No. 44131-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

DONNA DRECKMAN,
Appellant.

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

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Should this Court reject the appellant's claim because she proposed the very language she now challenges on appeal, and thus, under the invited error doctrine, she is barred from raising the issue on appeal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with four counts of Forgery. CP 1-4. A jury found the defendant guilty as charged. CP 15, 16, 17, 18. The defendant received a standard range sentence. CP 31-41.

2. JURY INSTRUCTION

At trial appellant proposed the following instruction on the defense of duress taken from WPIC 18.01:

> 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 65-66; 08/26/08 RP 36-37.

This proposed instruction did not contain the last sentence of the instruction as contained in WPIC 18.01 which provides that "[i]f 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]." The court gave the instruction as proposed by appellant. CP 23.

C. ARGUMENT

The Invited Error Doctrine Precludes Appellate Review.

The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). With respect to the application of the doctrine to jury instructions, the Supreme Court has held that "[a] party may not request an instruction and later claim on appeal that the requested instruction was given." State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The doctrine of invited error applies when an instruction given by the trial court contains the same error as the defendant's proposed instruction. State v. Neher, 112 Wn.2d 347, 352-53, 770 P.2d 1040 (1989). This is true even when the error is of constitutional magnitude. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002) (citing Studd, at 546-47).

In Patu, the "to convict" instructions were actually missing an element of the crime, but the Supreme Court nonetheless applied the invited error doctrine. Patu, at 721. In Studd, multi defendants in separate case appealed from defective self-defense instructions. Despite finding the error was of constitutional magnitude and presumed prejudicial, the Supreme Court applied the invited error doctrine and denied relief to those defendants who had proposed the erroneous instruction and had not tried to remedy the instruction before the trial court. Studd, at 546-47. The court held that the invited error doctrine is a "strict rule" to be applied in every situation where the appellant's actions at least, in part, caused the error. Studd at 547.

In State v. Boyer, 91 Wn.2d 343, 580 P.2d 1151 (1979) the court held as follows:

> A party may not request an instruction and later complain on appeal that the requested instruction was given. The defendant's challenge to the instruction must therefore fail.

Boyer at 344-45 (citations omitted).

In State v. Henderson, 114 Wn.2d 367, 792 P.2d 514 (1990) the court reviewed the continued viability of Boyer:

> *Boyer* is the established law of this state. As in the present case, constitutional error was there claimed but review was denied on the basis of invited error. *Boyer* has been regularly followed both by this court and by our Court of Appeals, as the following illustrative excerpts demonstrate:

> A party cannot request an instruction and later complain on appeal that the instruction should not have been given.[18]

(Footnoting Boyer, at 345.) State v. Kincaid, 103 Wn.2d 304, 314, 692 P.2d 823 (1985).

> Moreover, we note that the same result is required by the doctrine of invited error. *See generally State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979). That doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Boyer, supra*. The present case does exactly that.

State v. Pam, 101 Wn.2d 507 507, 511, 680 P.2d 762 (1984).

> Under these circumstances, we hold that: . . . (2) any error in connection therewith was invited error and cannot be complained of on appeal;[117]

(Footnoting Pam, at 511.) State v. Mak, 105 Wn.2d 692, 748, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986).

> Even where constitutional issues are involved, invited error precludes judicial review. *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).

State v. Tyson, 33 Wn.App. 859, 864, 658 P.2d 55, *review denied,* 99 Wn.2d 1023 (1983).

> Even where constitutional rights are involved, invited error precludes appellate review.

State v. Alger, 31 Wn.App. 244, 249, 640 P.2d 44, *review denied*, 97 Wn.2d 1018 (1982).

Affirmed.

Henderson at 870-871.

Here, appellant proposed the duress instruction with the exact same language of which she now complains. Further, although the court and the parties discussed the jury instructions the appellant did not object to the duress instruction given - the one she proposed. 08/26/08 RP 96-97. Thus, in light of the fact that appellant actually proposed the instruction she now complains of, she invited the error and, under the invited error doctrine, her claim must be denied.

D. CONCLUSION

For the foregoing reasons, this court should affirm the defendant's convictions and dismiss this appeal.

DATED this _____ day of October, 2013.

Respectfully Submitted,

By:_____
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA #15489

WAL/lh

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

STATE OF WASHINGTON, Respondent, v. DONNA LEE DRECKMAN, Appellant.	No.: 44131-4-II **DECLARATION OF MAILING**

DECLARATION

I, Sarah L. Wisdom hereby declare as follows:

On the 24th day of October, 2013, I mailed a copy of the Brief of Respondent to Mr. David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, and a copy to Lila Jane Silverstein and Kathleen A. Shea, Washington Appellate Project, 1511 3rd Ave. Ste. 701, Seattle, WA 98101-3647 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 24th day of October, 2013, at Montesano, Washington.

Sarah L. Wisdom

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