUBLISHED OPINION
FILED: June 17, 2013

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COURT OF APPEALS DIV. I
STATE OF WASHINGTON

APPELWICK, J. — France was convicted of five counts of felony harassment and one count of witness intimidation for sending threatening voice mails. The court imposed an exceptional sentence. France appeals, claiming that: (1) evidence was insufficient to sustain the convictions; (2) the charging document was defective; and (3) the court erred in failing to enter written findings and conclusions justifying an exceptional sentence. The charging document was not defective, and the court did not err in its procedure for justifying an exceptional sentence. We accept the State's concession of error and reverse as to witness intimidation. We affirm the felony harassment convictions.

FACTS

This case involves William France's crimes against two victims: his former public defender, Anita Paulsen, and Lisa Daugaard, Paulsen's supervisor.

Paulsen was assigned to represent France in August 2009. The case was resolved in a plea agreement. Apparently upset with his representation, France began leaving voice mail messages for Paulsen in October 2010, threatening to sexually assault her upon his release.

Paulsen estimated that she received more than 12 calls from France through early 2011, threatening sexual assault and physical injury. Daugaard, sent a cease and desist letter to France. France continued to leave messages for Paulsen. He also left messages for Daugaard, threatening to sexually assault and physically harm Daugaard and her family members. Paulsen and Daugaard filed a police report, and France was charged with multiple counts of felony harassment. On November 10, 2011, the trial court convicted and sentenced France to 180 months and ordered that he was to have no contact with the victims.

Later that day, France left another voice mail for Daugaard. He stated:

"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."^[1]

Paulsen also received additional voice mails. On November 11, France left a voice mail stating:

"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 [a] friend, I called up a few of my friends. I told them about [you]. They'll be paying you a visit. Have a nice fucking life, you worthless fucking bitch."^[2]

¹ The record of this call was provided by way of Daugaard's verbatim transcription. France does not dispute its accuracy.

² No written transcript of these calls exists. Defense counsel states that he made a good faith attempt to transcribe the messages in his brief. The State does not dispute the accuracy of these transcriptions, and neither does this court.

On November 17, France left Paulsen another voice mail, stating:

"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 [you] know. It's gonna be okay. I told them to take care of ya. [You know] treat you really good."

Paulsen testified that she interpreted France's words, "[t]hey're gonna to take you out for lunch," as "meaning to take me out, period." She stated that she perceived these words as a threat, and she believed that France would recruit other people to hurt her.

On December 5, France left the following voice mail for Paulsen:

"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 want to do though, I want to put a bullet up your fucking ass."

[Approximately 40 seconds of silence]

". . . 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?"

On December 14, France left the following voice mail for Daugaard:

"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."

On December 14, 2011, the State brought new charges against France, stemming from these postsentencing voice mails. On December 27, France left a voice mail for Daugaard stating, "Don't come to court girl. Don't come to court." Daugaard testified that she interpreted this voice mail to mean, "don't cooperate with the new case, basically."

The State charged France with three counts of felony harassment of Paulsen, two counts of felony harassment of Daugaard, and one count of witness intimidation of Daugaard.

When it came time to instruct the jury, instruction 6 provided the following definition for felony harassment:

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.

The "to convict" instructions for felony harassment required the following elements to be proved beyond a reasonable doubt:

- (1) That . . . the defendant knowingly threatened"
 - (a) maliciously to do any act which was intended to substantially harm [the victim] with respect to her physical health or safety; and
- (2) That the words or conduct of the defendant placed [the victim] in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority;
- (4) That the defendant was previously convicted of the crimes of felony harassment against [the victim]; and
- (5) That the threat was made or received in the State of Washington.

The to convict instruction for witness intimidation required the following elements to be proven beyond a reasonable doubt:

- (1) That . . . 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 acts occurred in the State of Washington.

And, instruction 9 provided the following definition of the term "threat":

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.

A jury found France guilty on all counts. The court imposed an exceptional sentence by running counts I-III consecutive to counts IV-VI, for a total of 120 months. The judgment and sentence, entered March 23, 2012, stated, "An exceptional sentence above the standard range is imposed Findings of fact and Conclusions of Law are attached in Appendix D." No Appendix D was attached. On December 13, 2012, the court issued findings of fact and conclusions of law for an exceptional sentence. France appeals.

DISCUSSION

I. Sufficiency of the Evidence of Felony Harassment

France contends that insufficient evidence supports his convictions for felony harassment. His argument centers on the claim that the State failed to prove that, with each count of harassment, he made a "threat" as defined by instruction 9.

When we review a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). We consider both circumstantial and direct evidence as equally reliable and defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We review jury instructions de novo, within the context of the instructions taken as a whole. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions must inform the jury that the State bears the burden of proof for every element of the crime beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Under the law of case doctrine, jury instructions not objected to become the applicable law, even if the instructions contain an unnecessary element of the crime. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Thus, if an unnecessary element is added in the to convict instruction in a criminal case, without objection, the State assumes the burden of proving the added element. Id. In the event of a sufficiency of the evidence challenge to a law of case conviction, the sufficiency is determined with reference to the instructions. Id. at 102-03; Tonkovich v. Dep't. of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948).

France assigns no error to the instructions. Instead, he relies exclusively on Hickman and Tonkovich to argue that, because definitional instruction 9 was admitted without objection, the law of the case required the State to prove that France made a threat in accordance with the full text of instruction 9. And, France contends, the State failed to prove that with each count of felony harassment, he threatened Paulsen or Dugaard with the immediate use of force against persons present at the time of making the voice mails. Under this reading, evidence would be insufficient, because France was in custody when he left the voice mails, and neither victim was present.

Neither Hickman nor Tonkovich compel that result. Hickman involved an unnecessary element added to the to convict instructions, and Tonkovich was a civil case involving neither to convict instructions nor criminal burdens of proof. Hickman, 135 Wn.2d at 105-06; Tonkovich, 31 Wn.2d at 222-23. France cites no Washington authority where the appellate courts have held that, in a criminal case, a definitional instruction, rather than a to convict instruction, creates an additional element of the crime. Several decisions by Washington courts refute the premise that a definition may create an element of the crime. For instance, in State v. Marko, the defendant argued that the statutory definition of "threat," provided to the jury, created an alternative means of committing the crime of witness intimidation. 107 Wn. App. 215, 218, 27 P.3d 228 (2001). The court held that the statutory definition was "strictly definitional" and did not create an additional element of the crime justifying unanimity instruction. Id. at 218-20. Similarly, in State v. Laico, the court held that the definition of "great bodily harm" did

not add elements to first degree assault, “but rather is intended to provide understanding.” 97 Wn. App. 759, 764, 987 P.2d 638 (1999).

France was charged with two “threat” crimes: felony harassment and witness intimidation. Instruction 9 contained two definitions of threat. The first paragraph states, “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.” (Emphasis added.) France dismisses the term “also” as used in instruction 9 as having no effect. France is incorrect. This language parrots precisely the model definitional instruction for threat as applied to witness intimidation. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 115.52, at 438 (3d ed. 2008) (WPIC). The notes for 11A WPIC 115.52 explain that the word “also” is to be used “[i]f this instruction is used with one or more of the definitions of threat contained in [11] WPIC 2.24[, at 7].” And, 11 WPIC 2.24 contains a definition for threat that was used in instruction 6 and the to convict instruction.³

Here, instruction 6 and the to convict instruction, modified the word “threaten,” with the phrase, “maliciously to do any act which is intended to substantially harm another person with respect to his or her physical health or safety.” This defined “threaten” for purposes of the felony harassment charges. But, that definition did not apply to the witness intimidation charge. The first paragraph of instruction 9 defined

³ The second paragraph of instruction 9 defines “true threat.” “True threat” is not an essential element of the crime to be incorporated in the to-convict instruction. State v. Allen, 176 Wn.2d 611, 632, 628, 294 P.3d 679 (2013). Rather, it safeguards the defendant’s free speech rights when threat is an element in the to convict instructions. Id. at 632.

threat for witness intimidation, but it had no application to felony harassment. It did not add an element to be proven.

The State needed to prove, in relevant part, that France knowingly threatened to maliciously do an act intended to substantially harm the victim's physical health or safety. France told Dugaard, "You think for one fucking minute nothing's going to happen to you? . . . Anita Paulsen, same thing, eight years, you'd better find a new job." He said that in 10 years he's "gonna get" her, and that he's going to sexually assault her in the elevator. He told Paulsen that he would "put a bullet" in her, sexually assault her, and anally penetrate her with a broom. He told Paulsen that his friends were going to pay her a visit. He also stated, "[A] couple of my buddies are coming to see ya. They're going to take you out for lunch." Paulsen testified that she interpreted these words as a threat, "meaning to take me out, period." A rational trier of fact could determine that in leaving these voice mails, France intended to substantially harm Paulsen and Dugaard with respect to their physical health or safety. We conclude that evidence was sufficient to support France's felony harassment convictions.

II. Witness Intimidation Conviction

France also contends that the evidence was insufficient to support his conviction for witness intimidation. Specifically, France argues that the voice mail he left with Dugaard stating, "Don't come to court, girl. Don't come to court," is insufficient to establish that he made a threat under RCW 9A.72.110(1)(c), as read with instruction 9.

Consistent with the to convict instruction, under RCW 9A.72.110(1)(c), a person is guilty of witness intimidation when he (1) uses a threat; (2) against a current or

prospective witness; (3) in attempt to induce that person to absent herself from legal proceedings for which she was summoned to testify. As we explained, instruction 9 defines "threat" as used in the witness intimidation statute.

France argues that the State presented insufficient evidence that he intended to immediately use force against any person who was present at the time that he left Dugaard the voice mail in which he stated, "Don't come to court." We reiterate that the law of the case, as set forth in Hickman and Tonkovich, does not compel a definitional instruction to be accepted as an element in the to convict instructions where the appellant assigns no error to the to convict instructions. Nonetheless, the State concedes error on the grounds that the jurors had to refer to instruction 9 in order to define threat for the purposes of witness intimidation. We accept the State's concession. We reverse and dismiss the witness intimidation charge.

III. Charging Document

France next argues that the charging document was constitutionally defective, because it did not include all essential elements of the crimes charged. Namely, France contends that because a "true threat" is an essential element of witness intimidation and felony harassment, it must be included in the charging document. Precedent dictates otherwise.

We review challenges to the sufficiency of a charging document de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). To be constitutionally adequate, a charging document must include all essential elements of the crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). To

avoid unconstitutional infringements upon protected speech, we interpret statutes criminalizing threatening statements as proscribing only true threats. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A “true threat” is a statement that, based on the context or circumstances, a reasonable person would foresee that the statement would be interpreted as a serious expression of intent to inflict bodily harm upon or kill another person. Id.

After the parties submitted their briefs for this case, the Washington Supreme Court decided State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). It concluded that the definition of a “true threat” is not an essential element of felony harassment that must be alleged in the charging document provided the definition is supplied to the jury a defendant’s First Amendment rights are sufficiently safeguarded. Id. at 630. Here, Allen controls. France was charged with felony harassment and witness intimidation. True threat was not included in the charging document, but the jury was given an instruction defining true threat in the second paragraph of instruction 9. Failure to include the true threat requirement in the charging document does not amount to error.

IV. Findings of Fact and Conclusions of Law Justifying Exceptional Sentence

France argues that his case should be remanded for entry of findings of fact and conclusions of law regarding exceptional sentence, because this document was not attached to the judgment entered on March 23, 2012. Whenever a trial court imposes an exceptional sentence, the court must explain the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535.

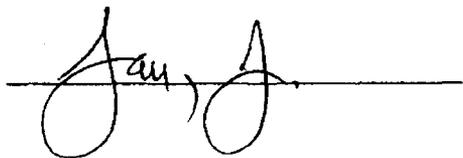
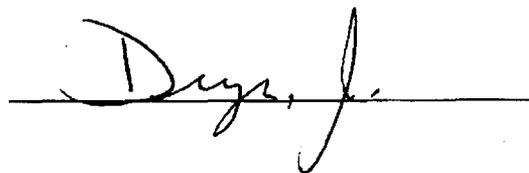
Tardy findings were entered on December 13, 2012. Findings and conclusions may be submitted and entered while an appeal is pending if there is no prejudice to the defendant and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004).

The trial court's December 13 findings satisfy RCW 9.94A.535. France does not argue that he was prejudiced by delay, and we discern no actual prejudice from the record or the briefs. And, no evidence indicates that the findings were tailored in response to France's arguments on appeal. Rather, the findings essentially repeat the Judge's oral ruling at sentencing. The written findings did not deviate from, nor substantively add to, the terms articulated at oral ruling. No remand is necessary.

We affirm.

A handwritten signature in cursive script, appearing to read "Applegate J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Jay J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Dyer J.", written over a horizontal line.

APPENDIX B

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

STATE OF WASHINGTON,)	
)	No. 68652-6-1
Respondent,)	
)	ORDER DENYING MOTION
v.)	FOR RECONSIDERATION
)	AND AMENDING OPINION
WILLIAM NEAL FRANCE,)	
)	
Appellant.)	

The appellant, William France, having filed a motion for reconsideration of the opinion filed June 17, 2013, and a panel of the court having determined that the motion should be denied but the opinion should be amended; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied. It is further

ORDERED that the opinion be amended as follows:

DELETE the last two sentences of the first full paragraph of the opinion on page 10, which read:

We accept the State's concession. We reverse and dismiss the witness intimidation charge.

REPLACE those sentences with the following sentence:

We accept the State's concession and reverse the witness intimidation conviction.

DELETE the last sentence of the second paragraph on page 12 which reads:

No remand is necessary.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JUL 23 AM 11:01

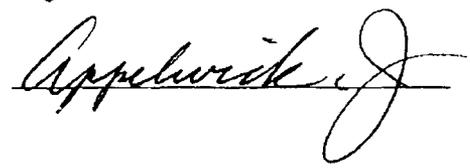
DELETE the last paragraph of the opinion on page 12 which reads:

We affirm.

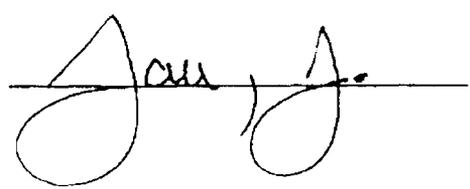
REPLACE that paragraph with the following:

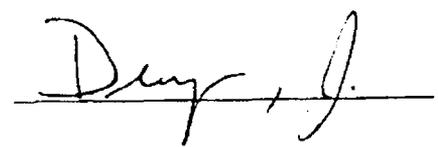
We reverse the conviction for witness intimidation, otherwise we affirm.

DATED this 23rd day of July, 2013.

A handwritten signature in cursive script, appearing to read "Appelwick", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Jones", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "Dwyer", written over a horizontal line.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Respondent,)	
)	SUPREME COURT NO. _____
v.)	COA NO. 68652-6-I
)	
WILLIAM FRANCE,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

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

THAT ON THE 22ND DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF AUGUST 2013.

X Patrick Mayovsky

2013 AUG 22 PM 4:19
COURT CLERK'S OFFICE
STATE OF WASHINGTON