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Cowlitz Co. Cause No. 05-1-01583-4

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FRANK LEE HARVILL,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.
2. The decision of the Court of Appeals is not in conflict with a decision of another decision of the Court of Appeals.
3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States.
4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

II. STATEMENT OF THE CASE

The State agrees with the Statement of the Case given in the petition for review.

III. ARGUMENT

A. THE COURT OF APPEALS PROPERLY HELD THAT ANY POTENTIAL ERROR IN THE TRIAL COURT'S REFUSAL TO GIVE A DURESS INSTRUCTION WAS HARMLESS BEYOND A DOUBT AND THE CONVICTION OF VIOLATION OF THE UNIFORMED CONTROLLED SUBSTANCES ACT SHALL BE UPHELD.

RAP 13.4(b) states that a petition for review will be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the

Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. The State submits that none of the four conditions are present and that the petition for review should be denied.

Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). There is no conflicting Supreme Court decision in a matter of this nature. Harvill's argument ignores the plain language of the duress instruction: "a defendant may assert duress as a defense to a crime where: (a) 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..." RCW 9A.16.060(1) (emphasis added).

Essentially, there must be evidence of an actual threat or use of force before the court will put forth to the jury whether the Harvill's apprehension of immediate death or bodily injury threat was reasonable. In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671, 681 161

P.3d 333 (2007).¹ The Court in Dornay held that because no evidence of a threat or use of force was presented, there was consequently no evidence that supported an apprehension of immediate death or bodily injury. Id.

Harvill relies heavily upon the decisions in State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994), and State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997), in asserting that actual threats are not required for a duress instruction to be given. Harvill mischaracterizes the facts in Riker by asserting that no actual threat was made to Riker. On the contrary, the facts in Riker clearly state that the informant did make specific threats to Riker and her family. Riker testified that the informant had previously used force against her sister to compel a drug transaction. Riker, 123 Wn.2d at 356. Riker further testified that she was compelled to participate in one of the drug transactions because the informant “threatened to harm her sister unless she got cocaine.” Id. Finally, Riker testified that the informant told her that she knew what the consequences would be if she did not follow through with the drug transactions. Id.

Riker’s testimony clearly identified threats and use of force upon herself and her family. The trial court was presented with evidence of a threat, and therefore justified in allowing Riker to argue that defense. The

¹ The Dornay Court noted that disciplinary proceedings are not criminal proceedings, and that duress is not a defense to an RPC violation. However, the Court still examined the Dornay’s duress defense, reasoning that, if established, it could mitigate a sanction.

actual issue presented to the Court in Riker was in regards to the burden of proof a defendant has in establishing the duress defense. Id. at 366-69. The issue did not involve whether an actual threat was needed before the duress instruction would be given to the jury.

Harvill also mistakenly relies upon the facts and holdings in Williams. In that case, Williams testified to the prior verbal and physical abuse her significant other had previously used to compel her to participate in various activities. Williams, 132 Wn.2d at 251. The actual issue in that case was whether the threats that were made to Williams were sufficiently immediate. Id. at 253. Therefore, as with Riker, the Court was not presented with an issue of whether actual threats were needed before the duress instruction was introduced; rather, the Court had to determine the immediacy of those threats and force.

Both Riker and Williams are distinguishable from the present matter. Both those cases involve actual threats or force being utilized to compel the defendants to commit crimes. Here, there was no evidence presented that the informant made any actual threats or threatened force to Harvill or his family in order to compel his participation in the illegal activities. Because of this distinguishing factor, Harvill's reliance upon Riker and Williams is without merit.

There is no conflicting Court of Appeals decision in another division in a matter of this nature. As a result, condition two has not been met.

Condition three has also not been met. The Court of Appeals correctly concluded that the outcome of the trial would not have been different even if the duress instruction had been given because the jury determined that the evidence was insufficient to establish the less burdensome entrapment defense. The Court of Appeals properly held that the duress defense requires additional evidence beyond what the entrapment defense requires. Harvill's counsel was not denied an opportunity to argue his theory of the case because sufficient evidence was not presented to establish the duress defense. No evidence of an actual threat or use of force was introduced; therefore, there was no need for the jury to determine the reasonableness of Harvill's apprehension of death or bodily injury. "[I]t is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) (*following* Albin v. National Bank of Commerce, 60 Wn.2d 745, 754, 375 P.2d 487 (1962); State v. Heath, 35 Wash. App. 269, 271-272, 666 P.2d 922 (1983)).

None of the issues brought forward by Harvill in this case rise to the level of a substantial public interest; therefore condition four has not been met.

IV. CONCLUSION

For the reasons stated above, Harvill's petition for discretionary review should be denied.

Respectfully submitted this 3rd day of December, 2008.

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By:



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