

NO. 44131-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DONNA DRECKMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Ms. Dreckman gave a statement to police in which she stated that her boyfriend provided her with blank checks and demanded she forge them. He threatened her with harm if she refused, and hit and threw things at her until she complied. At trial, she argued that although she committed the forgery, she did so only because she was afraid of her boyfriend, who had access to a firearm and had threatened to kill her in the past. The court instructed the jurors on the duress defense, but failed to direct them that they must return a verdict of not guilty if they found that Ms. Dreckman met her burden of proof for this defense. This was a manifest constitutional error, which was not harmless, and therefore requires reversal.

B. ASSIGNMENT OF ERROR

The court's failure to instruct the jury on its duty to return a not guilty verdict if Ms. Dreckman met her burden in proving the duress defense was a manifest constitutional error that requires reversal.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Reversal is required when there is a manifest constitutional error in jury instructions that is more than merely trivial, formal, or academic. Here, the court failed to instruct the jury that it must return a

verdict of not guilty if it found Ms. Dreckman acted under duress. Is Ms. Dreckman entitled to a reversal of her conviction and remand for a new trial?

D. STATEMENT OF THE CASE

An acquaintance invited Ms. Dreckman and her boyfriend at the time, Bruce Rehm, to stay in his trailer after they found themselves homeless. 8/26/08 RP 41-42. The trailer was owned by Jacqueline Kremer and located on her property. 8/26/08 RP 41. Ms. Dreckman and Mr. Rehm stayed there only a short time, leaving less than two weeks after their arrival. Id.

While Ms. Dreckman lived on the property, she assisted Ms. Kremer by driving her to errands on several occasions. 8/26/08 RP 44. While Ms. Kremer never spoke to Ms. Dreckman about Mr. Rehm, she testified that based on her own interaction with Mr. Rehm she did not feel he was a nice person and she did not trust him. 8/26/08 RP 44, 49.

At some point, Ms. Kremer discovered that several checks, written to Bruce Rehm and a man named Curtis Atlis, were fraudulently drawn against her bank account. 8/26/08 RP 43.

Ms. Dreckman gave a statement to police in which she admitted that she had written some of the forged checks. 8/11/08 RP 10; Supp.

CP 55 (Exhibit No. 5). However, she told police that she had only forged the checks because Mr. Rehm threatened that “something bad might happen” to her if she refused, and that he hit her and threw things at her in order to force her to comply. Supp. CP 55 (Exhibit No. 5).

At trial, Ms. Dreckman testified that Mr. Rehm was well-armed with a variety of weapons and that she was afraid of him. 8/26/08 RP 88. In the past, Mr. Rehm had physically assaulted her and threatened to kill her. 8/26/08 RP 87-88. Mr. Rehm threw batteries at her, pulled her hair, and dragged her across the floor. 8/26/08 RP 87. At one point, Ms. Dreckman took out a restraining order against Mr. Rehm, but eventually reconciled with him only to have the abuse begin again. 8/26/08 RP 85. Like many victims of domestic violence, Ms. Dreckman repeatedly hoped that “things would get better.” 8/26/08 RP 87.

Mr. Atlis similarly testified that Mr. Rehm was a methamphetamine user who he had seen carry weapons, including firearms. 8/26/08 RP 58, 61-62. Mr. Atlis cashed two of the checks, written in his name, at Mr. Rehm’s request. 8/26/08 RP 53-54. No evidence was presented that Ms. Dreckman benefitted financially from

the forged checks. Instead, the evidence suggested that only Mr. Rehm and Mr. Atlis profited from the crime. 8/26/08 RP 54, 92-93.

In closing, Ms. Dreckman argued the jury should acquit because although she did write the checks, she did so only because she feared Mr. Rehm would harm her if she refused. 8/26/08 RP 111-12. In the State's proposed jury instructions, it included an instruction on the defense of duress. 8/26/08 RP 36-37. The court agreed to give this instruction, but failed to instruct the jury that it must return a verdict of not guilty if it found Ms. Dreckman acted under duress. CP 23. The final line of the pattern instruction states: "If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [*as to this charge*]." 11 Wash. Prac., Pattern Jury Instr. Crim. 18.01 (3rd ed. 2008) ("WPIC") (emphasis original). The court's Instruction Number 13, which mirrored the pattern instruction on duress, omitted this critical statement. CP 23.

E. ARGUMENT

The court impermissibly failed to tell the jury that it must find Ms. Dreckman not guilty if it agreed she acted under duress.

- a. Jury instructions must make it manifestly apparent when it is the jury's duty to find a defendant not guilty.

A jury's role is not to search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn.App. 103, 120, 286 P.3d 402 (2012) ("truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden"). Instead, the job of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

The presumption of innocence may be diluted or even "washed away" by confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id. "A corollary of the due process requirement that a jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return a verdict of not guilty if the State does not carry its burden." State v. Smith, ___

Wn.App. ___, 298 P.3d 785, 789-90 (2013). This must be conveyed in the jury instructions. Id.

In Smith, the trial court substituted “should” for “it will be your duty” in the reasonable doubt instruction so that it read:

On the other hand, if, after weighing all the evidence, you have a reasonable doubt..., then *you should* return a verdict of not guilty.

Id. at 788 (emphasis original). This Court reversed, finding that although it was likely that the jury understood “should” meant they were required to do so, it was impossible to be certain that the jurors had understood this. Id. at 790. Jury instructions, read as a whole, must make the relevant legal standard manifestly apparent to the average juror. Id. at 791 (quoting State v. Kylo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009)). In Smith, this Court found that the substitution of “it will be your duty” with “should” failed to meet this requirement. Id.

- b. Manifest errors affecting a constitutional right can be raised for the first time on appeal and are reviewed de novo.

A party who fails to object to a jury instruction at trial can waive a claim of error on appeal. State v. O’Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); see also State v. Scott, 110 Wn.2d 682, 686-87, 757

P.2d 492 (1988). However, “[t]he general rule that an assignment of error be preserved includes an exception when the claimed error is a ‘manifest error affecting a constitutional right.’” O’Hara, 167 Wn.2d at 98 (quoting RAP 2.5(a)). Constitutional errors are afforded special consideration because they often result in serious injustice to the accused. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing Scott, 110 Wn.2d at 686-87). A constitutional error is considered “manifest” when it created actual prejudice to the defendant; however, constitutional errors are presumed prejudicial. O’Hara, 167 Wn.2d at 99 (citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)); Scott, 110 Wn.2d at 686 n.3.

The Supreme Court has held that a number of errors in jury instructions constitute a manifest constitutional error, including: directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. O’Hara, 167 Wn.2d at 100 (citations omitted). Those omissions that have been found not to constitute a manifest constitutional error include: the failure to instruct on a lesser included offense and the failure to define individual terms. Id. (citations omitted). When

drawing the distinction, the court has examined whether an omission in the jury instructions created “practical and identifiable consequences during the trial that should have been obvious to the trial court.” Id. at 108-09.

An error of law in jury instructions, as alleged here, is reviewed de novo. State v. Garbaccio, 151 Wn.App. 716, 732, 214 P.3d 168 (2009) (citing State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005)).

- c. The court’s failure to instruct the jury it must find Ms. Dreckman not guilty if it determined she acted under duress is a manifest error affecting a constitutional right.

Ms. Dreckman admitted to forging the checks at issue. 8/11/08 RP 4. Her sole defense at trial was that although she wrote the checks out, she did so only because she was fearful of Mr. Rehm. 8/26/08 RP 78, 87-88. The evidence presented at trial suggested that she had very good reason to fear him. Both she and Mr. Atlis testified that Mr. Rehm used illegal drugs and had access to a firearm. 8/26/08 RP 58, 61-62, 84-85, 88. Mr. Rehm had been physically abusive toward Ms. Dreckman in the past and had threatened to kill her. 8/26/08 RP 87-88. In order to force her to write the checks, Mr. Rehm hit and threw things at Ms. Dreckman, and threatened that “something bad might happen” if she refused to comply with his demands. Supp. CP 55 (Exhibit No. 5).

In addition, there was no evidence that Ms. Dreckman personally profited from the crime. None of the checks were made out in Ms. Dreckman's name, there was no evidence that she was present when the checks were cashed, and no evidence that Mr. Rehm or Mr. Atlis shared the money they received with her. 8/26/08 RP 70.

Prior to trial, Ms. Dreckman requested the jury be instructed on the affirmative defense of duress, and this instruction was included in the State's proposed instructions. 8/26/08 RP 36-37. Instruction Number 13, given by the court, mirrored the duress pattern instruction:

Duress is a defense to a criminal charge if:

- (a) The defendant participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant or another person would be liable to immediate death or immediate grievous bodily injury; and
- (b) Such apprehension was reasonable upon the part of the defendant; and
- (c) The defendant would not have participated in the crime except for the duress involved.

The defense of duress is not available if the defendant intentionally or recklessly placed herself in a situation in which it was probable that she would be subject to duress.

The burden is on the defendant to prove the defense of duress by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

CP 23; see also WPIC 18.01.

The only difference between the pattern instruction and the court's instruction was that the court's duress instruction omitted the final, critical line:

If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [*as to this charge*].”

WPIC 18.01 (emphasis original); see also CP 23.

This omission was a manifest constitutional error. The purpose of the duress instruction was to direct the jurors that they must return a verdict of not guilty if the defendant proved the defense of duress by a preponderance of the evidence. By omitting the last line, the court outlined the defendant's burden for the jury, but failed to inform the jurors that they were required to return a verdict of not guilty if Ms. Dreckman met that burden. This interfered with Ms. Dreckman's right to a fair hearing and denied her due process. See Smith, ___ Wn.App. ___, 298 P.3d at 789.

The practical and identifiable consequence of the instructional omission is that one or more jurors may have believed that Ms. Dreckman proved the defense of duress by a preponderance of the evidence, but did not understand that such a belief required acquittal, given that the instructions were silent on this issue. See O’Hara, 167 Wn.2d at 108-109 (manifest error when an omission in a jury instruction creates a practical and identifiable consequence during the trial); Smith, ___ Wn.App. ___, 298 P.3d at 790 (reversible error when language in the instruction does not make it manifestly apparent that it is the jury’s duty to return a verdict of not guilty).

It would have been obvious to the trial court that the omission of such an important and fundamental concept in the duress instruction constituted error, had it been discovered at the time, as the instruction otherwise followed the pattern instruction and the omitted information was not provided elsewhere in the jury instructions. See O’Hara, 167 Wn. 2d at 108-09 (no manifest error where the omitted portion of the instruction was duplicative and the error would therefore not be obvious to the trial court). Thus, the omission of this line from the duress instruction was a manifest error affecting a constitutional right. Id.

- d. Reversal is required because the manifest constitutional error was not harmless.

The effect of the constitutional error should be examined according to the standard provided in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Scott, 110 Wn.2d at 688; see also O'Hara, 167 Wn.2d at 99 (“[a]s noted in... Scott, a harmless error analysis occurs after the court determines the error is a manifest constitutional error”). Under Chapman, in order to hold that a constitutional error is harmless, the court “must be able to declare a belief that it was harmless beyond a reasonable doubt.” 386 U.S. at 24.

Here, no such declaration can be made. “An instructional error is harmless only if it ‘is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*” State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997) (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)) (emphasis original).

At trial, no one contested that Ms. Dreckman had written the forged checks. 8/26/08 RP 92-93. Ms. Dreckman’s sole defense was that she had acted out of fear of her boyfriend, Mr. Rehm. 8/26/08 RP

111-12. Ample evidence was presented both that this fear was reasonable, because of Mr. Rehm's access to weapons and his violent prior behavior toward Ms. Dreckman, and that Ms. Dreckman gained no personal profit from commission of the crime. 8/26/08 RP 54, 87-88, 92-93. Thus, the duress instruction, and specifically the line requiring the jury to acquit if Ms. Dreckman met her burden, was critical to Ms. Dreckman's defense. The error made was not trivial, formal, or academic. To the contrary, it was the only line in the jury instructions that directed the jury on what to do if they agreed with Ms. Dreckman's account of the facts. At a minimum, this creates a reasonable doubt that its omission affected the final outcome of the case.

Indeed, the omission of this line from the jury instruction was akin to no instruction at all, as it gave the jury no direction on how to proceed if they believed Ms. Dreckman proved the duress defense by a preponderance of evidence. A defendant is entitled to have the jury instructed on her theory of the case if there is evidence to support that theory. State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (quoting State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)). A failure to do so is reversible error. Id.

In Harvill, the trial court denied the defendant's request for the duress instruction because no evidence was presented that an explicit threat had been made. Id. at 258. The Supreme Court reversed, finding an explicit threat was not required. Id. at 263. The court held that “[p]erhaps the jurors would have dismissed Harvill’s testimony as patent fiction, but the trial court’s failure to instruct them on duress never gave them that chance.” Id. at 264.

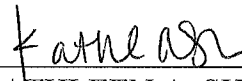
Ms. Dreckman was entitled to an instruction on the duress defense, having presented significant evidence at trial to support her theory of the case, and the omission of the final line effectively denied her that instruction. Because this denial was not harmless, this Court must reverse and remand for a new trial. See Walden, 131 Wn.2d at 479.

F. CONCLUSION

Failing to instruct the jury of its duty to find Ms. Dreckman not guilty if she acted under duress was a manifest constitutional error for which this Court must reverse and remand for a new trial.

DATED this 1st day of July, 2013.

Respectfully submitted,



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


STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 44131-4-II
)	
DONNA LEE DRECKMAN,)	
)	
APPELLANT.)	

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