

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2005 NOV -3 P 2 34

NO. 77444-7

BY C.J. HERRITT

*hjh*  
SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FROST,

Petitioner.

---

**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

NORM MALENG  
King County Prosecuting Attorney

Andrea R. Vitalich  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. ISSUE PRESENTED.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	11
1. THE DEFENDANT'S RIGHT TO PRESENT CLOSING ARGUMENT WAS NOT UNFAIRLY CURTAILED BECAUSE HE RAISED A DURESS DEFENSE AND ADMITTED THAT HE COMMITTED ALL OF THE ROBBERIES. ....	11
D. CONCLUSION .....	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

In re Winship,  
397 U.S. 358, 90 S. Ct. 1068,  
25 L. Ed. 2d 368 (1970)..... 12

Matthews v. United States,  
485 U.S. 58, 108 S. Ct. 883,  
99 L. Ed. 2d 54 (1988)..... 15, 16

United States v. Demma,  
523 F.2d 981 (9th Cir. 1975) ..... 17

Washington State:

State v. Aleshire,  
89 Wn.2d 67, 568 P.2d 799 (1977) ..... 15

State v. Banks,  
149 Wn.2d 38, 65 P.3d 1198 (2003)..... 18

State v. Callahan,  
87 Wn. App. 925, 943 P.2d 676 (1997) ..... 14

State v. Draper,  
10 Wn. App. 802, 521 P.2d 53,  
review denied, 84 Wn.2d 1002 (1974)..... 15

State v. Frost,  
\_\_\_\_ Wn. App. \_\_\_\_  
(No. 53767-9-I, filed 7/05/05), slip op. .... 11, 14

State v. Galisia,  
63 Wn. App. 833, 822 P.2d 303,  
review denied, 119 Wn.2d 1003 (1992)..... 15

State v. Mannering,  
150 Wn.2d 277, 75 P.3d 961 (2003)..... 13

State v. Riker,  
123 Wn.2d 351, 869 P.2d 43 (1994)..... 9, 12, 13

Statutes

Washington State:

RCW 9A.16.060(1)..... 12

A. **ISSUE PRESENTED**

A defendant who raises the defense of duress admits to committing a crime, but claims that he would not have committed it but for a threat of immediate death or life-threatening harm. A defendant is not entitled to claim duress unless there is sufficient evidence to support it. In this case, the defendant claimed that he participated in a string of armed robberies under duress. The State's evidence was very strong, and included the defendant's three tape-recorded confessions. The defendant testified at trial, admitted his participation in every robbery charged, and conceded facts establishing the elements of those crimes in order to raise his duress defense.

Was there any basis in the record or the law for defense counsel to have argued to the jury that the State had failed to prove the defendant's participation in the robberies?

B. **STATEMENT OF THE CASE**

The defendant, Joshua Frost, and his co-defendants, Matthew Williams and Alexander Shelton, were charged with multiple crimes based on their mutual participation in a string of armed robberies committed between April 9 and April 17, 2003. CP 1-11. Williams and Shelton accepted a plea offer; Frost considered

the same offer with the assistance of counsel, and rejected it. RP (7/11/03) 2-3; RP (8/26/03) 16-17. Accordingly, Frost proceeded to trial on six counts of first-degree robbery, one count of attempted first-degree robbery, one count of first-degree burglary, and three counts of second-degree assault, all with firearm enhancements. CP 131-37. The State's evidence was very strong, and included Frost's three tape-recorded statements to detectives in which he admitted his involvement in the robbery spree in great detail. Ex. 62, 70, 72.

Frost raised the statutory affirmative defense of duress, and claimed that Williams had threatened to kill him and his family if he did not assist in the robbery spree. RP (12/11/03) 30, 36, 50-51, 65; CP 48-130. In addition to a duress instruction, Frost proposed a modified instruction on accomplice liability that included the following language:

One is not an accomplice unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his actions to make it succeed.

CP 139. The prosecutor objected to this modified instruction, and argued that the effect of the instruction was to shift the burden of disproving duress to the State. RP (12/10/03) 37-39. The trial

court ruled that the standard accomplice instruction coupled with the standard duress instruction allowed the defense to argue its theory of the case: specifically, that Frost participated in the robbery spree under duress, and that he was not involved in the assaults. RP (12/10/03) 40-41, 49. The defense conceded that this was its theory of the case; however, Frost's attorney indicated that he also intended to argue that the State had failed to prove that Frost was an accomplice to the robberies. The trial court noted that such arguments were inconsistent with duress, but reserved its ruling regarding the duress instruction until after Frost's testimony. RP (12/10/03) 52-53.

Frost testified the following day. During his testimony, he admitted that he participated in every crime charged except for the three assaults, but claimed that his participation in the robberies was due to Williams's threats.<sup>1</sup> RP (12/11/03) 17-108.

---

<sup>1</sup> Although Frost had already admitted his involvement in the robbery spree in his three lengthy taped statements to the police, Frost did not say anything about being threatened by Williams until the third statement, which concerned only the robbery at the T & A Video store. Ex. 72, p.4. Accordingly, Frost's testimony was necessary to provide a basis for the defense of duress as to the other robberies.

First, Frost admitted that he drove to Lloyd and Verna Gapp's Burien home on April 8, 2003 in order to case it for a robbery planned for the following evening. RP (12/11/03) 31-32. Frost also admitted that he drove Williams and Shelton to the Gapps' home on April 9, 2003, entered the house with them, and participated in robbing the Gapps. RP (12/11/03) 36-42. He admitted that he took money, firearms, and other items from the Gapps' safe and put them into a bag while Williams held a gun to Lloyd Gapp's head. RP (12/11/03) 38. Frost admitted that he drove Williams and Shelton to his house after committing this home-invasion robbery. RP (12/11/03) 41-42. Frost also admitted that he had told Williams about the Gapps because he had been to their house before, and he knew that they kept money in their safe. RP (12/11/03) 26-27.

Next, Frost admitted that he drove Williams and Shelton to a Taco Time restaurant in Burien on April 12, 2003, and that he parked the car behind the restaurant and waited while Williams and Shelton went inside and committed an armed robbery. RP (12/11/03) 48-51. He described how Williams and Shelton counted the money they had taken from the employees as he drove them away from the scene and back to his house after the robbery. RP

(12/11/03) 51. Frost also admitted to participating in the planning stage of this robbery because he had previously worked at a different Taco Time, and because his girlfriend worked at the Taco Time that they robbed. RP (12/11/03) 45. He admitted that he knew "how their safe system works." RP (12/11/03) 46.

Frost further admitted to participating in a robbery at T & A Video in Federal Way on April 15, 2003. RP (12/11/03) 53. Frost admitted that he went into the store to case it approximately two hours before the robbery. RP (12/11/03) 54-55. He admitted that he drove back to the store shortly before it closed, and that he parked nearby while Williams, Shelton, and a third man went inside and committed armed robbery. RP (12/11/03) 55-56. Frost knew that Williams and Shelton had handguns, but claimed that he "never expected they would be used." RP (12/11/03) 57. Frost then drove everyone back to his house after the robbery. RP (12/11/03) 58.

Frost also admitted that he drove Williams and Shelton to a 7/Eleven store in West Seattle on April 17, 2003. RP (12/11/03) 60-61. Frost explained that he parked his car nearby, in a location where the car would not be seen from inside the store. RP (12/11/03) 61. Williams and Shelton went into the store, armed

with firearms, and robbed it.<sup>2</sup> They came back to the car with money, cigarettes, and "a cheap watch" they had taken from one of the store employees. RP (12/11/03) 62. Frost admitted that he drove them away from the scene. RP (12/11/03) 63.

Frost further explained that he drove Williams and Shelton to Ronnie's Market on the way home from 7/Eleven because Williams was unsatisfied with the amount of money they had taken from 7/Eleven. RP (12/11/03) 63-64. Frost parked in an apartment complex across the street while Williams and Shelton went into Ronnie's Market to commit yet another armed robbery. RP (12/11/03) 64-65. Frost admitted to hearing a gunshot while he waited in the car; nonetheless, he waited until Williams and Shelton returned, and he drove them back to his house after the robbery.<sup>3</sup> RP (12/11/03) 65-66.

---

<sup>2</sup> A young couple drove up during the 7/Eleven robbery, and Shelton pointed his gun at them and told them to leave. RP (12/8/03) 48, 63-64, 75. The couple drove to a nearby Safeway store and called the police. RP (12/8/03) 75. This part of the incident formed the basis for two of the second-degree assault charges. CP 131-37. Frost did not admit to direct participation in these crimes.

<sup>3</sup> Williams shot one of the store clerks in the hand during the Ronnie's Market robbery. RP (12/8/03) 92. This formed the basis for the third count of second-degree assault. CP 131-37.

On cross-examination, Frost reiterated that he had participated directly in each of the crimes charged except for the assaults:

Q: Mr. Frost, on April 9, 2003, when you and Matthew Williams and Alexander Shelton drove out to the Gapp residence you were the one driving, correct?

A: Yes, I was.

Q: And you knew you were going to the Gapp residence to rob them, correct?

A: Yes, I did, correct.

Q: And you knew that Matthew Williams had a gun, correct?

A: Yes, I did.

Q: On April 12 of 2003 when you and Matthew Williams and Alexander Shelton went to Taco Time you were the one driving, correct?

A: I did drive them there, yes.

Q: And you knew that you were going there to rob the Taco Time, correct?

A: Just as we were leaving, yes.

Q: And you knew both Matthew Williams and Alexander Shelton were carrying real firearms, correct?

A: I knew Matthew was. I found out Alex had the other one on the way up there.

Q: On the way to Taco Time?

A: Correct.

Q: And on April 15th, 2003, when you and Matthew Williams and Jason DeFoe and Alexander Shelton went to the T and A Video store you knew you were going there to rob it, correct?

A: Yep.

Q: And you knew that Matthew Williams and Alexander Shelton were carrying real firearms, correct?

A: Correct.

Q: And on April 17 of 2003 when you drove to the 7/Eleven store and stopped you knew that Alexander Shelton and Matthew Williams were armed with firearms, correct?

A: At the time we were driving to 7/Eleven, no. When we got to the 7/Eleven, yes.

Q: You knew that they were going into that 7/Eleven to rob it, correct?

A: Correct.

Q: On that same evening when you drove over to Ronnie's Market you knew you were going to Ronnie's Market so that Alexander Shelton and Matthew Williams could go in and rob it at gunpoint, correct?

A: They didn't say it but it was pretty apparent.

Q: Was there any question in your mind that you were going to Ronnie's Market so they could rob it at gunpoint?

A: In my mind, no.

Q: So that is what they did, correct?

A: Correct.

Q: And you knew they were both carrying real firearms, correct?

A: Yes, at that point I did.

RP (12/11/03) 105-07.

After both sides had rested, the court and the parties again discussed the jury instructions. During this discussion, the court ruled that Frost's testimony provided a basis for the duress instruction as to all charges except for the assaults, and that there was a basis for Frost to argue that he was not involved in the assaults. Defense counsel confirmed that he intended to argue that Frost had not participated in those assaults. RP (12/11/06) 124-26. However, when defense counsel indicated that he also intended to argue that the State had not proved that Frost participated as an accomplice to the robberies, the trial court noted that the defense of duress requires an admission that the defendant committed the acts charged, citing State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994). The court further observed that there was no factual basis upon which to argue a lack of participation. Rather, the court noted

that Frost "just got on the stand and admitted everything except the assault in the second degree charge[s]. He admitted he knew about it, he participated in every one of these events and he at least assisted by being the get away driver[.]" The court observed that if defense counsel argued a lack of accomplice liability, it "would disregard [his] client's testimony." RP (12/11/03) 126-27. Accordingly, the court ruled, based on Riker, that defense counsel could not argue both duress and a lack of accomplice liability for the robberies. RP (12/11/03) 128.

In closing argument, the prosecutor correctly stated that the jury was required to find that the State had proved all of the elements of the crimes charged beyond a reasonable doubt before considering whether Frost had established duress by a preponderance of the evidence. RP (12/11/03) 148-49. Defense counsel argued in closing that Frost did not participate in the second-degree assaults, and that the State had failed to prove that Frost was armed for purposes of the firearm enhancements because he did not use the guns himself during any of the robberies. RP (12/11/03) 173, 176-77, 185-89. Defense counsel further argued that Frost participated in the robberies under duress, but conceded that the jury would find Frost guilty of robbing the

Gapps, and possibly of robbing T & A Video as well, because Frost's participation in those robberies was more direct than his participation in the others. RP (12/11/03) 171-72, 182, 185-89.

The jury convicted Frost as charged on all counts and enhancements except for one count of second-degree assault. CP 210-14. He received a standard-range sentence and timely appealed. CP 236-46, 247-59. The Court of Appeals rejected all of Frost's claims in an unpublished opinion. State v. Frost, \_\_\_ Wn. App. \_\_\_ (No. 53767-9-I, filed 7/05/05), slip op.

C. **ARGUMENT**

1. **THE DEFENDANT'S RIGHT TO PRESENT CLOSING ARGUMENT WAS NOT UNFAIRLY CURTAILED BECAUSE HE RAISED A DURESS DEFENSE AND ADMITTED THAT HE COMMITTED ALL OF THE ROBBERIES.**

This Court has accepted review of one issue: whether Frost was deprived of the right to present closing argument when the trial court ruled that the defense had no basis to argue that the State had failed to prove Frost's participation in the robberies. See Petition for Review, at 18-20. Under the applicable law from this Court regarding the defense of duress, and given the facts of this case, the trial court's ruling was not error. Moreover, even if this Court were to conclude that the trial court's ruling could potentially

be error in a different case, any error in this case is purely theoretical and harmless beyond any reasonable doubt.

It is axiomatic that in any criminal prosecution, the State has the burden of proving the elements of the crimes charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, "a defense of duress *admits* that the defendant committed the unlawful act, but pleads an excuse for doing so." Riker, 123 Wn.2d at 367-68 (emphasis in original). Duress is a statutory defense which provides that admittedly criminal conduct may be excused in some circumstances if the defendant can establish that he would not have participated in a crime but for a threat of immediate death or life-threatening harm:

In any prosecution for a crime, it is a defense that:

(a) 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

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

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

RCW 9A.16.060(1).

Unlike defenses such as self-defense or alibi, duress "does not negate an element of an offense, but pardons the conduct even though it violates the literal language of the law." Riker, 123 Wn.2d at 367-68. Accordingly, duress is an affirmative defense that the defendant must prove by a preponderance of the evidence. Id. at 368-69. In order to claim duress, a defendant "would have had to admit all of the elements of the underlying crimes," including the requisite mens rea. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003). "Lack of intent and duress are, therefore, inconsistent with one another." Id. at 287. Moreover, in order for a defendant to receive an instruction on the defense of duress, there must be sufficient evidence presented at trial to support it. State v. Williams, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

In this case, Frost's trial testimony provided the factual basis for the defense of duress. Therefore, in accordance with this Court's rulings in Riker and Mannering, Frost admitted during his testimony that he participated in all of the robberies charged. In light of the record and the applicable law, the Court of Appeals correctly observed that Frost had no basis upon which to argue that the State had not proved his participation in the robberies:

As seen from Mannering and Riker, to assert the defense of duress Frost had to admit that he did commit unlawful acts that established the elements of the crime in question. Having made such an admission, he could not logically argue that the State failed to prove that his conduct satisfied all the elements of that crime. Frost does not seriously argue or offer authority for the proposition that the right to closing argument affords the latitude to concede facts and then argue as if the State still had to prove those facts.

State v. Frost, slip op. at 17. In other words, "[h]aving attempted to prove duress by admitting the crimes charged, Frost left no room to argue that the State failed to prove the crimes charged." Id. at 18. Accordingly, no error occurred and this Court should affirm.

Nonetheless, Frost asserts that a defendant cannot be precluded from arguing that the State has not proved the crimes charged, even if the defendant presents a defense – such as duress – that is wholly inconsistent with that argument. Petition for Review, at 19-20. But even if this Court were to hold that it may be error to preclude a defendant from asserting both duress and a lack of proof in some cases, there is still no basis to reverse *this* case.

A defendant may assert inconsistent defenses at trial, but only if the evidence independently supports each of the defenses in question. Compare State v. Callahan, 87 Wn. App. 925, 932-33, 943 P.2d 676 (1997) (holding that accident and self-defense "are

not invariably inconsistent and mutually exclusive," so long as evidence supports both theories), *with State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) (observing that "[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense"). However, presenting inconsistent defenses is particularly problematic when one of those defenses is an affirmative defense, such as duress or entrapment, because a defendant's denial of guilt generally negates the affirmative defense. See, e.g., *State v. Galisia*, 63 Wn. App. 833, 836-38, 822 P.2d 303, review denied, 119 Wn.2d 1003 (1992) (while it is possible to claim entrapment without admitting guilt, defendant did not present sufficient evidence to merit entrapment instruction); *State v. Draper*, 10 Wn. App. 802, 806, 521 P.2d 53, review denied, 84 Wn.2d 1002 (1974) (defendant who denied committing criminal acts was not entitled to claim entrapment).

In unusual circumstances, the evidence may support both an affirmative defense and a defendant's denial of guilt. For instance, in *Matthews v. United States*, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988), the defendant, who worked for the Small Business Administration (SBA), was charged with accepting a bribe. The evidence showed that the defendant had taken a "loan"

from a small business owner in exchange for SBA aid. The business owner was cooperating with the FBI, and the transaction was conducted at the FBI's direction and under surveillance. Matthews, 485 U.S. at 60-61. At trial, the defendant admitted to accepting the loan, but claimed that "he believed it was a personal loan unrelated to his duties at the SBA." He also sought to raise an entrapment defense. Id. at 61. The trial court refused the defendant's request to instruct the jury on entrapment because the defendant denied any criminal intent, and thus had not admitted all the elements of the crime. Id. at 62.

The United States Supreme Court reversed, observing that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Matthews, 485 U.S. at 63. Accordingly, the Court held that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." Matthews, 485 U.S. at 62. Therefore, the Court held that it was error for the trial court to deny the entrapment instruction based solely on the defendant's claim of a lack of intent. Nonetheless, the Court observed that in most cases "it is very

unlikely that the defendant will be able to prove entrapment without testifying and, in the course of testifying, without admitting that he did the acts charged[.]” Id. at 65 (quoting United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975)). Therefore, the Court remanded the case to the 9th Circuit for consideration of whether there was sufficient evidence to warrant an entrapment instruction in light of the defendant’s testimony. Matthews, 485 U.S. at 65.

While Matthews illustrates the general principle that a defendant is not precluded as a matter of law from raising an affirmative defense while denying guilt, Matthews also illustrates that both defenses will be supported by the record only in very unusual circumstances. Therefore, while the trial court’s ruling in this case – that Frost could not claim both duress and a lack of participation for the same crime – could theoretically be error in a different case, any such theoretical error is harmless beyond any reasonable doubt.

As noted above, Frost admitted his participation in the robbery spree in three detailed, tape-recorded confessions. Ex. 62, 70, 72. He reiterated his involvement in the robberies during his trial testimony, although he claimed that he participated in the robberies under duress. RP (12/11/03) 17-108. In his confessions

and in his testimony, Frost admitted to casing the Gapp residence and the T & A Video store prior to the robberies. He admitted to participating as a principal in the burglary and home-invasion robbery at the Gapps'. He admitted helping to plan the Taco Time robbery. And he admitted that he drove his armed co-defendants to and from the robberies at the Gapp residence, Taco Time, T & A Video, 7/Eleven, and Ronnie's Market. In sum, Frost conceded facts establishing his guilt as to every crime charged except for the second-degree assaults. Accordingly, if defense counsel had argued to the jury that the State had failed to prove Frost's participation in these robberies, such argument would have been in direct contradiction to Frost's own statements and testimony. In fact, the jury would have been bound to disregard such an argument in accord with the court's instruction to "[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." CP 175.

An error of constitutional dimension is harmless if there is no reasonable possibility that the error alleged affected the verdict. State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003). In this case, even if this Court were to find that the trial court's ruling was technically erroneous, there is no possibility, reasonable or

otherwise, that the outcome of the trial would have been different if alternative arguments had been made. The evidence of Frost's guilt was overwhelming, and Frost admitted his guilt in order to raise the defense of duress. There is simply no basis to grant Frost a new trial.

**D. CONCLUSION**

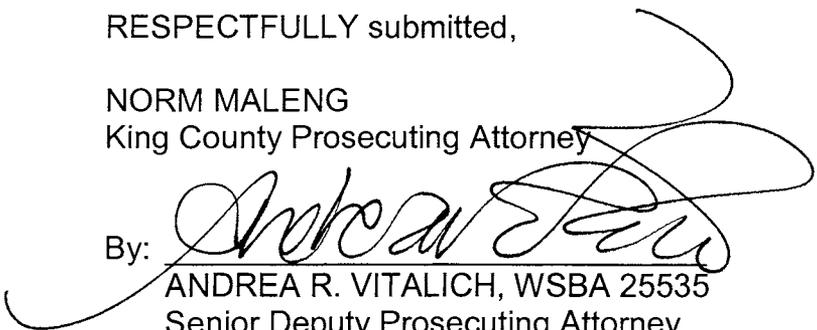
There was no basis in fact or in law for Frost to argue that the State had not proved his participation in the robbery spree because Frost conceded that he participated in the robbery spree in order to raise the affirmative defense of duress. This Court should reject Frost's claim, and affirm.

DATED this 7<sup>th</sup> day of November, 2006.

RESPECTFULLY submitted,

NORM MALENG  
King County Prosecuting Attorney

By:

  
ANDREA R. VITALICH, WSBA 25535  
Senior Deputy Prosecuting Attorney  
Attorneys for the Respondent

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 Dana M. Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of Respondent, in STATE V. JOSHUA FROST, Cause No. 77444-7, in the Supreme Court, 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.

U Brame  
Name  
Done in Seattle, Washington

11/7/06  
Date

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2006 NOV - 8 P 2:35  
BY C.J. HENRITT  
CLERK