64507-2

64507-2

NO. 64507-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JORAWAR SINGH,

Appellant.

REC'D
JUL 13 2010
King County Prosecutor
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard F. McDermott, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional right to present a defense by including an optional paragraph in the pattern duress instruction, which permitted jurors to disregard the appellant's key defense, because there was insufficient evidence to support the paragraph.

2. Trial counsel deprived the appellant of his constitutional right to effective assistance by failing to object to the trial court's duress instruction.

Issues Pertaining to Assignments of Error

1. Did the trial court violate the appellant's constitutional right to present a defense by instructing jurors that duress is not an available defense if the accused intentionally or recklessly places himself in a situation in which it was probable he would be subject to duress, where the evidence was insufficient to support that language?

2. Did trial counsel deprive the appellant of his constitutional right to effective representation by proposing a duress instruction without the above language and then failing to object to the trial court's inclusion of the language?

B. STATEMENT OF THE CASE

Jorawar Singh and two other young men, Jacob Kaizer and Matthew Wagner, robbed a 7-11 in Des Moines. 2RP 71-74; 4RP 29-32; 5RP 24-25.[1] Kaizer had a gun and showed it to the clerk at the cash register. 2RP 63; 4RP 21-22; 5RP 33-34. According to the clerk, only Kaizer spoke. 2RP 68. The clerk recognized both Singh and Kaizer because they had been to the store before. 2RP 61-62, 70-74. Singh, in fact, spoke to him in the Punjabi language during other visits. 2RP 73-74.

Singh, who was standing next to Kaizer, grabbed a box of lighters sitting on the counter near the register. 2RP 65-67; 4RP 34; 6RP 33-35. Kaizer obtained money from the cash register, and Wagner took two cases of cheap beer. 2RP 43, 63-65, 68; 4RP 30-33. They fled with their booty and the clerk pressed an alarm button. 2RP 68-69. He ran outside, looked to see where the robbers ran, and called 911. 2RP 69.

Officers soon arrived, one with a tracking dog. 2RP 90, 99-101; 3RP 7-11, 42-4, 68-70, 87-89. Singh and his cohorts were quickly found nearby, arrested, and identified by the clerk in individual "show-ups." 2RP 69-75; 103-15, 3RP 20-26, 44-50; 74-80, 89-91. The officers found the

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[1] This brief refers to the 7-volume report of proceedings as follows: 1RP – 9/23/09; 2RP – 9/29/09; 3RP – 9/30/09; 4RP 10/1/09; 5RP – 10/8/09; 6RP 10/12/09; 7RP – 11/20/09.

beer and some clothing Singh and his companions wore, but no gun or lighters. 2RP 118-20; 3RP 13-16, 30-31, 54-60, 4RP 44-46. Kaizer had the money; a jail officer found it during a strip search. 4RP 74-78.

Wagner, like Singh, had been charged with first degree robbery. CP 39; 4RP 61-62. He pleaded guilty to that crime. In exchange for the plea, and his testimony against Singh, the state agreed to recommend a favorable sentence. 4RP 48-51, 60-63.

Wagner was 19 years old at the time of the incident, had not graduated from high school, had no income, and drank alcohol beginning at age 15. 4RP 7-12. He preferred vodka. 4RP 12. He lived in an apartment near the 7-11 with an uncle who sometimes gave him money. 4RP 10-13. Wagner did not know his uncle's last name. 4RP 52-53. He met Kaizer through his uncle a couple of weeks before the robbery. 4RP 52-53. Wagner and Kaizer regularly spent time together and often drank. 4RP 13.

In the hours before the robbery, Wagner and Kaizer were drinking together at Kaizer's apartment. 4RP 13-14. Wagner drank "Cisco," which he described as "[h]ard alcohol, pretty close." 4RP 13.[2] Later that

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[2] "Cisco" is a fortified wine "[k]nown as 'liquid crack,' for its reputation for wreaking more mental havoc than the cheapest tequila." http://www.bumwine.com/cisco.html.

evening, Singh, who was 23 years old, came over with gin. 4RP 14-16. Wagner recalled meeting him a week or two earlier at the same apartment. 4RP 16-17.

Kaizer showed them a black semiautomatic handgun. 4RP 20-22. Either Kaizer or Wagner decided to rob the 7-11 that night, an idea Wagner had hatched about a week earlier. 4RP 23, 53-56. This was not Singh's idea. 4RP 53. The plan was for Wagner to walk to the back of the store and take beer, while Kaizer and Singh went to the counter. 4RP 23, 53-56.

They walked to 7-11, waited for customers to depart, and went inside. 4RP 27-29. As planned, Wagner went to the beer cooler and Kaizer and Singh went to the counter. 4RP 29-31. Wagner grabbed beer, during which time he heard two voices demanding things from the clerk. 4RP 29-33, 56-58, 60-61. The three left the store together and ran into a brushy and wooded area. 4RP 34-35, 40-46. Wagner abandoned the beer during his flight. 4RP 42-45. He continued running through the wooded area and, after he had made it back out to a sidewalk, an officer stopped him. 4RP 45-46.

Wagner testified Singh had not been "roughed up" or threatened with a gun to participate in the crime. Nor did Singh state at any point he did not want to join in. 4RP 47.

Singh's primary defense was duress, and his testimony was substantially different than Wagner's. 5RP 24-25, 38. He testified he finished painting a neighbor's apartment that night about 10. 5RP 26-27, 77, 80. The neighbor paid him $50 and two bottles of gin. 5RP 29, 77. He took the bottles to his apartment and went out with the $50. 5RP 77, 79-80. He bought a beer and cigarettes at a gas station located across the street from the 7-11. 5RP 27, 77. His plan was to take the bus to a different 7-11, where his friends congregated to drink beer. 5RP 27-29, 75, 78. He sat at a dark bus stop and began drinking his beer and smoking a cigarette. 5RP 29, 74, 76-77.

Two men walked up to Singh. One pulled out a gun and demanded money. As he surrendered his money, Singh saw that the armed man was Kaizer, with whom he had attended junior high school. 5RP 29-30, 44, 72-76. Singh had never before seen the other man. 5RP 30. Singh thought the other man, Wagner, may have had a gun as well. 5RP 120. After taking Singh's money and cigarettes, Kaizer demanded he get up and

walk with them or he would die. Singh obeyed, feeling he had no choice because he was "scared to get shot." 5RP 30-34.

They walked toward a 7-11 that Singh had gone to regularly for about two or three years. He knew the clerk and often spoke with him. 5RP 32-33, 44-45. Kaizer kept his hand over the gun during the entire walk. 5RP 117. He told Singh he would steal lighters and the other man, Wagner, would steal beer. 5RP 32-33, 47, 50; 6RP 17. Singh did not know Kaizer planned to use his gun to rob the clerk of the money from the cash register because he already had Singh's money. 5RP 34.

When the men entered the store, Wagner went for beer and Singh walked to the lighters on the counter near the cash register. 5RP 32-34; 6RP 17. He picked up the lighters without saying anything to the clerk. 5RP 34-35. He was about to leave when Kaizer displayed the gun and took money from the register. 5RP 34, 46-50, 6RP 23. The three men fled together and ran around the back of the store into a wooded area. 5RP 35-36, 80.

After running down a trail for a short time, Kaizer demanded the lighters from Singh. At gunpoint, he ordered Singh get down on his knees. He then took Singh's hooded sweatshirt off and threw it. 5RP 36-37, 80-81, 121. Kaizer demanded that Singh lie in that spot. 5RP 37. He was

found by a police dog and arrested shortly thereafter. 2RP 108-10, 3RP 20-21.

In support of his duress defense, Singh called Bianca Domingue as a witness. He knew Singh as her friend's boyfriend. 5RP 62-65. She had gotten off a bus near the 7-11 on the night of the robbery when she saw three men huddled closely together. 5RP 60-61. She did not see any faces and could not identify any of the men. 5RP 66-67. One of the men grabbed another and gestured as if he had a weapon. 5RP 61-62, 66. This frightened her and she left. 5RP 62.

Consistent with the defense theory, Sing proposed a duress instruction. CP 35 (attached as appendix A). The trial court gave a duress instruction that was similar, but included an optional paragraph from the pattern duress instruction that was not in Singh's instruction. CP 94 (instruction 16, attached as appendix B). The jury rejected the defense and found Singh guilty. CP 101. The trial court imposed a standard range 90-month sentence, as well as 18 months community custody. CP 106-14.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED SINGH'S RIGHT TO PRESENT A DEFENSE BY ADDING DAMAGING OPTIONAL LANGUAGE TO A PATTERN DURESS INSTRUCTION WHERE THE EVIDENCE DID NOT SUPPORT THE LANGUAGE.

Singh proposed a duress instruction that did not include the following optional paragraph: "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 trial court included the paragraph. CP 94 (instruction 16) (attached as appendix). The court's instruction mirrored WPIC 18.01.[3] Because the facts in

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[3] WPIC 18.01, the pattern duress instruction, provides that duress is a defense 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 [himself][herself] in a situation in which it was probable that [he][she] would be subject to duress.]

Singh's case did not support the paragraph, the trial court erred. Singh's conviction should be reversed.

a. The trial court's inclusion of the challenged paragraph was reversible error.

Due process guarantees a defendant the right to defend against the state's allegations and present a defense. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). An accused is therefore entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. Failure to so instruct is reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (failure to give duress instruction reversible error).

Duress is an affirmative defense that should not be considered by the jury unless there is substantial evidence to support it. State v. Turner, 42 Wn. App. 242, 245, 711 P.2d 353 (1985), review denied, 105 Wn.2d 1009 (1986). An accused who "intentionally or recklessly places himself .

> The defendant has the burden of proving this defense 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. 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].

. . in a situation in which it is probable that he . . . will be subject to duress is not afforded the defense." RCW 9A.16.060(3); State v. McKinney, 19 Wn. App. 23, 25, 573 P.2d 820, review denied, 90 Wn.2d 1012 (1978).

McKinney is instructive by comparison. It is also the only Washington case addressing the language contained in the challenged paragraph. The accused and a companion were drinking beer at a tavern for several hours when the companion suggested they rob the tavern. The accused knew his companion had the gun. He nevertheless obtained a paper bag in which to put the money, after which the companion pointed a gun at the bartender and told the accused to grab the money. The accused testified he took the money because his thought his companion might shoot him or the bartender. McKinney, 19 Wn. App. at 24.

The trial court refused the accused's request for a duress instruction. This Court affirmed, finding the evidence did not establish the accused acted under any personal constraint or was threatened by his companion. The Court concluded, "One who intentionally or recklessly places himself in a situation in which it is probable that he will be subject to duress is not afforded the defense." McKinney, 19 Wn. App. at 25.

Because of the dearth of Washington authority, it is helpful to look at similar cases from other jurisdictions. One such case, Williams v.

Maryland,[4] cites McKinney as part of its survey of duress cases from several other jurisdictions.[5] Williams claimed he was forced to commit an attempted robbery by former members of a drug gang to which Williams owed a debt. Williams, 101 Md. App. at 412. The court found duress did not apply because, by voluntarily becoming indebted to a reputed drug organization, Williams recklessly placed himself in a situation where it would be probable he would be subjected to duress. Williams, 101 Md. App. at 425-26. The court concluded that "[t]his was a situation that would not have occurred but for Williams's association with the drug organization." Id. at 426. See Williams v. State, 600 So.2d 432, 435 (Ala. Crim. App. 1992) (because defense at theft trial was that accused stole money due to coercion from loan shark who had threatened to harm his family, state was entitled to instruction stating defense does not apply where accused intentionally or recklessly placed himself in a situation where it was probable that he would be subject to duress); Meador v. State, 10 Ark. App. 325, 330, 664 S.W.2d 878, 881 (Ark. App. 1984) (trial court did not err by refusing to delete paragraph from duress instruction

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4 101 Md. App. 408, 418-19, 646 A.2d 1101 (Md. App. 1994).

5 Williams also discusses section 2.09 of the Model Penal Code, which includes the same language as RCW 9A.16.060(3).

because defendant's drug dependence caused him to owe debt to men who forced him to attempt robbery).

The common thread running through these cases is the accused was at least partly to blame for his coercive predicament, by falling in with the wrong crowd, borrowing money from dangerous sources, or becoming dependent upon illegal substances. Unlike the defendants in those case, Singh did nothing to expose himself to Kaizer's coercion at gunpoint. He was not indebted to either Kaizer or Wagner. There was no evidence to suggest he was aware Kaizer was violent.

Nor did Singh play any role in "planning" the robbery. Wagner testified he did not know what Singh was going to do in the store. 4RP 22-23. Although Wagner testified he heard two voices making demands of the clerk, he could not specify "who said what." 4RP 31-32, 56-57, 60-61. In contrast, the clerk testified only Kaizer spoke to him. 2RP 68. Singh testified he said nothing throughout the incident. 5RP 35.

In any event, there is no dispute Kaizer stood near Singh when he pulled the gun. Under those circumstances, demands by Singh for money or cooperation from the clerk are consistent with his duress defense because by then Kaizer had threatened him at gunpoint. This is much different than producing a paper bag to put money in without being

threatened, as did the accused in McKinney. See In re Personal Restraint of Le, 122 Wn. App. 816, 821, 95 P.3d 1254 (2004) (trial court did not err in refusing duress instruction because in his trial testimony, accused admitted he was never threatened and gun was never pointed at him); State v. Jeffrey, 77 Wn. App. 222, 227, 889 P.2d 956 (1995) (felon did not present sufficient evidence to establish necessity defense to unlawful possession of a weapon because he possessed gun before perceived need for protection arose).

Singh did not intentionally or recklessly place himself in his coercive situation. There was thus no evidence to support the trial court's use of the optional paragraph. The court erred by giving it.

The trial court's error was not harmless. The added paragraph permitted jurors to disregard Singh's duress theory if they erroneously believed, for example, that he intentionally or recklessly exposed himself to coercion by participating in a robbery after learning Kaizer was armed. In this sense, the trial court's error is analogous to erroneously giving an aggressor instruction, because such an instruction "effectively deprived" Singh of his defense theory. State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) (conviction reversed where trial court incorrectly gave jury

aggressor instruction, which "effectively deprived him of his theory of self-defense").

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." State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), overruled on other grounds by In re Personal Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Because the court's error here affected the defense theory, it is also constitutional.

The state cannot prove the error harmless beyond a reasonable doubt. By giving the duress instruction, the trial court concluded Singh presented sufficient evidence that he acted under Kaizer's compulsion. The challenged paragraph is powerful because it can gut the duress defense.

This point is illustrated in State v. Stockton, 91 Wn. App. 35, 955 P.2d 805 (1998). The accused presented a necessity defense to the charge of unlawful possession of a weapon. Like the duress defense, recklessly placing one's self in a position where criminal conduct would be necessary defeats a necessity claim. Stockton, 91 Wn. App. at 41. The accused testified a man approached him and asked him what he wanted. The

accused believed the man was trying to sell him drugs. He said he did not want anything and continued walking. Two other men approached, asked if the accused had money, and put their hands in his pockets. An altercation ensued, during which the accused grabbed a gun from someone's hand, pointed it at his assailants for a short time, and ran off. Stockton, 91 Wn. App. at 38.

Because the accused mentioned drugs, the trial court, over defense objection, permitted the prosecutor to ask if the accused had knowledge of street drug transactions. The accused admitted he had bought drugs on the street, but not in the previous two years. Stockton, 91 Wn. App. at 39. This Court found the accused's previous drug use did not tend to disprove any element of the necessity defense. It did, however, allow the state to infer that if he was buying drugs, he had put himself in a situation where he would need to do something illegal. Stockton, 91 Wn. App. at 41. This Court concluded, "The prejudice was particularly significant here because the evidence tended to negate an element of Stockton's defense." Stockton, 91 Wn. App. at 42.

The prejudice to Singh is even worse. Unlike in Stockton, here the error is not admission of *evidence* tending to support a finding of reckless exposure, but rather giving jurors the *option of* finding reckless exposure

in the first place. For these reasons, the constitutional error in this case was not harmless. Singh's conviction should be reversed.

b. Singh may make this argument for the first time on appeal.

The trial court gave a duress instruction, but did not give the defense proposed instruction. Compare CP 35 with CP 94.[6] Singh's trial counsel took no exception to the court instruction. 6RP 3-5. But under RAP 2.5(a)(3), certain instructional errors that are of constitutional magnitude may be challenged for the first time on appeal. Constitutional errors are treated specially because they often result in serious injustice to the accused. State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The appellant must demonstrate the error is (1) manifest; and (2) truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is manifest if it results in actual prejudice or had practical and identifiable consequences in the trial. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999).

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[6] Because Singh proposed a proper duress instruction in light of the evidence, he did not invite the trial court's error. See State v. Vander Houwen, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) (invited error did not bar challenge to alternate jury instruction that accused requested after trial court refused accused's original, correct instruction); State v. Carter, 127 Wn. App. 713, 716, 112 P.3d 561 (2005) (invited error doctrine prohibited review of challenge to *identical* instruction proposed by defense counsel).

In O'Hara, the Court held failing to give jurors the complete definition of "malice" as it related to defense of self or property was not manifest constitutional error. O'Hara, 167 Wn.2d at 106-08. It was not of constitutional magnitude because the instructions still required jurors to find the accused did not act on a reasonable belief the victim maliciously trespassed or maliciously interfered with real or personal property in order to convict. O'Hara, 167 Wn.2d at 108. Nor was the error "manifest" because the instruction still allowed the jury to determine whether the accused reasonably believed the victim was maliciously trespassing or maliciously interfering with his real or personal property. O'Hara, 167 Wn.2d at 108.

The trial court's error in Singh's trial was qualitatively different than the mere definitional error in O'Hara. See also State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991) (neither failure to define individual terms in instructions nor failure to define technical terms in instructions is manifest error of constitutional magnitude), cert. denied, 506 U.S. 856 (1992); Scott, 110 Wn.2d 691 (right to due process does not require court to define particular terms used in instruction so long as all elements are set forth).

Rather than not going far enough, the court here went too far by improperly including a portion of the duress instruction that made it easier for the jury to find guilt by disregarding the duress defense. Failing to define a term, in contrast, does not present a means by which jurors can nullify a defense theory, or in any other way make it easier to find guilt. The practical and identifiable consequence of the court's error here is the possibility jurors found Singh guilty by negating his duress defense without supporting evidence. The error here was therefore manifest, and it affected Singh's constitutional right to present a defense. This Court should review the issue for the first time on appeal.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S ERRONEOUS DURESS INSTRUCTION.

If this Court concludes defense counsel waived the challenge to the duress instruction by failing to object, it should nevertheless reach the merits because counsel's failure deprived Singh of his constitutional right to effective representation.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109

Wn.2d 222, 229, 743 P. 2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); see State v. Davis, 119 Wn.2d 657, 664, 835 P.2d 1039 (1992) (court reviewed defense counsel's failure to object to aggressor instruction under ineffective assistance theory).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

a. Counsel's failure to object was deficient.

Reasonable attorney conduct includes an obligation to investigate pertinent law. State v. Woods 138 Wn. App. 191, 197-98, 156 P.3d 309

(2007). Therefore, proposing an incorrect instruction, even when it is mirrors a pattern instruction, may constitute ineffective assistance. Id. The same is true of a failure to object to an improper instruction. State v. Howland, 66 Wn. App. 586, 595, 832 P.2d 1339 (1992) (counsel deficient for failing to "notice" inaccurate jury instruction), review denied, 121 Wn.2d 1006 (1993).

Singh's trial counsel failed to object to the trial court's duress instruction, which contained a paragraph that permitted jurors to nullify his defense theory. Counsel's failure was not based on a legitimate tactic. Duress was the central feature of counsel's chosen strategy. 6RP 72-74 (defense closing argument). The brackets around the paragraph in WPIC 18.01 should have alerted counsel that it was optional and should be given only if evidence supports it. The evidence did not support the instruction. Counsel's failure to object to the erroneous instruction was deficient performance. State v. Carter, 127 Wn. App. 713, 718, 112 P.3d 561 (2005).

b. Counsel's deficient performance prejudiced Singh.

Prejudice is established where it is reasonably probable that, but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A

reasonable probability is one that is sufficient to undermine confidence in the jury's verdict. Strickland, 466 U.S. at 694.

Singh makes that showing here. He presented strong evidence to support his duress defense. But because of Wagner's testimony that Singh knew Kaizer was armed before they went into the store, jurors could have concluded Singh recklessly placed himself in a situation in which it was probable he would be coerced. There is a reasonable likelihood jurors could have improperly relied on the challenged paragraph to defeat Singh's duress defense. Singh's conviction should be reversed and the case remanded for a new trial with new counsel and correct instructions. State v. Crawford, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006).

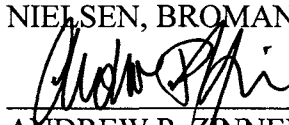
D. CONCLUSION

The trial court erroneously included an optional paragraph in the duress instruction that was unsupported by the evidence. The paragraph supplied jurors with a way to negate the duress defense. The trial court's error was manifest, of constitutional magnitude, and prejudicial. Alternatively, trial counsel was ineffective for failing to object to the court's duress instruction. This Court should reverse Singh's conviction.

DATED this 12 day of July, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 18631
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Attorneys for Appellant

APPENDIX A

INSTRUCTION NO. ___

Duress is a defense to a charge of Robbery in the First Degree 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 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 defendant has the burden of proving this defense 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. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

WPIC 18.01

APPENDIX B

No. 16

Duress is a defense to a charge of Robbery 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 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 in a situation in which it was probable that he would be subject to duress.

The defendant has the burden of proving this defense 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. 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.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64507-2-I
	)	
JORAWAR SINGH,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JORAWAR SINGH
DOC NO. 307364
MONROW CORRECTIONAL COMPLEX - MSR
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JULY, 2010.

x Patrick Mayovsky