

64507-2

64507-2

NO. 64507-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JORAWAR SINGH,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD MCDERMOTT

BRIEF OF RESPONDENT

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A. ISSUES

1. A defendant may not challenge a jury instruction on appeal if he either proposed the instruction or failed to object to the instruction at trial. Here, Singh joined in requesting the instruction at trial that he now challenges on appeal. Is he barred from bringing this claim?

2. The trial court has discretion to give a jury instruction that is consistent with the law and facts of the case. Here, the trial court gave a WPIC instruction that is legally correct and supported by the evidence. Was this instruction proper?

3. A defendant's claim of ineffective assistance fails unless he was prejudiced by deficient representation at trial. A defendant's representation is not deficient if counsel did not object to a proper jury instruction. Here, the jury instruction was properly given by the trial court and Singh was not prejudiced by the instruction. Does this defeat Singh's claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

Defendant Jorawar Singh was charged by amended information with Robbery in the First Degree. CP 12. At trial, Singh raised the defense of duress. CP 94. The jury convicted Singh as charged. CP 101. The trial court imposed a standard range sentence. CP 106-114. Singh now appeals his conviction. CP 104-105.

2. SUBSTANTIVE FACTS.¹

Late one night, Defendant Jorawar Singh came to Jacob Kaiser's apartment to drink. 4RP 15. Matthew Wagner was already at the apartment drinking with Kaiser, when Singh, known to the group as "Ice Cream," arrived with gin. 4RP 13-15. The men knew each other, all having met a week or two earlier at Kaiser's apartment. 4RP 15-17.

Wagner testified that as the three men continued drinking, Kaiser took out a semiautomatic pistol and showed the group. 4RP 21-22. The group continued to drink for another hour. 4RP 21.

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (09/23/09); 2RP (09/29/09); 3RP (09/30/09); 4RP (10/01/09); 5RP (10/08/09); 6RP (10/12/09); and 7RP (11/20/09 sentencing hearing).

The last time Wagner and Kaiser were together, they had discussed the idea of someday robbing a local store. 4RP 53-54. Now, short on beer and money, it seemed like the right time to rob the nearby convenience store. 4RP 18, 22-23. While Singh did not come up with the idea for the robbery, Singh never said that he did not want to be a part of it, nor did anyone threaten Singh to participate in the robbery. 4RP 46-47, 53.

Kaiser, Wagner, and Singh left the apartment and walked down the road to the convenience store. 4RP 22-25. They first explored a wooded-area behind the convenience store to plan the getaway. 4RP 24-27. They walked by some police officers, who stood 20 yards away. 3RP 41, 49-53; 4RP 25-27. The police officers saw the trio. 3RP 41, 49-53. Kaiser, Wagner, and Singh went to a nearby restaurant and waited for the police to leave. 4RP 26-27. After receiving an emergency call elsewhere, the officers drove away. 3RP 41-42.

The three men then approached the convenience store and waited for customers to leave the store. 4RP 27-29. After the last car drove from the store parking lot, Kaiser, Wagner, and Singh entered the convenience store. 4RP 27-29. As planned, Wagner went to the back of the store and grabbed two cases of beer as

Kaiser went to the counter. 4RP 22-23, 29-30. Singh joined Kaiser at the counter. 4RP 29. Kaiser took out his gun and put it on the counter in front of the clerk. 2RP 63-64. Singh and Kaiser then shouted demands at the clerk. 4RP 31-32.

The clerk opened up the cash register, and Kaiser grabbed money from the clerk. 2RP 63-65. Singh grabbed a 100-count box of cigarette lighters. 2RP 65-67, 74. The clerk immediately recognized Kaiser from a previous encounter. 2RP 62-63, 65-66. The clerk knew Singh and his family from his many visits to the store, but during the robbery, the clerk could not see or recognize Singh's face because it was covered by the hood of Singh's sweatshirt. 2RP 62-63, 65-66. After Kaiser grabbed the money and Singh took the lighters, the two left the counter and ran to the exit. 2RP 65-69. Multiple indoor and outdoor video cameras captured the entry, robbery, and flight of the trio. 2RP 31-49. The clerk pushed the silent alarm and called police. 3RP 68-69.

Kaiser, Wagner and Singh fled out the store's front door. 4RP 32. Singh ran first, followed by Kaiser and Wagner, who was carrying the cases of beer. 4RP 40-41. They escaped into the wooded area behind the store, dropping the stolen lighters and beer along the way. 4RP 25-27, 32, 41-42. Once in the woods,

Singh told Wagner to be quiet. 4RP 47. They separated from one another. 4RP 42.

Police responded to the scene with a dog track. 3RP 10-12. Singh was apprehended first, as he lay on the ground behind some short shrubs. 3RP 21-22. Police apprehended Kaiser and then Wagner around the wooded area. 2RP 108-110; 3RP 20-21; 4RP 45-46. The store's stolen money was found in Kaiser's possession during a later strip search, but the gun was never recovered. 4RP 74-78.

Singh claimed duress, and testified that he was smoking a cigarette and drinking a beer at a bus stop when two men approached him. 5RP 29-30. Singh recognized Kaiser as an old classmate from junior high, who used to bully Singh. 5RP 29-31. Singh did not know Wagner. 5RP 29-30. Kaiser took out a gun and demanded money from Singh, who handed all the cash he had to Kaiser. 5RP 29-31. Kaiser then forced Singh to walk with them down the street. 5RP 31-33, 35. Singh complied and followed Kaiser and Wagner to the convenience store. 5RP 32-33. Singh explained that before entering the store, Kaiser demanded that Singh steal cigarette lighters for Kaiser. 5RP 33-34.

Singh said that after entering the store, Kaiser and he went to the counter and that, to Singh's surprise, Kaiser pointed the gun at the clerk and demanded money. 5RP 33-36. Scared that Kaiser would use the gun against Singh, Singh grabbed the box of cigarette lighters and fled from the store into the wooded area with Kaiser and Wagner into the woods. 5RP 36-37. Singh escaped from Kaiser and Wagner. 5RP 36-37.

Defense witness, Bianca Domingue, was a friend of Singh's girlfriend. 5RP 64-65. Domingue testified that on the night of the robbery she saw three men walking near the convenience store. 5RP 61-64. She explained that one of them looked like he had a weapon pointed at the head of another man. 5RP 63-64. She was unable to identify any of the individuals involved. 5RP 62-64. Scared by the situation, she walked the other way but never called police. 5RP 62.

3. OTHER RELEVANT FACTS.

At the start of trial, Singh filed his proposed jury instructions, which included an instruction for the defense of duress based on the Washington Pattern Jury Instructions - Criminal (WPIC) 18.01. CP 35. The State also submitted jury instructions, which included this same WPIC instruction, but also included optional bracketed language that was omitted by Singh.² Supp. CP __ (Sub 43, State's Proposed Instructions).

At the close of the State's case-in-chief, Singh's counsel and the State submitted to the court a final set of proposed jury instructions. 5RP 3. The parties agreed to these instructions and their accuracy. 5RP 3-5. This final set included the WPIC 18.01 duress instruction with the optional bracketed language that had been omitted in Singh's pretrial proposed instructions. 5RP 4; CP 94. The parties expressly said that they did not take exception to these instructions. 5RP 3. The trial court accepted these instructions as being requested by both the State and Singh, and gave them as the court's instructions to the jury. 5RP 3-5, 35-37.

² The specific language of the jury instruction that Singh now challenges states:

The defense of duress is not available if the defendant intentionally or recklessly placed himself in a situation in which it was probable that he would be subject to duress.

5RP 4; CP 94 (Instr. No. 16).

C. ARGUMENT

1. THE INVITED ERROR DOCTRINE PRECLUDES REVIEW OF ANY INSTRUCTIONAL ERROR.

The sole issue raised by Singh on appeal is whether the trial court erred in using optional bracketed language from the WPIC duress instruction. But Singh not only failed to object to this instruction at trial, he joined in proposing the challenged instruction to the court. Because the invited error doctrine precludes review of any instructional error that was proposed by the defendant, Singh's claim fails.

"The invited error doctrine precludes review of any instructional error -- even one of constitutional magnitude -- where the challenged instruction is one that was proposed by the defendant." State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)). The defendant invites an error when the trial court gives a jury instruction that the defendant requested. State v. Studd, 137 Wn.2d 533, 538-39, 973 P.2d 1049 (1999).

This doctrine exists so that a defendant may not "request an instruction and later complain on appeal that the requested instruction was given." Id. at 546 (quoting Henderson, 114 Wn.2d at 870). Our Supreme Court has held that this is a strict rule that

does not allow for any flexibility, regardless of the circumstances or the nature of alleged constitutional error. Studd, 137 Wn.2d at 546-48.

For the first time on appeal, Singh challenges jury instruction number 16, the jury instruction on the law of duress. CP 94. The instruction given by the trial court was the same instruction that both parties agreed to and proposed to the court. 5RP 3-5. While Singh and the State filed separate proposed instructions before trial, after the State's case, the parties agreed upon a final set of revised instructions for the court to accept, which included the duress instruction. 5RP 3-5. This jointly-proposed set of instructions was adopted by the court. 5RP 3-5.

Accordingly, Singh requested the instruction that he now challenges for the first time on appeal. Any error resulting from this instruction was invited by Singh. Singh's claim of constitutional error does not survive this bar. See Studd, 137 Wn.2d at 546-48. The strict rule of the invited error doctrine applies and precludes appellate review.

2. SINGH WAIVED ANY CHALLENGE TO THE COURT'S JURY INSTRUCTION WHEN HE AGREED TO ITS LANGUAGE.

Even if the Court found that the invited error doctrine did not bar Singh from his instructional challenge, he waived this claim by not objecting to the instruction at trial. In order to claim error on the basis of a jury instruction given by the trial court, an appellant must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 89 P.2d 1246 (1995). The purpose of requiring objections or exceptions is "to afford the trial court an opportunity to know and clearly understand the nature of the objection to the giving or refusing of an instruction in order that the trial court may have the opportunity to correct any error." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). The person objecting must state the instruction objected to and the reasons for the objection. CrR 6.15(c). Our Supreme Court has held:

It is well-settled law that before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show that an exception was taken to that instruction in the trial court. That rule is not a mere technicality. As we have explained clearly and often:

"CR 51(f)³ requires that, when objecting to the giving or refusing of an instruction, "[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection." The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction. [*citations omitted*].

Therefore, the objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal. [*citations omitted*]."

Salas, 127 Wn.2d at 181-82 (quoting State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990)).

The trial court afforded Singh the opportunity to take exception to any of the instructions proposed. 5RP 3. Singh did not object to or take exception to these instructions. 5RP 3. Indeed, he agreed to instructions that were adopted by the court. 5RP 3.

³ CR 51(f) states:

Objections to Instruction. Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

Singh now challenges the duress jury instruction that he did not take exception to at trial. By raising this issue now he has deprived the trial court of the ability to clarify the full legal and evidentiary basis for its instruction. Because Singh failed to take exception at trial to the duress jury instruction that he now challenges, he may not bring this claim.

Singh argues that he may alternatively bring this claim for the first time on appeal because he argues that the trial court's use of the optional language in duress instruction was an error of constitutional magnitude. Under RAP 2.5(a)(3), an issue may be raised for the first time on appeal if it is "a manifest error affecting a constitutional right." "Constitutional errors are treated specially because they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). But, "the exception actually is a narrow one, affording review only of certain constitutional questions." Scott, 110 Wn.2d at 682. This narrow exception is frequently misread; it may not be invoked merely because a defendant can identify a constitutional issue not litigated below. State v. Valladares, 31 Wn. App. 63, 75-76, 639 P.2d 813 (1982). Allowing "every possible constitutional error" to be raised for the first time on appeal undermines the trial process and would

waste resources. State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992); see also State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

There is a two-step process under RAP 2.5(a)(3): 1) whether the alleged error suggests a constitutional issue; and 2) whether the error is "manifest." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Thus, an appellate court must first make a cursory determination as to whether the alleged error presents a constitutional issue at all. Id.

Here, Singh provides no authority that the use of the duress instruction language in question amounts to a constitutional error. Instead, Singh makes a sweeping statement that "An error that affects the defense theory, such as the erroneous inclusion of an aggressor instruction, 'is constitutional in nature and cannot be deemed harmless unless it is harmless beyond a reasonable doubt.'" Appellant's Brief at 14 (quoting State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998)). But this assertion overstates the holding of Birnel. Birnel does not hold that an error affecting any defense theory is a constitutional error. The complete citation to Birnel states:

An error affecting a defendant's self-defense claim is constitutional in nature and cannot be deemed harmless unless it is harmless beyond a reasonable doubt.

Id. at 473 (emphasis added).

The Birnel Court specified how an aggressor instruction is not favored because it potentially invalidates a claim of self-defense. Id. at 473. The reason for this distinction with aggressor instructions is because, unlike affirmative defenses, the State bears the burden of proving beyond a reasonable doubt the *absence* of self-defense. State v. Camara, 113 Wn.2d 631, 638, 781 P.2d 482 (1989); State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Accordingly, an erroneous aggressor instruction negates an element of the crime, and thus is an error of constitutional magnitude. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

Duress, on the other hand, is an affirmative defense because it admits that the defendant committed the crime, but provides an excuse for committing it. State v. Riker, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994). It is a defense that is a statutory creation. See RCW 9A.16.060. The State does not have to prove the absence of duress; the *defendant* must prove the existence of

duress. Riker, 123 Wn.2d at 368-69. Proof of duress therefore does not negate any element of the crime. State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994). Any inadequacy in instructions on duress has no bearing on the State's burden of proof. Accordingly, any error on those grounds is not a constitutional one.

Even if Singh could establish that there was constitutional error, an error of constitutional magnitude must also be manifest. State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756, 761 (2009). “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” O'Hara, 217 P.3d at 761; State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). To demonstrate actual prejudice, there must be a “‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’” O'Hara, 217 P.3d at 761 (alteration in original) (internal quotation marks omitted) (quoting Kirkman, 159 Wn.2d at 935, 155 P.3d 125).

To ensure that the actual prejudice inquiry and the harmless error analysis are distinct, “the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” Id. at 761. The defendant must show

that the had "practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001) (quoting Lynn, 67 Wn. App. at 345); see also State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2001). The term "'manifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. 'Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." Lynn, 67 Wn. App. at 345. In other words, the defendant must show how the alleged error actually affected his constitutional rights. Id. at 346.

Singh provides no authority to support his claim that the trial court's jury instruction amounted to manifest error. In fact, it is not clear from the record that this optional language had any effect in this case. Because the evidence established Singh's intentional involvement in every aspect of the offense, this instruction would have little impact on the trial. While Singh testified that he was forced to participate in the robbery, these factual questions were properly left to the jury to resolve.

Contrary to Singh's claim, the trial court did not instruct the jury to ignore the defense of duress in this case. The trial court simply instructed the jury that *if* the jury found that the defendant recklessly or intentionally placed himself in the situation where duress was probable, then the defense of duress would no longer be available. This is a correct statement of the law. See infra, § C.3.a. The court left the factual determination to be resolved by the jury. The court's deference to the jury had no practical and identifiable consequences in the trial of the case. Singh's claim of duress was considered and rejected by the jury without infringing on his constitutional rights. Because there was no manifest error affecting a constitutional right, Singh may not bring this claim for the first time on appeal.

3. THE COURT'S JURY INSTRUCTION WAS PROPER.

Even if Singh could bring this claim, the instruction was proper. Singh requested that the jury be instructed as to the defense of duress, and the trial court did so. Singh claims that the trial court erred when it included the full WPIC duress instruction. Specifically, Singh argues that the trial court erred by including the optional bracketed WPIC language that: "The defense of duress is

not available if the actor intentionally or recklessly places himself in a situation in which it was probable that he will be subject to duress." CP 35. The instruction was a correct statement of the law and was supported by evidence that Singh intentionally involved himself in the robbery.

a. The Duress Jury Instruction Properly Informed The Jury Of The Law.

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." State v. Aguirre, 168 Wn.2d 350, 364-65, 229 P.3d 669 (2010). In this case, the trial court's instruction accurately stated the law of duress.

RCW 9A.16.060 sets forth the statutory defense of duress.

The statute provides that it is a defense to any crime other than murder, manslaughter or homicide by abuse, that:

- (1) 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
- (2) That such apprehension was reasonable upon the part of the actor; and

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

RCW 9A.16.060(1). Duress is an affirmative defense. Riker, 123 Wn.2d at 367-68. The defendant bears the burden of proving duress by a preponderance of the evidence. Id. at 368-69. RCW 9A.16.060 also provides that the defense of duress is not available "if the actor intentionally or recklessly places himself or herself in a situation in which it is a probable that he or she will be subject to duress."

The trial court may refuse to instruct the jury as to the affirmative defense of duress if there is no substantial evidence to support it. State v. McKinney, 19 Wn. App. 23, 573 P.2d 820 (1978). However, if evidence is presented from which the jury could conclude that the defendant acted under duress, the instruction should be given. State v. Harvill, __ Wn.2d __, 234 P.3d 1166, 1168 (2010); State v. Turner, 42 Wn. App. 242, 246-47, 711 P.2d 353 (1986). Factual issues, such as whether a threat is sufficiently immediate to constitute duress, should be determined by the trier of fact based on an assessment of all circumstances. Id. at 246-47.

The trial court's instruction to the jury followed the language of Washington Pattern Instruction 18.01, which states:

Duress is a defense to a criminal charge if:

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

WPIC 18.01 (emphasis added).

The "Note on Use" for the pattern instruction advises courts to "Use bracketed material as applicable." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 18.01 at 274 (3d ed. 2008).

Singh does not claim that the duress instruction was improper. He instead challenges the use of the optional bracketed portion of the instruction, which instructs the jury as to the statutory exception for duress. However, after Singh submitted his opening

brief in this case, this Court, through State v. Healy, ___ P.3d ___, WL 3211994 (Wn. App., Aug. 16, 2010), has addressed the legality of this optional bracketed language. The Court held that this bracketed language correctly states the law and is consistent with RCW 9A.16.060(3), which creates for an exception to a duress defense if the defendant intentionally or recklessly placed himself into the situation where it was probable that he would be subject to duress. Healy, WL 3211994 at *1. The Court stated that "The drafters of the model Penal Code anticipated this [statutory] provision 'will have its main room for operation in the case of persons who connect themselves with criminal activities.'" Id. (quoting MODEL PENAL CODE § 2.09 cmt. 3, at 379 (1985)).

In Healy, this Court held that by including the bracketed language of WPIC 18.01 the trial court properly left to the jury the factual question of whether this statutory exception to duress applied to the case. Healy, WL 3211994 at *8. The trial court's decision to give this jury instruction is consistent with our Supreme Court's recent holding in Harvill, which states that the trier of fact should resolve similar factual questions. Id. at *7. In our case, the trial court accurately instructed the jury as to the law of duress and

allowed the jury to resolve any factual questions related to the claim.

b. The Trial Court Did Not Abuse Its Discretion In Providing The Full Duress Jury Instruction.

If a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion. Aguirre, 168 Wn.2d at 364-65. The specific language of a jury instruction is a matter within the court's discretion. Healy, WL 3211994 at *2 (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Jansen, 149, Wn. App. 393, 399, 203 P.3d 393 (2009); State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997). Thus, if there is evidence to support the giving of the instruction, the court has not abused its discretion, and the instruction is proper.

Again, Healy is instructive. Healy had long been connected with unlawful activities. Healy, WL 3211994 at *2. Eventually, Healy had a falling out with a criminal associate, leading to hostility between them, especially after Healy served as a confidential informant against him. Id. at *2, *7. The associate found out about Healy's police involvement and contacted Healy several times to

threaten violence against him and his mother. Id. at *2. Healy did not want help from police because he thought it would further expose him as a confidential informant. Id. at *3. According to Healy, the criminal associate forced him to participate in a string of burglaries. Id. at *3-4.

At trial, Healy "objected vigorously" to the State's inclusion of the bracketed duress exception language of WPIC 18.01. Id. This Court held that the trial court did not abuse its discretion by giving this instruction because there was sufficient evidence to support a conclusion that Healy was reckless. Id. Healy had been earlier connected with criminal activities. Id. Healy also had violent and hostile interactions with the criminal associate that escalated after Healy became a confidential informant. Id.

The Court held that this evidence would allow a jury to conclude that Healy recklessly created the predicament he found himself in the night of the burglaries. Id. Healy could have accepted police help regarding the threats, but chose not to. Id. The Court held that "being pressed into crime against one's will by former criminal associates is not so unusual as to foreclose submitting this [duress exception] issue to the jury." Id. at *7. Accordingly, the trial court properly included this optional duress

exception language in the duress jury instruction so the jury could factually determine whether Healy's duress was due to his own reckless or intentional conduct. Id. at *1, *7.

Under Washington law, each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997); See also State v. Davis, 119 Wn.2d 657, 665, 835 P.2d 1039 (1993); State v. Theroff, 95 Wn.2d 385, 389-90, 622 P.2d 1240 (1980). In evaluating whether the evidence was sufficient to support a jury instruction requested by a party, the appellate court should view the evidence in the light most favorable to the party requesting the instruction.⁴ State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). See also State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

Viewing the evidence in the light most favorable to the State in this case, there was evidence from which the jury could conclude that Singh had intentionally or recklessly placed himself in a situation where he would probably be subject to duress. Singh knew Wagner and Kaiser before the robbery. 4RP 15-17. He met

⁴ In this case, both parties requested the now challenged jury instruction. Because the defendant proposed the instruction, appellate review is barred. See supra § C.1. However, for purposes of this section, the evidence will be discussed in a light most favorable to the State.

with them at Kaiser's house, brought gin, and they all began drinking. 4RP 15-22. Kaiser took out a gun and started to discuss the idea of committing a robbery. 4RP 53-54. After more drinking, the three men left the apartment and walked to the convenience store. 4RP 21-25. They planned a getaway behind the store. 4RP 24-27. Along the way, they walked by police who were next door to the convenience store. 3RP 41, 49-53; 4RP 25-27. Singh, Wagner, and Kaiser went across the street and waited for police to leave the area. 4RP 26-27. They then continued with the plan to commit the robbery. 4RP 27-29.

If the jury were to believe Singh initially agreed to robbery but factually concluded, based on the testimony of Domingue, that Singh was subjected to duress at some point that night, there was evidence to support the fact that Singh recklessly put himself into that situation. In fact, the jury could have concluded a number of possibilities based on the testimony. The jury could find that there was no duress at all, and thus find the defendant guilty. The jury could consider Singh's account and thus acquit him. Or, the jury could agree with some of Singh's claim and find that Singh may have tried to back out of the robbery after intentionally associating with the crime. This latter possibility makes the instruction proper.

As in Healy, Singh knowingly associated with co-defendants who were likely to use violence. Indeed, while they were all at Kaiser's apartment, Kaiser was openly carrying a firearm. 4RP 21-22. After Kaiser and Wagner discussed the plan to rob the convenience store, Singh walked with them to the robbery and helped planned the getaway. 4RP 18, 22-27. Like in Healy, Singh had a chance for police intervention and help, but did not take advantage of it. 4RP 18, 22-27; See Healy, WL 3211994 at *5. Instead, Singh continued walking to the convenience store to commit the robbery. 4RP 27-64.

Since there was evidence that Singh associated with his co-defendants and went to the convenience store after Kaiser took out a gun and discussed the idea of robbing a store, a jury could conclude that Singh intentionally or recklessly associated himself with the night's violence. Even if the jury were to believe Singh that he was forced to participate in the robbery at some point, there was sufficient evidence for jury to factually determine that Singh's duress was due to his own reckless or intentional conduct. This evidence was sufficient to support the giving of the bracketed language contained within the WPIC duress instruction. Thus, the trial court did not abuse its discretion in giving this jury instruction.

4. SINGH'S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE JURY INSTRUCTION.

Singh claims that he received ineffective assistance of counsel when his counsel failed to object to the duress instruction. Because the instruction was proper, Singh's counsel's performance was not deficient, and his claim fails.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The petitioner has the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding

would have been different (the prejudice prong). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Petitioner must establish a reasonable probability that, but for counsel's errors, the

result of the proceeding would have been different. Strickland, 466 U.S. at 694.

Here, the trial court properly instructed the jury as to the law of duress. See supra § C.3. When there is no error, a defendant cannot show that his counsel provided deficient representation by failing to object. See State v. Gerdts, 136 Wn. App. 720, 729-730, 150 P.3d 627 (2007). Singh's claim of ineffective assistance fails because he failed to show deficient performance.

Even if this Court found that Singh's counsel was deficient for not objecting to the instruction, he still suffered no prejudice. Singh does not argue that the jury was misadvised as to the applicable law of duress. Singh instead argues that the jury was instructed that they were permitted to "nullify his defense theory." Appellant's Brief at 20. But the jury was instructed that the statutory exception to duress only applied if facts supported it. Singh does not show how deference to the jury as to a factual finding, based on an accurate statement of law, could prejudice him.

Indeed, even if Singh had shown that there was insufficient evidence to support the optional language he now challenges on appeal, the jury would have simply ignored that possible statutory exception to defense, since the facts did not support it. State v.

Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994) (jury is presumed to follow its instructions). The instruction did not direct the jury to ignore the defense, misstate the law, or mislead the jury as to the facts of the case. It simply allowed the jury to apply the facts to the case before it. Singh cannot prove that he would suffer prejudice in such a circumstance.

This lack of prejudice becomes more obvious in light of co-defendant Wagner's testimony and the corroborating video evidence that showed Singh approached the store, participated in the robbery, and led in the get-away. The facts show that Singh was not a duress victim in this case. Singh cannot show that had his counsel objected to this optional language in this instruction that the result of the trial would be different. Because Singh suffered no prejudice by the duress instruction, his claim of ineffective assistance fails.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Singh's conviction.

DATED this 23rd day of September, 2010.

Respectfully submitted,

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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 Andrew Zinner, the attorney for the appellant, at Nielsen, Broman, & Koch, 1908 E. Madison St., Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JORAWAR SINGH, Cause No. 64507-2-1, in the Court of Appeals, Division I, 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.

W Brame
Name
Done in Seattle, Washington

9/29/10
Date