

COA NO. 68652-6-I

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

REC'D  
JAN 23 2013  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 JAN 23 PM 4:16

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

The Honorable Harry McCarthy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

The State concedes the evidence is insufficient to support the witness intimidation conviction under the law of the case doctrine. Brief of Respondent (BOR) at 12-14. That conviction must be reversed and the charge dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (setting forth remedy for conviction unsupported by sufficient evidence).

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

The State, however, claims the evidence is sufficient to support the harassment convictions because the instruction defining the crime of felony harassment and the "to convict" instructions for harassment "contained a definition of what constitutes a threat" that was supported by the evidence. BOR at 6-12. The State is wrong.

The instruction defining the crime of felony harassment does not define "threat." It defines the crime of harassment. CP 37. Contained within that definition of the crime of harassment is the requirement that a person knowingly threatens to do any act intended to substantially harm the victim's health or safety. It does not define what "threat" means.

The "to convict" instructions likewise do not define what "threat" means, but rather list the elements that the State needed to prove, one of which is a threat. CP 38, 43-46. None of those instructions defines what constitutes a "threat."

Instruction 9 defined the term "threat" as used in the instruction defining the crime of harassment and the to-convict instructions. Instruction 9 is the only instruction that defines what "threat" means and, as the State concedes, the evidence is insufficient to convict if Instruction 9 measures the existence of a threat. BOR at 9.

Jury instructions are to be read as a whole, and each one is read in the context of all others given. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). This axiomatic principle requires that the definition of threat in Instruction 9 be incorporated into the instructions regarding felony harassment.<sup>1</sup>

Read in conjunction with the instruction defining the crime of harassment and the "to convict" instruction listing the elements, Instruction 9 requires the State to prove the threat connected with "any act which is intended to substantially harm another person with respect to his

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<sup>1</sup> The jury in France's case was instructed to consider the instructions as a whole. CP 32 (Instruction 1).

physical health or safety" must be a threat "to communicate the intent immediately to use force against any person who is present at the time." It is undisputed that the evidence is insufficient to show France communicated the intent immediately to use force against any person who was present at the time.

Contrary to the State's suggestion, the issue is not whether jurors could rely on a common understanding of the term "threat." BOR at 11. This is not a case where there is no definition of the term. The jury was instructed on what the term "threat" meant in Instruction 9 and that definition became the law of the case. Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948); Hickman, 135 Wn.2d at 102.

The definition of "threat" contained in Instruction 9 is not limited to the crime of witness intimidation. The jury was not instructed that the definition of threat only applied to the witness intimidation count. Instruction 9 therefore applies to all the counts and is read in conjunction to the instructions related to the harassment counts.

Indeed, the conclusion is irrefutable because Instruction 9 also contains a definition of a "true threat," which the State recognizes applies to all the counts, including the harassment counts. BOR at 11. 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 was constitutional error).

The State cannot have it both ways, arguing one portion of Instruction 9 applies to all counts but that another portion applies only to the witness intimidation count. Instruction 9 is not limited in that way and cannot be parsed in that manner. The harassment counts must be dismissed for insufficient evidence under the law of the case doctrine.

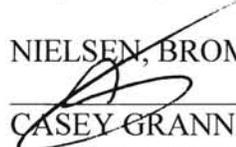
B. CONCLUSION

For the reason stated above and in the opening brief, France requests reversal of the convictions and dismissal of the charges with prejudice.

DATED this 23<sup>rd</sup> day of January 2013.

Respectfully Submitted,

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CASEY GRANNIS

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Respondent,	)	
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WILLIAM FRANCE,	)	
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Appellant.	)	

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**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 23<sup>RD</sup> DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF JANUARY 2013.

X Patrick Mayovsky

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