

No. 39870-2-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY DOW

Appellant.

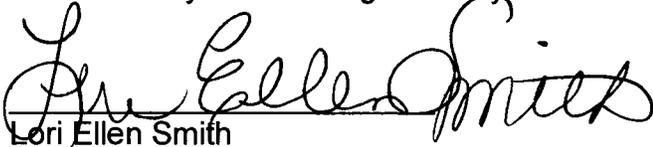
Appeal from the Superior Court of Washington for Lewis County

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RESPONSE BRIEF

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STATEMENT OF THE CASE

Respondent needs to point out an error in Dow's "assignments of error." In assignment of error number 1, Dow states "Mr. Dow's conviction for felony harassment" Brief of Appellant 1. Mr. Dow was convicted of Burglary in the First Degree, not felony harassment. RP 222.

As to the statement of the case, Dow's statement of the case is adequate for purposes of responding to this appeal, except as otherwise supplemented in detail and cited as part of the argument below.

ARGUMENT

A. DOW'S PRIOR BURGLARY CONVICTION IS *PER SE* ADMISSIBLE FOR IMPEACHMENT PURPOSES UNDER ER 609 AND DOW DID NOT PROPOSE A LIMITING INSTRUCTION OR OTHERWISE OBJECT TO THIS EVIDENCE SO THE ISSUE IS WAIVED AND FURTHERMORE ANY ERROR IS HARMLESS.

For the first time on appeal Dow argues that his constitutional "due process" rights were violated when, according to his characterization, "the State introduced propensity evidence as substantive proof of guilt, and the court failed to give a limiting instruction." Brief of Appellant 6. However, the evidence Dow complains of was not admitted as "propensity" evidence--nor was it admitted for some substantive purpose under ER 404(b). Rather,

Dow's prior burglary conviction was properly admitted under ER 609 for impeachment purposes only. Furthermore, Dow did not propose a limiting instruction below, nor did he otherwise object to this impeachment evidence. Accordingly, so he has waived his right to address these issues now. In the alternative, if it was error for the trial court to fail to *sua sponte* give a limiting instruction, any error should be held harmless.

Standard of Review

Interpretation of an evidence rule is a question of law, which is reviewed *de novo*. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). However, "[w]hen the trial court has correctly interpreted the rule, we review the trial court's decision to admit evidence under ER 404(b) for an abuse of discretion." State v. Russell, 154 Wn.App. 775, 781, 225 P.3d 478 (2010). Likewise, a trial court's admission of prior convictions under ER 609 is reviewed for abuse of discretion. State v. Rivers, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Foxhoven, 161 Wn.2d at 174. "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion." Russell, 154 Wn.App. at 781, citing Foxhoven, 161 Wn.2d at 174.

However, "an erroneous ER 609 ruling is not reversible error unless [the reviewing court] determine[s] that 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Rivers, 129 Wn.2d at 706 (quoting State v. Ray, 116 Wn.2d 531, 546 P.2d 1220 (1991)).

Waiver

"[A]s for challenges to evidentiary admissions, a party may assign error on appeal only on the specific ground of the evidentiary objection made at trial." Russell, 154 Wn.App. at 783, citing State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Furthermore--and *contrary to Dow's assertion now--* "[t]hese alleged evidentiary errors also are not 'manifest errors affecting a constitutional right,' that can be first raised on appeal under RAP 2.5(a)(3)." Russell, 154 Wn.App. at n.3 783, citing State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)(for error to be first raised on appeal under RAP 2.5(a)(3), it must be both manifest and truly of constitutional magnitude).

In the present case, Dow made no objection whatsoever in the trial court to the admission of his prior burglary conviction for impeachment purposes. RP 133, 179. Nor did Dow propose a

limiting instruction. Id. A party who fails to ask for a limiting instruction generally "waives any argument on appeal that the trial court should have given the instruction." State v. Stein, 140 Wn.App. 43, 70, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045 (2008); *see also* State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007)("the failure to give a limiting instruction is not error when no instruction was requested.") Nor did Dow make any specific objection regarding the admissibility of his prior burglary conviction for impeachment purposes. RP 133. As such, these issues are not preserved for review and this Court should refuse to address them now. WWJ Corp., supra. In the alternative, if this Court decides to address these issues, it should find that error, if any, is harmless--as argued elsewhere below.

Dow begins his argument with the somewhat misleading claim that his prior burglary conviction was admitted as "*propensity* evidence." Brief of Appellant 7-8. Dow goes on to support his argument with a citation to a case that discusses admission of evidence solely under ER 404(b). Id., *citing* State v. Russell, 154 Wn.App. 775, 225 P.3d 478 (2010). But Dow's burglary conviction was not admitted under ER 404(b). Rather, Dow's prior burglary conviction was admitted for impeachment purposes only, pursuant

to ER 609. Although Dow does, in a subsequent paragraph, mention the term "impeachment evidence," he nonetheless again goes on to cite the Russell case--which discusses evidence admitted for a substantive, non-impeachment purpose, and only under ER 404(b). Brief of Appellant 8; Russell supra.

In Russell, this Court discusses the admission of prior bad acts of sexual conduct to be used as *substantive* evidence to show "lustful disposition" under ER 404(b). Russell, 154 Wn.App. at 781,782. Thus, the challenged evidence in Russell seems far more likely to be prejudicial than the very brief mention of Dow's prior burglary conviction on cross examination in the present case. Russell at 784, 785. And, while Respondent is not necessarily saying that cases analyzing ER 404(b) evidence cannot be consulted where the evidence is instead admitted pursuant to ER 609, this Court in Russell did seem to indicate that this difference might matter.

For example, when the State in Russell cited State v. Myers, 133 Wn.2d 26,36,941 P.2d 1102(1997) in support of one of its arguments, this Court distinguished Myers when it stated, "Myers does not mention ER 404(b) or address the circumstances here." Russell, 154 Wn.App. at 785. Thus, because the Russell case

deals with prior acts of sexual misconduct under ER 404(b)--used for a *substantive* purpose-- and not a *per se* admissible prior crime of dishonesty under ER 609(a)(2) as in the present case, Russell's applicability here is questionable.

Here, the evidence Dow now objects to was admitted only for impeachment purposes under ER 609(a)(2). RP 133, 179. ER 609(a) provides:

For the purpose of attacking the credibility of a witness in a criminal . . . case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . (2)involved dishonesty or false statement, regardless of the punishment.

Id. Thus, under ER 609(a)(2)--a crime involving dishonesty like the prior burglary conviction in the present case-- is *per se* admissible for impeachment purposes. State v. Thompson, 95 Wn. 2d 888, 632 P.2d 50 (1981). This is in contrast with ER 404(b)-- which does not have a similar "automatically-admissible" or *per se* admissible provision. ER 404(b).

Here, unlike the ER 404(b) evidence in the Russell case, Dow's prior burglary conviction was admitted as a "crime of dishonesty" under ER 609(a)(2) for the purpose of impeachment only. RP 133, 179. Furthermore, unlike the evidence in Russell, in

the present case the *only* reference to the prior conviction was extremely brief, during cross examination when the prosecutor asked Dow, ". . . you have been convicted of burglary?" To which Dow answered, "yes." RP 179. It should be noted that Respondent does understand Dow's argument that without the limiting instruction the prior conviction impeachment evidence *technically* could be considered by the jury as "substantive" evidence. Nonetheless, Respondent disagrees that this was the effect of the ER 609 evidence in this case. As just mentioned, the reference to Dow's prior burglary conviction was extremely brief and fleeting. RP 179. Consequently, it is highly unlikely that this brief, fleeting reference to Dow's prior conviction would be viewed by the jury as "propensity evidence," as urged by Dow on appeal. This Court should affirm.

1. The Law is Unsettled on the Issue of Court's Duty to Give a Limiting Instruction When it is Not Requested by a Party.

Dow presents the argument that the trial court must give a limiting instruction on ER 404(b) or ER 609(a)(2) evidence even if it is not requested by a party-- as if the issue is well-settled law.

With all due respect to this Court and its Russell decision, Respondent is not altogether certain that the law in this area is so

well-settled. See, e.g., a post-Russell case, State v. Williams, No. 27924-3-III, 2010 WL 2390081 (June 15, 2010), where Division Three noted:

[the defendant] also assigns error to the court's failure to instruct the jury on the limited purpose of this evidence. The trial court is required to give the jury a limiting instruction **if requested**. State v. Foxhoven, 161 Wash.2d 168, 175, 163 P.3d 786 (2007); State v. Stein, 140 Wash.App. 43, 70, 165 P.3d 16 (2007). [The defendant] did not request a limiting instruction and therefore waived any right to assign error here. Stein, 140 Wash.App. at 70, 165 P.3d 16.

Williams, *supra* (emphasis added).

Thus, the Williams Court declined to follow this Court's ruling in Russell that a trial court must give a limiting instruction even if a party has not requested it. *Id.* Furthermore, previous cases do not seem to necessarily support the view that it is the trial court's duty to give a limiting instruction when it has not been requested. See, e.g., State v. DeVincentis, 150 Wn.2d 11, 23 n.3, 74 P.3d 119 (2003)(trial court should instruct jury of the omitted purpose of 404(b) evidence, but the request must be *made by the complaining party*); State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975)(no error for failure to give limiting instruction when no request for instruction was made); State v. Noyes, 69 Wn.2d 441, 446-447, 418 P.2d 471 (1966)(trial court should give limiting instruction but has no duty to do so on its own motion and failure to do so is not

error where no request is made); State v. Mahmood, 45 Wn.App. 200, 213, 724 P.2d 1021, *review denied*, 107 Wn.2d 1002 (1986)(where ER 404(b) evidence is admitted, a limiting instruction has been recommended by the Supreme Court but there is *no error* in failing to give instruction *where no request is made*).

Thus, as previously cited, it does not appear that the law is absolutely "settled" on the issue of whether a trial court, when admitting prior bad act evidence, is *required* to give a limiting instruction if such instruction is *not requested* by a party.

Devincentis, supra; Noyes, supra; Williams, supra. Another consideration should be that--as addressed elsewhere in this brief--a defendant's decision to not request a limiting instruction can be a legitimate trial tactic to avoid reemphasizing damaging evidence to the jury. State v. Donald, 68 Wn.App. 543, 551, 844 P.2d 447 (1993).

But most of all--given the uncertainty in the law regarding whether a trial court must give a limiting instruction where it is not requested by a party (and it was not requested here)--this Court should find that in this case, because Dow did not request the instruction, he cannot complain of it now. Williams, supra; Hess,

supra.; Noyes, supra. Accordingly, Dow's convictions should be affirmed.

In the alternative, this Court should find any error is harmless, as argued below.

2. Even If it Was Error For the Trial Court to Fail to Sua Sponte Give a Limiting Instruction, Any Error Is Harmless.

If this Court finds that the trial court was required to give a limiting instruction *sua sponte*, any error should be found harmless.

"Applying the harmless error standard the appellate court looks to the evidence at trial, the importance of defendant's credibility, and the effect the prior convictions may have had on the jury." State v. Hardy, 133 Wn.2d. 701, 711, 946 P.2d 1175 (1997).

Here, even if the trial court had given a limiting instruction regarding the ER 609(a)(2) prior conviction, the jury would have found Dow guilty nonetheless. A review of the record shows that evidence of Dow's guilt was overwhelming, and that Dow's claim he committed the crime under "duress" is not supported by the evidence.

The evidence presented at trial in this case showed that on October 14, 2008, the victim of the burglary, Mr. Blair, was in bed asleep in his trailer home. RP 46. Upon feeling movement in his trailer, Mr. Blair woke up and saw two men standing in his kitchen.

RP 47. The two individuals said they were there to collect the money Mr. Blair owed, and one of them, Paul, had a gun. RP 48,49. Mr. Blair told them he didn't have the money. RP 50. Upon hearing this, "Paul" told the defendant, Mr. Dow, "you know what you got to do." RP 50. At that time, Paul held the gun on Mr. Blair and Dow starting beating Blair. RP 50. Blair said that Dow jumped on his bed and started hitting Blair in the head and ribs with his fists. RP 51, 61,62; Ex. 3-6. Dow also kned Blair in the ribs, causing two broken ribs. RP 52. When Dow saw that the guy with the gun was gone, Mr. Blair grabbed a propane bottle and started hitting Dow with it. RP 52,53. Blair had not seen Dow before that night. RP 53.

Blair sustained severe bruising to his head, a bloody nose and two broken ribs from the beating. RP 55. His trailer was also torn up from the scuffle. RP 55. Blair said that even after Paul left with the gun, Dow continued to beat him, hitting him at least five more times. RP 56. Dow eventually took off running out the door as Blair was hitting him with the propane torch bottle. RP 57. Blair went out in the yard to see where Dow went and he heard a car motor running. RP 57. Dow looked over a fence and saw Paul inside the car and Mr. Dow was just getting into the vehicle. RP 57.

Blair got the license number of the vehicle and the police were called. RP 59,60. Neither Paul nor Dow had permission to enter Mr. Blair's trailer on the night in question. RP 61. Mr. Blair said that when Dow was beating him, there was no hesitation or "pulling back" of punches on Dow's part. RP 81. Mr. Blair picked out Dow's picture from a photo montage. RP 83.

Dow told Officer Ramirez that he and Paul went to Blair's trailer because Mr. Blair owed money to Paul, and Dow owed money to Paul as well. RP 136. So Paul offered Dow a way to take care of his debt to Paul, and that was for Dow to beat up Mr. Blair. RP 136. Dow told Officer Ramirez that they went to Mr. Blair's trailer and Paul opened the door and they went inside. RP 138. Paul had a gun. RP 137. Once inside, Dow went to the bedroom where Mr. Blair was and Dow began hitting Mr. Blair with his elbows, knees and fists. RP 138. Dow also told Officer Ramirez that if Paul had given Dow the gun, that Dow would have turned the gun on Paul. RP 147. Dow also told Ramirez that he had seen Paul "[mess] people up for 20 bucks." RP 147. Officer Ramirez said that Dow's statements were consistent with Mr. Blair's description of the incident. RP 152. Dow told Officer Ramirez that he feared the possibility of death that night. RP 153.

Officer Ramirez said that in the October 16th interview of Dow, Dow did not say that Paul pointed the gun at Dow in a threatening manner. RP 154. Nor did Dow tell Officer Ramirez that Paul expressly threatened to kill Dow or otherwise hurt Dow if he did not go with Paul to collect the debt from Blair. RP 154. Dow told Officer Ramirez that after he stopped assaulting Blair, Dow went outside, jumped the fence and went to the vehicle where Paul was waiting. RP 156. After the incident, Paul told Dow that he no longer owed Paul any money. RP 156.

Dow testified that he did not believe he had a choice when Paul came to him and asked him to go with him to Blair's residence and collect the debt. RP 162. Upon leading questions by his defense counsel, Dow answered "yes" when asked if he believed there was a "possibility or a probability of immediate death or grievous bodily injury" if he did not do as Paul asked. RP 162. Upon a further leading question on direct by his counsel, Dow answered, "no, I wouldn't have" when asked "would you have gone into Randy's trailer and assaulted him had it not been for Paul's orders and him pointing the gun at you?" RP 163. Dow also admitted that they entered the home without permission from Mr.

Blair, and that when they got inside, Dow told Mr. Blair, "you need to come up with some money." RP 171.

On cross, Dow said that he did not start beating Mr. Blair "until the gun touched my kidney." RP 172. Dow also indicated knowledge of fighting moves such as jujitsu, "reverse side control" and "guillotine" holds. RP 174. Dow apparently disposed of the gun after the incident. RP 175,176. Right after the incident, Dow ran to find Paul waiting in his vehicle and he jumped into Paul's vehicle and they went to a bar. RP 178.

To sum up the evidence just stated and cited, the evidence presented overwhelmingly showed that the victim recounted the entire unlawful entry into his home by Dow and Paul, and testified in detail about Dow's assaulting him resulting in broken ribs and other injuries. Dow's statements to the police corroborated the victim's story.

Importantly, Dow's duress defense was weak, regardless of the brief mention of the impeachment evidence. Dow's direct testimony about his alleged fear of Paul was ineffectual at best. All Dow did on *direct* was answer "yes" to extremely leading and conclusory questions by his defense counsel. For example, the "evidence" of Dow's duress defense came only when Dow's

defense counsel asked Dow on direct if he believed there was a "possibility or a probability of immediate death or grievous bodily injury" if he did not do as Paul asked. RP 162. Dow said, "yes." Id. Then, Dow's trial counsel asked him, "would you have gone into Randy's trailer and assaulted him had it not been for Paul's orders and him pointing the gun at you?" RP 163. Dow responded, "no, I wouldn't have." RP 163. *That is it.*

Dow's duress claim was further diminished when he continued beating Mr. Blair, even *after* the person who supposedly "forced" Dow to commit the crime ("Paul") had left the premises. Mr. Blair said that even after Paul left with the gun, Dow continued to beat him, hitting him at least five more times. RP 56. Moreover, after continuing to beat the victim even after Paul left the residence, Dow immediately sought out Paul afterwards--searching for him and jumping a fence to get to the vehicle where Paul was waiting. RP 156. To top it all off, Dow rode in the vehicle with Paul to a bar after the incident. RP 178. This hardly seems like the actions of a person who was in mortal fear of Paul--the person he claims threatened him with death if he didn't commit the crime.

Thus, Dow's argument that the jury considered his prior burglary conviction as "substantive" evidence simply because there

was no limiting instruction is a stretch at best. The fact of the burglary conviction was elicited from Dow on cross examination in an extremely brief exchange. RP 179. This minor reference to the prior conviction when compared to the overwhelming evidence presented regarding the Burglary in the First Degree charge is not likely to have "prejudiced" the jury into thinking Dow is a "criminal type" simply because of that prior conviction.

Rather, the facts presented as to the *current* crime alone are alarming enough to have kept the jury's attention focused solely on Dow's criminality for the *current* crime--easily eclipsing the fleeting reference to Dow's prior burglary conviction. RP 179. And Dow's testimony and actions before, during, and after the crime belie his "duress" claims. Accordingly, his appellate argument that a limiting instruction would have changed the jury's verdict is not persuasive. This Court should affirm.

B. DOW HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE BECAUSE EVEN IF HIS COUNSEL HAD PROPOSED A LIMITING INSTRUCTION HE CANNOT SHOW PREJUDICE UNDER STRICKLAND.

Dow also argues that his trial counsel was ineffective for failing to propose a limiting instruction regarding the admission of Dow's prior burglary conviction. Brief of Appellant 11. This argument is not persuasive.

To show ineffective assistance of counsel by proving (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). A defendant's counsel is ineffective if there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. Strickland, 466 U.S. at 687-88. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001) (citing Strickland, 466 U.S. at 694, 100 S.Ct. 1945.). However, an appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988).

In sum, to show ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome of his trial. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). But legitimate trial tactics or strategy cannot be the basis for an ineffective assistance

of counsel claim. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A failure to request a limiting instruction can be a tactical decision not to emphasize damaging evidence. See, State v. Donald, 68 Wn.App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993); State v. Barragan, 102 Wn.App. 754, 762, 9 P.3d 942 (2000).

In the present case, Dow has not shown that his trial counsel was ineffective because even if his counsel had proposed a limiting instruction and such instruction was given, it would not have changed the outcome of the trial. This is based upon the same reasons and facts and evidence discussed in the "harmless error" section above. In sum, as previously noted, because of the overwhelming evidence presented in this case and Dow's shaky-at-best "duress" claim--compared to the fleeting reference to his prior burglary conviction--a limiting instruction would not have changed the outcome of the trial, even if Dow's counsel had proposed such an instruction. A defendant's counsel is ineffective if there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. Strickland, 466 U.S. at 687-88. Dow has not made this showing here, and he thus cannot show prejudice under Strickland. Strickland, supra; Thomas, supra.

This defeats Dow's ineffective assistance of counsel claim as to this contention.

1. Dow's Second Basis for an Ineffective Assistance of Counsel Claim Likewise Fails.

Dow also claims his trial counsel was ineffective because his counsel allegedly "should have been alerted by the language in Dixon to the possibility that this case might present circumstances 'require[ing] the Government to disprove the existence of duress beyond a reasonable doubt.'" Brief of Appellant 17 (emphasis added). In the first place, Respondent is not aware of a single case imposing such a wildly speculative duty on trial counsel that he "should have been" alerted by the "possibility" that this case "might" present some sort of far-fetched legal issue regarding his duress claim. Nor do any of the cases cited by Dow impose such an onerous, impossible-to-achieve duty on trial counsel.

Most importantly, (and as further discussed in the next section), Dow's trial counsel had no duty to make this specious duress-negates-an-element-of-burglary argument because *the law says no such thing*. See e.g., State v. Peters, 47 Wn.App.854, 858-860, 737 P.2d 693 (1987), where that Court rejected the very same argument (in a burglary case) that Dow now claims his attorney was "ineffective" for failing to make. The law does say, however,

that trial counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed.

State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 1251 (1995).

Here, as evidenced by the Peters decision (and discussed further below), even if Dow's counsel had made the questionable argument he now suggests, the trial court would not have been persuaded by such argument. Peters, supra. Furthermore, as noted by Dow, the relevant instruction given here was based on a pattern instruction, WPIC 18.01--which further negates Dow's ineffective assistance claim as to this contention. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Additionally, the United States Supreme Court case that Dow says "should have prompted counsel to consider whether a nonstandard instruction was more appropriate" is not on-point (different crime) and furthermore, the "negation" claim was *rejected* in Dixon. Brief of Appellant 14, 15.

Because there is no on-point law to support Dow's claim that his duress defense "negated" the intent element of the burglary charge--and in fact there is a case that rejects such a claim--Dow's counsel was not required to make such an obviously-meritless argument. Peters, supra. Therefore, the outcome of Dow's case

would not have changed even if trial counsel had made such an argument, and Dow cannot show prejudice as required under Strickland. Accordingly, his ineffective assistance of counsel claim fails as to this claim as well.

C. THE DURESS INSTRUCTIONS CORRECTLY STATED THAT DOW HAD TO PROVE DURESS BY A PREPONDERANCE OF THE EVIDENCE BECAUSE HIS DURESS CLAIM DID NOT "NEGATE" AN ELEMENT OF BURGLARY.

Dow's inventive argument that his duress defense "controverted the 'intent to commit a crime' element of burglary" so that it was the State's burden to *disprove* the defense is without merit.

Basically, Dow argues for the first time on appeal that the jury instruction on duress misstated the burden of proof. Brief of Appellant 12-14. However, Dow did not make this objection below. Generally, failure to object to an instruction precludes challenge on appeal. State v. Bailey, 114 Wn.2d 340,345,787 P.2d 1378 (1990). Therefore, this Court should find that Dow waived the right to raise this issue now. Dow argues in the alternative that his counsel was ineffective for "misunderstanding [the] applicable law" regarding the duress instruction. Brief of Appellant 17. (This issue is addressed

under the previous section discussing Dow's ineffective assistance claims).

Duress is an affirmative defense that must be established by a preponderance of the evidence. State v. Frost, 160 Wn.2d 765, 773, 161 P.3d 361 (2007). In general, "[a]s an affirmative defense, duress does not function to negate an element of the charged offense. . . . Rather, a finding of duress excuses the defendant's otherwise unlawful conduct." Id. (citations omitted). However, it is true that there are some circumstances in which the existence of duress negates the mental element of the charged offense. In such a case, the State would have to *disprove* the existence of duress beyond a reasonable doubt. Dixon v. United States, 548 U.S. 1, 7 n.4, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006). The present case, however, is not one of those cases.

Tellingly, Dow cites no on-point case discussing the crime of burglary in support of his argument Dow's duress claim "negated" the burglary element that he "entered or remained" inside the victim's residence "with the intent to commit a crime." Brief of Appellant 15. This Court is "not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn.App. 907, 911 n. 1, 10 P.3d 504

(2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Furthermore, Respondent searched, but did not find, a single Washington case that has found that a claim of duress negated an element of the crime of burglary so as to require the State to disprove the existence of duress beyond a reasonable doubt.

In fact, there is a case where a defendant tried this same argument in a second degree burglary case, and the argument was rejected. See *e.g.*, Peters, 47 Wn.App. at 858-860. In Peters, as Dow does here, the defendant claimed that his claim of duress "negated" both the unlawful entry and the intent elements of burglary. Thus, argued Peters (and Dow), the jury should have been instructed that the State had the burden to disprove duress beyond a reasonable doubt. Peters, 47 Wn.App. at 695. The Peters Court disagreed, noting that "duress does not negate criminal intent." Id. at 696.

And, pertinent to the instant case, the Peters Court further explained:

[the defendant] by his own admission, unlawfully entered the [victim's] home with the intent to commit a crime therein. If the jury had been convinced that he acted under duress, he would have been excused from the legal consequences of his actions. Absence of duress was not, however, an element of the crime charged. Therefore, the burden was

not on the State to prove the absence of duress beyond a reasonable doubt, and the court did not err by refusing [defendant's] proposed 'to convict' instruction. Accord, State v. Russell, 47 Wn.App. 848, 737 P.2d 698 (1987).

Peters, 47 Wn.App. at 696 (emphasis added).

This reasoning from Peters is applicable to the present case. Like Peters did, Dow makes the same argument with regard to the burglary crime here, and the Peters ruling rejecting this same claim thus applies. In short, the correct rule is that Dow had to prove that he acted under duress by a preponderance of the evidence. Frost, supra.; Peters, supra. The jury instructions on duress were therefore correct, and Dow's claim that the instructions impermissibly lowered the State's burden because his duress claim "negated" an element of the crime is utterly without merit. Peters, supra. This Court should agree, and should affirm.

CONCLUSION

Dow's prior burglary conviction was not admitted as "propensity" or substantive evidence under ER 404(b). Rather, it was admitted under ER 609(a)(2) for impeachment purposes only, and the reference to it was brief and fleeting. Furthermore, Dow did not request a limiting instruction, and the law on whether the trial court must give a limiting instruction where it is not requested is not exactly well-settled. Therefore, this case should not be reversed on

this basis. Furthermore, even if the trial court should have *sua sponte* given a limiting instruction, any error is harmless given the overwhelming evidence in this case.

Moreover, Dow's ineffective assistance of counsel claims fail because he has not shown that, absent the alleged deficiencies, the result of his trial would have been different. Finally, Dow's claim that his duress defense "negated" an element of the burglary, requiring the State to prove the absence of duress beyond a reasonable doubt is not supported by on-point authority. Accordingly, Dow was required to prove his duress claim by a preponderance of the evidence, as correctly stated in the jury instructions. His arguments to the contrary are without merit.

Accordingly, as fully argued above, this Court should affirm Dow's convictions in all respects.

RESPECTFULLY SUBMITTED this 20th day of July, 2010.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

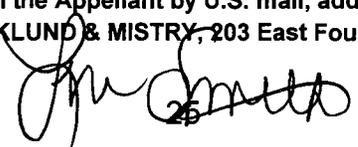
by:


LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

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Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows: BACKLUND & MISTRY, 203 East Fourth Ave., Ste. 404, Olympia, WA 98501.


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