No. 44131-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DONNA DRECKMAN,

Appellant.

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

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Ms. Dreckman's right to effective assistance of counsel was violated when her attorney proposed a duress instruction that failed to direct the jury it must find her not guilty if the defense proved Ms. Dreckman acted under duress.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

A defendant has a Sixth Amendment and Article I, section 22 right to the effective representation of counsel. A defendant is entitled to a new trial where she can establish her attorney performed deficiently and she was prejudiced by the ineffective representation. Is Ms. Dreckman entitled to a new trial where her attorney offered an instruction on the defense of duress that did not inform the jury of its obligation to find Ms. Dreckman not guilty if it believed she had acted under duress?

C. ARGUMENT

Defense counsel rendered ineffective assistance of counsel by proposing a duress instruction that failed to instruct the jury it must find Ms. Dreckman not guilty if the defense met its burden of showing Ms. Dreckman acted under duress.

The State charged Ms. Dreckman with four counts of forgery after Ms. Dreckman admitted to writing checks for her boyfriend from

an acquaintance's account. CP 1-4, 8/11/08 RP 10; Supp. CP 55 (Exhibit No. 5). When confessing to police, Ms. Dreckman explained she had written the checks only because her boyfriend threatened her, hit her, and threw things at her when she refused. Supp. CP 55 (Exhibit No. 5).

The defense argued at trial the jury should find Ms. Dreckman not guilty because she wrote the checks only because she feared her boyfriend, Bruce Rehm, would harm her if she refused. 8/26/08 RP 111-12. This theory was supported by substantial evidence during the trial. Ms. Dreckman testified that Mr. Rehm had physically assaulted and threatened to kill her in the past and that she had taken out a restraining order against him. 8/26/08 RP 85, 87-88. There was testimony that Mr. Rehm had access to firearms and was a methamphetamine user. 8/26/08 RP 58, 61-62, 88. There was also no evidence that Ms. Dreckman personally profited from the crime. 8/26/08 RP 54, 92-93.

At Ms. Dreckman's request, the court instructed the jury on the defense of duress. 8/26/08 RP 36-37. The instruction given to the jury, which mirrored the pattern instruction, failed to include the final line: "If you find that the defendant has established this defense, it will be

your duty to return a verdict of not guilty *[as to this charge]*." 11 Wash. Prac., Pattern Jury Instr. Crim. 18.01 (3rd ed. 2008) ("WPIC") (emphasis original). Thus, although the jury was instructed on duress, by omitting this final line the jury was not told it must acquit if the defense met its burden of showing Ms. Dreckman acted under duress.

In the State's response to Ms. Dreckman's opening brief, it argues that because the proposed instruction was submitted by the defense, Ms. Dreckman's claim is barred on appeal by the doctrine of invited error. Resp. Br. at 5. However, given that Ms. Dreckman's trial counsel proposed the defective instruction, she was denied the effective assistance of counsel and her convictions must be reversed.

a. Ms. Dreckman had the constitutionally protected right to effective assistance of counsel.

A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;[1] Const. art. I, § 22;[2] United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d

[1] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence."

563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687. An attorney renders

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[2] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..."

constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms"), quoting Strickland, 466 U.S. at 688. While an attorney's decisions are treated with deference, his actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

If there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. Thomas, 109 Wn.2d at 226.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed *de novo*." State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

b. Ms. Dreckman is entitled to a reversal of her conviction because trial counsel rendered ineffective assistance of counsel.

Ms. Dreckman's trial counsel requested the court instruct the jury on duress, but the instruction she proposed failed to instruct the jury it must return a verdict of not guilty if it found Ms. Dreckman had met her burden to show she had acted under duress. CP 23. Generally, review of an erroneous jury instruction is precluded under the invited error doctrine. In re Pers. Restraint of Haghighi, 178 Wn.2d 435, 465, 309 P.3d 459 (2013). However, review is not precluded where the error is the result of ineffective assistance of counsel. Id.; State v. Kyllo, 166 Wn.2d 856, 861-62, 215 P.3d 177 (2009); State v. Johnson, 172 Wn.App. 112, 129-30, 297 P.3d 710 (2012).

When reviewing a counsel's failure to request an instruction, counsel is deemed ineffective when a defendant was entitled to a jury instruction, the attorney's performance was deficient in failing to request the instruction, and the failure prejudiced the defendant. State. Johnston, 143 Wn.App. 1, 21, 177 P.3d 1127 (2008); State v.

Thompson, 169 Wn.App. 436, 495, 290 P.3d 996 (2012). An attorney will not be found deficient if declining to request the instruction was a reasonable trial tactic. State v. Powell, 150 Wn.App. 139, 206 P.3d 703 (2009).

Here, the defense requested the instruction and the trial court gave it without hesitation. 8/26/08 RP 36-37; CP 23. Given that the entire defense rested on convincing the jury Ms. Dreckman acted under duress, it would have been unreasonable for counsel not to have made this request. See Kyllo, 166 Wn.2d at 869; State v. Kruger, 116 Wn.App. 685, 693, 67 P.3d 1147 (2003) (finding counsel should have asked for a voluntary intoxication instruction where intent was the focus of the defense). However, despite counsel's request, Ms. Dreckman was denied the benefit of the instruction because of her attorney's error. The value of the instruction was nullified by the fact that it did not actually direct the jury to find Ms. Dreckman not guilty even if the jury found she acted under duress. CP 23. Counsel's error was equivalent to having not requested the instruction at all, as the jury was educated about the duress defense but not informed of its obligation to find Ms. Dreckman not guilty if the jurors believed she had met her burden of showing she acted under duress.

Without this instruction, Ms. Dreckman was severely prejudiced. A defendant is prejudiced when a faulty instruction makes it easier for the jury to convict. In re Pers. Restraint of Wilson, 169 Wn.App. 379, 391-92, 279 P.3d 990 (2012) (finding ineffective assistance of counsel where the trial attorney requested a pattern instruction that did not reflect the state of the current law). Even when the issue is effectively raised in front of the jury, the defense is impotent without the proper instruction. Kruger, 116 Wn.App. at 695.

Duress was Ms. Dreckman's sole defense at trial, and significant evidence was presented that Ms. Dreckman had acted out of her reasonable fear of Mr. Rehm. 8/26/08 RP 58, 61-62, 87-88. Testimony was presented about the past abuse Ms. Dreckman had suffered, Mr. Rehm's penchant for weapons, and the fact that Ms. Dreckman did not profit from her wrongdoing. 8/26/08 RP 85, 87-88. As the court recognized when giving the duress instruction, there was sufficient evidence of jurors to find Ms. Dreckman acted under duress. However, the jury was not given the critical information about how to deliberate and reach a verdict.

Without the instruction requiring the jury to find Ms. Dreckman not guilty if it found she had met her burden of showing duress, the

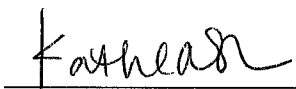
defense's theory was bound for failure. With the instruction, there was a reasonable probability the jury would have come to a different conclusion, given the evidence presented at trial. See Strickland, 466 U.S. at 694; Wilson 169 Wn.App. at 391. Because trial counsel's performance was deficient and Ms. Dreckman was prejudiced as a result, Ms. Dreckman is entitled to a new trial. See Strickland, 466 U.S. at 687.

D. CONCLUSION

For the foregoing reasons, Ms. Dreckman respectfully requests this Court reverse her convictions and remand her case for further proceedings.

DATED this 27th day of December 2013.

Respectfully submitted,



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DIVISION TWO

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v.	)	NO. 44131-4-II
	)	
DONNA DRECKMAN,	)	
	)	
APPELLANT.	)	

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