82358-8

NO. 35821-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA HARVILL,

Appellant.

FILED
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DIVISION II
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James E. Warme

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO GIVE A JURY INSTRUCTION ON DURESS WHEN HARVILL INTRODUCED SUBSTANTIAL EVIDENCE TO ENTITLE HIM TO THE DURESS INSTRUCTION.

Relying on State v. Turner, 42 Wn. App 242, 711 P.2d 353 (1985), the state argues that the trial court did not commit error by failing to instruct the jury on duress. Brief of Respondent (BOR) at 5-9. The state asserts that "Harvill's claim of duress falls short of the standard set in *State v. Turner.*" BOR at 9. The state's reliance on Turner is highly misplaced.

In Turner, the trial court refused to give a duress instruction, focusing on the statutory requirement of apprehension of "immediate death or immediate grievous bodily injury." The court found that there was insufficient evidence to create a jury instruction on the immediacy requirement. Turner, 42 Wn. App. at 245. This Court reversed the trial court, holding that the trial court erred by refusing to instruct the jury on duress because the question of whether a threat of immediate death or immediate grievous bodily injury occurred is generally a question of fact for the jury. Id. at 245-47. This Court emphasized that cases from other jurisdictions and treatises support the conclusion that when the defense of duress is asserted, immediacy of the danger is to be determined by the trier

of fact based on an assessment of all the circumstances. Id. at 246-47. Referring to RCW 9A.16.060, this Court reasoned that "the Legislature did not intend the duress defense to be limited to instances where the refusal would result in simultaneous execution of the threat." Id. at 247.

Accordingly, this Court's holding in Turner does not preclude a duress instruction here because whether a threat of immediate death or immediate grievous bodily injury existed was a question of fact for the jury. The state mistakenly asserts that Harvill "admitted there were never any specific threats in any way made to him by Nolte." BOR at 3, 9. The record reflects that the state asked Harvill, "With regard to the work place, no specific threats to you in any way, were there?" Harvill replied, "Not directly to me." 14RP 41-42.

Furthermore, the trial court here did not focus on the immediacy requirement. The court refused to give an instruction on duress, finding that "there was no testimony about any threat" and consequently "the defense of duress fails as a matter of law." 14RP 68-69. Without citing any authority, the state argues that the trial court did not err in refusing to give the duress instruction because "there was no evidence or testimony of any direct, explicit, or immediate threats." BOR at 10. Contrary to the state's argument, the correct inquiry is whether Harvill reasonably believed that he faced immediate harm, which is a question of fact for the

jury to resolve. State v. Mannering, 150 Wn.2d. 277, 286, 75 P.3d 961 (2003). Notably, the state fails to distinguish this case from State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997) and State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994), where Williams and Riker were entitled to duress instructions despite the absence of any explicit or specific threats. See Brief of Appellant at 8-9.

The state also argues that the trial court did not error in refusing to give the duress instruction because Nolte testified that he had purchased drugs from Harvill in the past and Harvill knew where to get drugs. BOR at 9-10. The state, again, cites no authority to support its argument that such testimony precludes an instruction on duress. Consequently, the state's argument fails.

Reversal is required because the trial court erred in failing to give a duress instruction based on its erroneous conclusion of the law that an explicit threat is necessary to establish duress.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Harvill's conviction and remand his case to the superior court.

DATED this 9th day of February, 2008.

Respectfully submitted,

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Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Rebekah Ward, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626.

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

DATED this 9th day of February, 2008 in Kent, Washington.

Valerie Marushige

Valerie Marushige
Attorney at Law
WSBA No. 25851

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