

NO. 62994-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARTIN HEALY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GEORGE MATTSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Whether the trial court properly instructed the jury as to the defense of duress where the instruction was a correct statement of the law and was supported by the evidence.

2. Whether this Court should remand for correction of the scrivener's error on the judgment and sentence so that it accurately reflects the sentence that was imposed by the trial court.

B. STATEMENT OF THE CASE.

Martin Healy was convicted by jury trial of the crimes of possession of a stolen vehicle, two counts of burglary in the second degree, attempted burglary in the second degree and malicious mischief in the first degree. CP 139, 145. Healy also pled guilty to attempted bail jumping. CP 104-10.

On November 24, 2007, the police stopped a stolen white van that Healy was driving.¹ RP2 28-37; RP3 100-02. Healy was the lone occupant of the van. RP2 38. The van contained items

¹ The verbatim report of proceedings will be referenced herein as follows: RP1 refers to October 30 through November 13, 2008; RP2 refers to November 17, 2008; RP3 refers to November 18, 2008; RP4 refers to November 19, 2008; RP5 refers to November 20, 2008; RP6 refers to November 24, 2008; RP7 refers to November 25, 2008; RP8 refers to December 1, 2008; RP9 refers to December 2, 2008; RP10 refers to January 23, 2009; and RP11 refers to February 6, 2009.

that had been stolen from an unoccupied model home in a new housing development a few blocks from where the van was stopped. RP2 44-46, 90-102; RP3 119, 130. The van contained a range oven, a microwave oven, a computer and a computer monitor, all taken from the model home. RP2 44-46; RP3 130. Shoe marks on the front door of the model home and another new home in the development indicated that the doors had been kicked open. RP2 92, 134; RP3 24, 79-81. Shoe marks on the door of a third new home in the development indicated that someone had attempted to kick open that door as well. RP2 130-34. The shoe marks on the doors matched the tread of Healy's shoes. RP2 71; RP3 78.

In addition to the items found in the stolen van, other furnishings were stolen from the model home, including a refrigerator. RP3 119, 125, 132. In removing the refrigerator from the home, the burglars caused a significant amount of damage, including water damage. RP3 125-43. Shoes prints from the model home, as well as the fact that a large refrigerator was stolen, indicated that more than one person burglarized the model home. RP3 75-77.

Healy offered a duress defense at trial. Healy testified and admitted to breaking into two new homes by kicking the doors open and trying to break into a third home by kicking the door open. RP4 112-13, 154-62. He admitted that he helped remove a refrigerator from the model home, and that he drove the stolen white van from the home with the stolen items inside. RP5 12, 21, 54, 62-63.

Healy admitted that he had committed property crimes in the past and had been previously convicted of possession of stolen property, attempted burglary and taking a motor vehicle without permission. RP4 114; RP5 8, 31. However, Healy contended that on November 24, 2007, he was forced to commit the crimes at issue because he had been threatened by Robert Mattson and John Cotton. RP4 113.

Healy testified that he met Mattson in 2002 and the two committed numerous crimes and used methamphetamine together. RP4 114. In 2002, Healy and Mattson had a "falling out," although Healy never explained the exact nature of the conflict. RP4 115-16. Healy alleged that in 2002, as a result of the conflict with Mattson, Mattson smashed the windshield of Healy's truck with a bat. RP4 116. To retaliate against Mattson, Healy claimed that he

would find vehicles that Mattson had stolen and dumped and move them to Mattson's residence to make Mattson mad. RP4 118.

In 2004, Healy went to prison. RP4 118. After Healy was released from prison in 2006 he met John Cotton through Mattson. RP4 119. In the summer of 2007, Healy began working as a confidential informant for the Bellevue Police Department after having been implicated in an unspecified crime. RP5 65; RP6 22. In his role as a confidential informant, Healy agreed to give Detective Christiansen of the Bellevue Police Department information about auto theft activity, including information about Mattson and Cotton. RP4 121-22; RP6 24-25.

Healy testified that in October of 2007, he had an encounter with Cotton and Mattson, and that during the encounter Mattson cursed at Healy and called him a rat. RP4 125-26. Healy yelled back at Mattson and then drove away. RP4 129. Mattson and Cotton followed Healy until he pulled into a parking lot where a police car was parked, and then they disappeared. RP4 130. Healy told Detective Christiansen about the incident. RP4 131. Defense witness Carl Brown testified that he witnessed this verbal altercation between Healy and Mattson. RP7 19-25.

Healy testified that he had no further contact with Mattson until November 3, 2007. RP4 132. Healy testified that on that date he received a phone call from Mattson in which Mattson said he was on Healy's mother's porch and was going to send "a hot one," which Healy took to mean that he was threatening to throw a flare into the house. RP4 132. Healy called 911 and drove to his mother's house. RP4 133. He did not see Mattson or Cotton and there was no damage to the house. RP4 133. Officer Skelton of the Renton Police Department responded to the 911 call and talked with Healy. RP6 7-8. Healy reported that someone had threatened to damage the house or hurt his mother, but Healy declined to file a report and told Officer Skelton that "I just wanted you to know that I am going to be in the area to take care of business, if I need to." RP6 9. Healy reported this incident to Detective Christiansen, who suggested Healy wear a wire so that any future threats could be recorded and prosecuted. RP6 28-29. Healy declined to do so. RP6 29.

Healy testified that at approximately 4 a.m. on November 24, 2007, he returned to his mother's home from a bar to find Mattson and Cotton waiting for him in the alley. RP4 140. Another unidentified person was standing near his mother's house with a

flashlight. RP4 142. A black van, driven by a fourth, also unidentified person², drove up. RP4 142. Mattson told Healy to get in the van, saying "we wouldn't want nothing to happen to your mom's." RP4 143. According to Healy, inside the van Mattson put a screwdriver to Healy's neck and said something about not letting Healy "take them all down." RP4 146. Cotton hit him in the torso. RP4 147. The van drove around and the men accused Healy of being a snitch, which he denied. RP4 148. The van drove to the housing development where Mattson ordered Healy to kick in the door of four houses, saying he wanted stainless steel appliances. RP4 154-62.

Healy testified that inside the model home he helped move the refrigerator into the garage but did not help take any other items. RP5 12, 54. Cotton put other appliances and some furniture items in the black van. RP5 13-16. Mattson then backed a white van, which Healy had not seen before, into the garage. RP5 18. Healy helped the others load the refrigerator into the white van. RP5 18. Mattson, Cotton and Healy next drove to another house, where they pulled the refrigerator out of the white van, put it in the

² Although Healy testified that he was with this group for approximately five hours, he never got a look at the driver's face. RP5 51.

black van and moved other items from the black van into the white van. RP5 20. Mattson and Cotton left in the black van and told Healy to stay there. RP5 20. Healy started to drive the white van away and was quickly apprehended by the police. RP5 21-24. The white van's steering column and ignition switch had been pried out. RP2 43. Although Healy had a cell phone, he did not attempt to call Detective Christiansen or 911. RP5 66.

The defense called Detective Yohann, who interviewed Healy on November 25, 2007. RP5 94. Detective Yohann testified that Healy told him that he had an ongoing feud with Mattson and that Mattson and Cotton threatened to hurt his mother if he did not assist them in the burglaries. RP5 97.

The defense also called Jail Officer Conrad who testified that on September 11, 2008, John Cotton threatened to "get" Healy when the two came into contact with each other at the jail. RP5 88. Cotton told Officer Conrad, "If you let me out of the cell, I am going to fuck him up." RP5 91.

In rebuttal, the State called Detective Christiansen. RP6 16. Detective Christiansen testified that he had known Healy for four years and that Healy had agreed to work as a confidential informant in the summer of 2007 in exchange for a reduction of charges.

RP6 22. Healy provided information to Christiansen about people committing auto theft, including Robert Mattson. RP6 24-25. Healy was able to provide first-hand information regarding Mattson and others because he was regularly associating with friends of Mattson. RP6 52, 55. Detective Christiansen testified that in early November of 2007 he offered to arrange a body wire for Healy to obtain evidence of Mattson's threatening behavior. RP6 29. Healy declined. RP6 29. Detective Christiansen testified that Healy was able to contact him by phone at all times of day and night, and that Healy could have terminated his contract if he was concerned for his safety. RP6 35.

At Healy's request, the trial court instructed the jury as to the defense of duress. RP4 4; RP6 57; CP 91-92. The court held extensive argument as to the proper wording of the duress instruction. RP6 57-135. The defense objected to the court's inclusion of language in the duress instruction that "The defense of duress is not available if the defendant intentionally or recklessly placed himself in a situation in which it was probable that he would be subject to duress." RP7 7-8; CP 91. The court included this language, concluding that this was a factual determination for the

jury to decide based on Healy's actions in his ongoing feud with Mattson. RP6 68-70, 103-10; RP7 3.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE AFFIRMATIVE DEFENSE OF DURESS.

Healy requested that the jury be instructed as to the defense of duress, and the trial court did so. Healy objects to language in the duress instruction that duress is unavailable if a defendant recklessly places himself in a situation in which it was probable that he would be subject to duress. The instruction was a correct statement of the law and was supported by evidence that Healy recklessly engaged in criminal associations and criminal conduct that contributed to the situation that he claimed constituted duress. The trial court did not abuse its discretion in allowing the jury to make the factual determination as to whether the duress defense was established in this case.

RCW 9A.16.060 sets forth the statutory defense of duress. The statute provides that it is a defense to any crime other than murder, manslaughter or homicide by abuse, that:

(1) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

(2) That such apprehension was reasonable upon the part of the actor; and

(3) That the actor would not have participated in the crime except for the duress involved.

RCW 9A.16.060(1). Duress is an affirmative defense, because it admits that the defendant committed the crime but provides an excuse for committing it. State v. Riker, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994). The defendant bears the burden of proving duress by a preponderance of the evidence. Id. at 368-69.

RCW 9A.16.060 also provides that the defense of duress is not available "if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress."

The trial court may refuse to instruct the jury as to the affirmative defense of duress if there is no substantial evidence to support it. State v. McKinney, 19 Wn. App. 23, 573 P.2d 820 (1978). If substantial evidence is presented from which the jury could conclude that the defendant acted under duress, the instruction should be given. State v. Turner, 42 Wn. App. 242, 246,

711 P.2d 353 (1986). Factual issues, such as whether a threat is sufficiently immediate to constitute duress, should be determined by the trier of fact based on an assessment of all the circumstances. Id. at 246-47. However, the trial court may refuse to give a duress instruction if the evidence presented cannot support the defense. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

The trial court's instruction to the jury followed the language of Washington Pattern Instruction 18.01, which states:

Duress is a defense to a criminal charge if:

(a) The defendant participated in the crime under compulsion of another who by threat or use of force created an apprehension in the mind of the defendant that in the 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 [himself][herself] in a situation in which it was probable that [he] or [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.

The "Note on Use" for the pattern instruction advises courts to "Use bracketed material as applicable." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 180.01 at 274 (3d ed. 2008).

Healy objected to the court's inclusion of the bracketed paragraph regarding the defendant intentionally or recklessly placing himself in a situation that leads to duress. RP7 7-8. Healy contends that the trial court abused its discretion in including the bracketed language.

Other courts have held that, for purposes of evaluating duress, a defendant who is engaged in criminal associations has recklessly placed himself in a situation where he might be subjected to the threatened use of force. For example, in Williams v. State, 101 Md. App. 408, 646 A.2d 1101, 1102 (Md. Ct. Spec. App. 1994), the defendant was charged with attempted robbery, burglary and use of a handgun claimed duress at his bench trial. To support his duress defense, Williams testified that he was abducted by three men who forced him to commit the crimes because they threatened to kill him if he did not lead them to the drug stash of a drug organization in which Williams had been involved. Id. at 1103. The court held that Williams' involvement in

the drug organization, his decision to borrow money from the leader of the organization and to conduct drug runs to repay the debt constituted recklessness and precluded application of the duress defense. Id. at 426. The court explained, "this was a situation that would not have occurred but for Williams' association with the drug organization." Id. at 426. Notably, Williams provided information to the police about one of the drug runs, but this fact did not change the court's conclusion that Williams' overall conduct constituted recklessness. Id. at 1103, 1110.

In United States v. Liu, 960 F.2d 449 (5th Cir. 1992), the defendant was convicted of bribery offenses. Liu, a gang member and illegal alien, provided information to the Houston police about gang activities after his arrest for promoting prostitution. Id. at 450-51. Liu then engaged in a scheme to sell fraudulent green cards with one of the police officers. Id. at 451. Liu offered a duress defense, claiming that his participation in the fraudulent green card scheme was based on fear of injury or death at the hands of the police officer. Id. The court refused to give the defense proposed duress instruction. Id. at 453. The appellate court found that the court's refusal to give the defense proposed instruction was proper because the instruction contained "no

reference to the defendant's burden to show proof that he did not negligently or recklessly place himself in a situation in which it was possible that he would be forced to choose the criminal conduct." Id. at 454.

In Meador v. State, 10 Ark. App. 325, 664 S.W.2d 878, 880 (Ark. Ct. App. 1984), the defendant was convicted of attempted armed robbery of a nursing home. He claimed that men to whom he owed money forced him to commit the robbery in order to collect on the debt. Id. at 327. The court instructed the jury as to duress, but the defendant objected to inclusion of language that "Duress is not a defense if Mark Meador recklessly placed himself in a situation in which it was reasonably foreseeable that he would be subjected to the force or threatened force." Id. at 330. The appellate court held that the jury was properly instructed because it could be inferred from the evidence that defendant's drug dependence placed him in the position of owing the men money. Id. at 882.

Finally, in People v. Rodriguez, 30 Ill.App.3d 118, 332 N.E.2d 194, 195 (Ill. App. Ct. 1975), the defendant pled guilty to escape for failing to return from home furlough. The defendant asserted that he failed to return out of fear because a jail officer had

given him money to buy marijuana and he had squandered the money during his furlough. Id. at 196. On appeal, the defendant argued that the court should have made further inquiry into the defense of compulsion before accepting the factual basis for the plea. Id. at 119. The appellate court held that the defense did not apply because it is only available if the compulsion arose "without the negligence or fault of the person who insists upon it as a defense." Id. at 120. The court held that under the facts asserted by the defendant, the compulsion arose from the defendant's appropriation of the funds for his own use, and thus the statutory defense was inapplicable. Id.

Under Washington law, each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. Williams, 132 Wn.2d at 259. See also State v. Davis, 119 Wn.2d 657, 665, 835 P.2d 1039 (1993) (prosecution is entitled to aggressor instruction in self-defense case if there is evidence to support it); State v. Theroff, 95 Wn.2d 385, 389-90, 622 P.2d 1240 (1980) (prosecution entitled to have jury instructed on necessary force where there is evidence to support it). In evaluating whether the evidence was sufficient to support a jury instruction requested by a party, the appellate court should view the evidence in the light

most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). See also State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

Viewing the evidence in the light most favorable to the State, there was evidence from which the jury could conclude that Healy had recklessly placed himself in a situation where it was probable that he would be subject to duress by virtue of his long-standing and continued criminal associations. The jury could have concluded that Healy was reckless in forming a criminal association with Mattson in the first place, and committing crimes with him. The jury could have concluded that after having the "falling out" with Mattson, Healy was reckless in antagonizing him by moving cars that he had stolen to Mattson's residence. The jury could have concluded that Healy was reckless in continuing his criminal activities after his release from prison, thus leading to his work as a confidential informant. The jury could have concluded that Healy was reckless in having continued involvement with Mattson's friends and associates which gave him first-hand information to pass on to Detective Christiansen about their criminal activities. And finally, the jury could have concluded that Healy was reckless

in not cooperating with Detective Christiansen in his offer of help in apprehending Mattson for his previous intimidating behavior. In sum, there was evidence from which the jury could conclude that but for Healy's own reckless behavior, he would not have been in a situation where he would have been the subject of force or threats of force.

Healy's reliance on United States v. Paoello, 951 F.2d 537 (3rd Cir. 1991), is misplaced. In that case, the trial court improperly refused to give a justification defense instruction. Id. at 539. The defendant was convicted of the crime of being felon in possession of a firearm. He testified that he went to a tavern where a man demanded that he buy him a drink. Id. The man followed him out of the bar, hit him, and shot a gun into the air. Id. Paoello grabbed the gun and ran, at which point he was apprehended by the police. Id. On appeal, the government argued that Paoello was not entitled to the justification defense because he was reckless in going to a bar where "bad" people hung out. Id. at 541. The appellate court rejected that argument, reasoning that going to the tavern was lawful conduct and could not be found to be reckless. Id. In contrast, in the present case, the State did not predicate its

theory of recklessness on Healy's lawful conduct, but on his criminal associations and conduct.

Healy also asserts that it is bad public policy to allow the State to argue that Healy was reckless in being a confidential informant. In making this argument, Healy mischaracterizes the State's argument. The State did not argue that Healy's recklessness was his work as a confidential informant in itself. Rather, the State argued that Healy's conduct before becoming a confidential informant and while being a confidential informant was reckless. It would be bad public policy to allow a defendant to be shielded from the consequences of his own recklessness simply by virtue of the fact that he was also a confidential informant. There is no support for the proposition that RCW 9A.16.060 provides a broader duress defense to government informants than to other citizens.

Healy also argues that his recklessness was too "attenuated." Whether his recklessness actually contributed to the situation or not was a question for the jury to determine based on all the circumstances. In this respect, it is like the question of whether the threat is sufficient immediate. In State v. Williams, supra, 132 Wn.2d at 259, the trial court refused to give a duress

instruction because it found that the threatened harm was not immediate. The defendant had testified that she committed welfare fraud out of fear of injury from her abusive boyfriend, who worked as a merchant seaman. Id. at 251. The Washington Supreme Court held that the reasonableness of the defendant's perception of immediacy was a question of fact that should be resolved by the jury. Id. at 259-60. Likewise, whether Healy's recklessness was too attenuated to have contributed to the situation was a question of fact for the jury to resolve. Because there was evidence of reckless behavior by Healy that might have contributed to the situation, the trial court properly instructed the jury that a defendant who recklessly places himself in a situation in which it was probable that he would be subject to duress is not entitled to claim the defense.

The trial court properly exercised its discretion in instructing the jury as to duress. The instruction was a correct statement of the law, and viewing the evidence in the light most favorable to the State, there was evidence to support an inference that Healy recklessly placed himself in a situation in which it was probable that he would be subject to duress.

2. THE SCRIVENER'S ERROR AS TO THE CONFINEMENT TIME IMPOSED FOR COUNTS III AND IV REQUIRES REMAND FOR CORRECTION.

Healy was convicted of the following felony crimes with the following standard ranges:

Count I	Possession of Stolen Vehicle	43 to 57 months
Count II	Burglary in the Second Degree	51 to 68 months
Count III	Burglary in the Second Degree	51 to 68 months
Count IV	Attempted Burglary in the Second Degree	38.25 to 51 months
Count V	Malicious Mischief in the First Degree	43 to 57 months

CP 139-51. In imposing sentence on February 6, 2009, the trial court stated:

On the PSP and the attempted -- I mean on the malicious mischief the Court will impose 57; on the attempted burglary, 51; the malicious mischief has been merged; and on the other two burgs I will impose 61 months.

RP11 17. Thus, the court imposed 61 months of confinement for Count III, burglary in the second degree, was 51 months of confinement for Count IV, attempted burglary in the second degree. However, the judgment and sentence erroneously reflects 51 months for Count III and 61 months for Count IV. This Court should remand solely for correction of this scrivener's error so that the judgment and sentence accurately reflects the sentence imposed

by the trial court. There is no need for resentencing. See State v. Amos, 147 Wn. App. 217, 224 n.1, 195 P.3d 564 (2008).

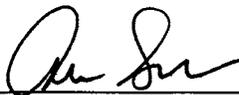
D. CONCLUSION.

The trial court properly instructed the jury as to the affirmative defense of duress. Healy's convictions should be affirmed. The matter should be remanded solely for correction of the scrivener's error so that the terms of confinement for Counts III and IV reflect the sentence that was imposed by the trial court.

DATED this 20th day of January, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HEALY, Cause No. 62994-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

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