

Supreme Court No.: 90664-5  
Court of Appeals No.: 44131-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DONNA DRECKMAN,

Petitioner.

**FILED**  
AUG 27 2014  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
OF

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PETITION FOR REVIEW

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Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Ms. Dreckman requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in State v. Donna Dreckman, No. 44131-4-II, filed July 22, 2014. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Article I, section 22 grants individuals convicted of a crime the constitutional right to review. Pursuant to RAP 18.8(a) the court may waive or alter the time in which an act must be performed on appeal in order to serve the ends of justice. Ms. Dreckman properly moved to file a supplemental assignment of error after the State supplemented the record with additional information. The court granted Ms. Dreckman's motion and gave the State the opportunity to respond to the supplemental assignment of error. Should this Court grant review in the substantial public interest because the Court of Appeals improperly relied on Cowiche Canyon Conservancy v. Bosley<sup>1</sup> and declined to consider Ms. Dreckman's appeal because she raised the issue in her reply after the court granted her explicit permission to do so? RAP 13.4(b)(4).

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<sup>1</sup> 118 Wn.2d 801, 828 P.2d 549 (1992).

### C. STATEMENT OF THE CASE

An acquaintance invited Ms. Dreckman and her boyfriend at the time, Bruce Rehm, to stay in his trailer after they found themselves homeless. 8/26/08 RP 41-42. The trailer was owned by Jacqueline Kremer and located on her property. 8/26/08 RP 41. Ms. Dreckman and Mr. Rehm stayed there only a short time, leaving less than two weeks after their arrival. Id.

While Ms. Dreckman lived on the property, she assisted Ms. Kremer by driving her to errands on several occasions. 8/26/08 RP 44. While Ms. Kremer never spoke to Ms. Dreckman about Mr. Rehm, she testified that based on her own interaction with Mr. Rehm she did not feel he was a nice person and she did not trust him. 8/26/08 RP 44, 49. At some point, Ms. Kremer discovered that several checks, written to Bruce Rehm and a man named Curtis Atlis, were fraudulently drawn against her bank account. 8/26/08 RP 43.

Ms. Dreckman gave a statement to police in which she admitted that she had written some of the forged checks. 8/11/08 RP 10; Ex. 5. However, she told police that she had only forged the checks because Mr. Rehm threatened that "something bad might happen" to her if she refused, and that he hit her and threw things at her in order to force her to comply. Ex. 5.

At trial, Ms. Dreckman testified Mr. Rehm was well-armed with a variety of weapons and that she was afraid of him. 8/26/08 RP 88. In the past, he had physically assaulted her and threatened to kill her. 8/26/08 RP 87-88. Mr. Rehm threw batteries at her, pulled her hair, and dragged her across the floor. 8/26/08 RP 87. At one point, Ms. Dreckman took out a restraining order against Mr. Rehm, but eventually reconciled with him only to have the abuse begin again. 8/26/08 RP 85. Like many victims of domestic violence, Ms. Dreckman repeatedly hoped that “things would get better.” 8/26/08 RP 87.

Mr. Atlis similarly testified that Mr. Rehm was a methamphetamine user who he had seen carry weapons, including firearms. 8/26/08 RP 58, 61-62. Mr. Atlis cashed two of the checks, written in his name, at Mr. Rehm’s request. 8/26/08 RP 53-54. No evidence was presented that Ms. Dreckman benefitted financially from the forged checks. Instead, the evidence suggested that only Mr. Rehm and Mr. Atlis profited from the crime. 8/26/08 RP 54, 92-93.

In closing, Ms. Dreckman argued the jury should acquit because although she did write the checks, she did so only because she feared Mr. Rehm would harm her if she refused. 8/26/08 RP 111-12. The jury was instructed on the affirmative defense of duress, but the instruction failed to direct the jury it must return a verdict of not guilty if it found Ms.

Dreckman acted under duress. CP 23. The final line of the pattern instruction states: “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 (3<sup>rd</sup> ed. 2008) (“WPIC”) (emphasis original). The court’s Instruction Number 13, which mirrored the pattern instruction on duress, omitted this critical statement. CP 23.

In Ms. Dreckman’s Opening Brief, she alleged the trial court erred when it instructed the jury on duress without informing the jurors they must find Ms. Dreckman not guilty if she met her burden of proving she acted under duress. Op. Br. at 1-2. In response, the State filed a motion to supplement the record with a copy of the instruction proposed at trial. In support of its motion, it provided an affidavit from William A. Leraas, the prosecuting attorney at trial, in which he stated that defense counsel had provided the instruction on duress. This affidavit was necessary because based on the verbatim report of proceedings, it appeared that Mr. Leraas provided all of the jury instructions, including the duress instruction defense counsel had “offered to propose.” 8/26/08 RP 36-37. The Court

of Appeals granted the State's motion to supplement the record. The court's ruling is attached as Appendix B.

Ms. Dreckman subsequently moved, pursuant to RAP 18.8, to file a supplemental assignment of error given the additional information provided by the State. The Court of Appeals granted Ms. Dreckman's motion and accepted the supplemental assignment of error. The court's ruling is attached as Appendix C. In her argument in support of her supplemental assignment of error, Ms. Dreckman explained that she was denied the effective assistance of counsel when her counsel offered a duress instruction that failed to direct the jury it must find Ms. Dreckman not guilty if she proved the affirmative defense.

Despite granting Ms. Dreckman's motion to file the supplemental assignment of error, the Court of Appeals held that her claim of ineffective assistance of counsel was raised too late to warrant consideration. It affirmed Ms. Dreckman's forgery convictions without considering her claim of ineffective assistance of counsel. Slip. Op. at 3.

E. ARGUMENT IN FAVOR OF GRANTING REVIEW

**The Court should grant review to correct the improper application of Cowiche Canyon Conservancy v. Bosley and wrongful denial of Ms. Dreckman's right to appeal.**

- a. The Court should grant review in the substantial public interest because *Cowiche Canyon Conservancy v. Bosley* does not preclude review of an issue raised in reply after the court has permitted the filing of a supplemental assignment of error under RAP 18.8(a).

The Court of Appeals, citing Cowiche Canyon Conservancy v. Bosley, found that Ms. Dreckman's "claim of ineffective assistance of counsel was raised too late to warrant [its] consideration." 118 Wn.2d at 809; Slip Op. at 3. In Bosley, the plaintiff assigned error to finding of fact 22 in its opening brief but presented no argument as to that error. 118 Wn.2d at 809. Instead, it provided argument regarding finding of fact 22 for the first time on reply. Id. This Court found that because the issue was raised and argued for the first time on reply, it was too late to warrant consideration. Id. It further noted, "[t]hat the issue existed earlier is obvious from finding of fact 22." Id.

The circumstances under which Ms. Dreckman raised the issue of ineffective assistance of counsel for the first time on reply are starkly different than the circumstances present in Bosley. Here, the verbatim report of proceedings showed that upon receiving the proposed jury instructions, the court stated:

I received instructions from Mr. Leraas. The instructions included proposed instruction on the defense of duress the defense has offered to propose, are there any others?

8/26/08 RP 36-37 (emphasis added). Thus, it appeared from the record that the defense had offered to propose the instruction, but that the State had ultimately provided a copy of the instruction to the Court. Because this jury instruction omitted the critical direction to the jury that it must return a verdict of not guilty if Ms. Dreckman established the affirmative defense, Ms. Dreckman argued on appeal that this omission was a manifest constitutional error that required reversal. Op. Br. at 1.

When the State responded with additional information, revealing that, in fact, defense counsel proffered the erroneous instruction, Ms. Dreckman moved to file a supplemental assignment of error pursuant to RAP 18.8(a), raising the issue of ineffective assistance of counsel for the first time. The Court of Appeals granted Ms. Dreckman's motion pursuant to RAP 18(8)(a), which allows the court to alter the provisions of the rules in order to serve the ends of justice. Appendix C; RAP 18.8(a). The court gave the State 30 days to respond, which the State declined to do. Appendix C.

Because Ms. Dreckman properly moved to file a supplemental assignment of error and the Court of Appeals granted the motion, Bosley

does not control. The court's holding that review was precluded despite the fact it allowed Ms. Dreckman to file the supplemental assignment of error and gave the State the opportunity to respond raises an issue of substantial public interest. This Court should accept review.

- b. When the Court of Appeals declined to review Ms. Dreckman's claim, it denied Ms. Dreckman her right to appeal.

A person convicted of a crime has a constitutional right to appeal. Const. art. I, § 22. The importance of this right has been reiterated in numerous cases by this Court. City of Seattle v. Klein, 161 Wn.2d 554, 567, 166 P.3d 1149 (2007).

Under RAP 18.8(a), the court may, on the motion of a party:

waive or alter the provisions of any of these rules and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice.

Ms. Dreckman moved the court for relief after the State supplemented the record with additional information, showing that the error alleged in Ms. Dreckman's opening brief was invited. The Court of Appeals granted Ms. Dreckman's motion to raise the issue of ineffective assistance of counsel. When the Court of Appeals subsequently declined to consider her claim, despite granting her permission to file it and allowing the State the

opportunity to respond, it wrongly denied Ms. Dreckman her constitutional right to appeal. This Court should grant review.

c. The Court should review Ms. Dreckman's claim on the merits and reverse.

This court should grant review of the Court of Appeals opinion and review Ms. Dreckman's claim on its merits. 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 for the jury to find Ms. Dreckman acted under duress. However, it was not given the critical information about how to deliberate and reach a verdict.

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). 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).

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.

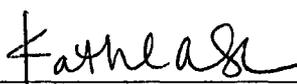
Defense counsel's failure to propose the full instruction severely prejudiced Ms. Dreckman. She was entitled to have the issue she raised on appeal reviewed and her conviction reversed. This Court should grant review in the substantial public interest and consider Ms. Dreckman's case on its merits.

F. CONCLUSION

The Court should grant review of the Court of Appeals opinion affirming Ms. Dreckman's forgery convictions.

DATED this 21<sup>st</sup> day of August, 2014.

Respectfully submitted,

  
\_\_\_\_\_  
Kathleen A. Shea – WSBA 42634  
Washington Appellate Project  
Attorney for Petitioner

**APPENDIX A**

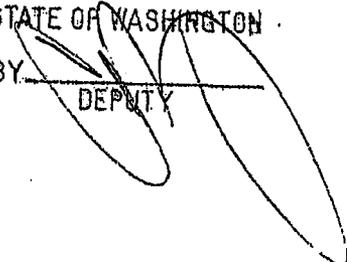
**COURT OF APPEALS, DIVISION II OPINION**

**July 22, 2014**

FILED  
COURT OF APPEALS  
DIVISION II

2014 JUL 22 AM 10:23

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONNA LEE DRECKMAN,

Appellant.

No. 44131-4-II

UNPUBLISHED OPINION

LEE, J. — A jury convicted Donna Dreckman of forgery. Dreckman appeals, arguing that the jury instruction on her duress defense was erroneous and she received ineffective assistance of counsel. Any alleged error in the jury instruction was invited; therefore, we are precluded from reviewing it. Further, we will not address her claim of ineffective assistance of counsel because it was raised for the first time in her reply brief. We affirm.

FACTS

The State charged Dreckman with four counts of forgery. Dreckman admitted she forged the checks; however, she claimed that she was forced to do so by her boyfriend. She testified that her boyfriend hit her, threw things at her, and threatened her.

Dreckman requested that the trial court instruct the jury on a duress defense. She proposed the following instruction, which the trial court gave:

Duress is a defense to a criminal charge if:

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

Clerk's Papers CP at 66. The jury found Dreckman guilty of all four counts of forgery.

Dreckman appeals.

## ANALYSIS

### A. JURY INSTRUCTION

Dreckman claims that the trial court erred by giving the duress instruction because it did not instruct the jury that it had the duty to find Dreckman not guilty if she met her burden to prove she acted under duress. But because Dreckman proposed the jury instruction, she is precluded from challenging it on appeal.

The invited error doctrine "prohibits a party from 'setting up error in the trial court and then complaining of it on appeal.'" *State v. Armstrong*, 69 Wn. App. 430, 434, 848 P.2d 1322 (1993) (quoting *State v. Young*, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991)). Under the invited error doctrine, "even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). Here, Dreckman

No. 44131-4-II

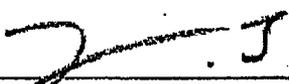
proposed the instruction on the duress defense; therefore, any error in the instruction was invited and we are precluded from reviewing it.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Although Dreckman originally stated that the State proposed the erroneous instruction, she concedes the error was invited in her reply brief. She then argues in her reply brief that she received ineffective assistance of counsel based on trial counsel proposing an erroneous instruction. However, "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowlche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990)). Accordingly, we will not address this issue.

Dreckman invited any error related to the jury instruction on duress. And her claim of ineffective assistance of counsel was raised too late to warrant our consideration. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
LEE, J.

We concur:

  
\_\_\_\_\_  
MAXA, P.J.

  
\_\_\_\_\_  
MELNICK, J.

**APPENDIX B**

**RULING GRANTING STATE'S MOTION TO SUPPLEMENT  
THE RECORD**

**SEPTEMBER 30, 2013**



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

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General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

September 30, 2013

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CASE #: 44131-4-II

State of Washington, Respondent v Donna Lee Dreckman, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

**A RULING BY COMMISSIONER BEARSE:**

Respondent's motion to supplement the record with the defense's proposed jury instruction is granted. Respondent has 5 days from the date of this ruling to file the instruction with the trial court and designate it for transmittal to this court. Respondent also is granted an extension of time to and including 10/31/13 to file the Respondent's Brief. The court continues the imposition of sanctions until 10/31/13 and will consider the Clerk's motion for further sanctions without oral argument if the brief is not filed by 11/04/13. The clerk will forward any further continuance requests for filing the brief to the Chief Judge for consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a large, stylized flourish at the end.

David C. Ponzoha  
Court Clerk

**APPENDIX C**

**RULING GRANTING DRECKMAN'S MOTION TO ALLOW  
SUPPLEMENTAL ASSIGNMENT OF ERROR**

**JANUARY 10, 2014**



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

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General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

January 10, 2014

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CASE #: 44131-4-II  
State of Washington, Respondent v Donna Lee Dreckman, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

**A RULING BY COMMISSIONER BEARSE:**

Appellant's motion to allow supplemental assignment of error is granted. The additional assignment of error contained in the reply brief is accepted for filing. The State is allowed to respond to the new argument regarding ineffective assistance. Any response is due within 30 days of the date of this ruling.

Very truly yours,

David C. Ponzoha  
Court Clerk

### DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44131-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent William Leraas, DPA  
[wleraas@co.grays-harbor.wa.us]  
Grays Harbor County Prosecutor's Office
- petitioner
- Attorney for other party

  
MARIA ANA ARBANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: August 21, 2014

# WASHINGTON APPELLATE PROJECT

**August 21, 2014 - 4:05 PM**

## Transmittal Letter

Document Uploaded: 441314-Petition for Review.pdf

Case Name: STATE V. DONNA DRECKMAN

Court of Appeals Case Number: 44131-4

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: \_\_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: [maria@washapp.org](mailto:maria@washapp.org)

A copy of this document has been emailed to the following addresses:

[wleraas@co.grays-harbor.wa.us](mailto:wleraas@co.grays-harbor.wa.us)



Washington State Court of Appeals  
Division Two

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General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS: 9-12, 1-4.**

August 22, 2014

Honorable Ronald Carpenter  
Clerk of the Supreme Court  
Temple of Justice  
Olympia, WA 98504

90664-5

Re: PETITION FOR REVIEW  
**State v Donna Lee Dreckman, No. 44131-4-II**

Dear Mr. Carpenter:

A Petition for Review has been filed in the above referenced matter. That petition, together with our file(1) and the briefs, are enclosed.

Very truly yours,

David C. Ponzoha  
Court Clerk

DCP:skw