82358-8

NO. 35821-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA HARVILL,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
07 SEP 10 AM 8:52
STATE OF WASHINGTON
BY DEPUTY

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

The Honorable James E. Warme

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

2136 S 260th Street, BB304
Des Moines, Washington 98198
(253) 945-6389

PM 9-7-07

TABLE OF CONTENTS

Page

A. ASSIGNMENT OF ERROR 1

Issue Pertaining to Assignment of Error 1

B. STATEMENT OF THE CASE 1

1. Procedural Facts 1

2. Substantive Facts 2

C. ARGUMENT 6

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN FAILING TO GIVE A JURY INTRUCTION ON DURESS 6

D. CONCLUSION 13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Griffin,
100 Wn.2d 417, 670 P.2d 265 (1983) 8

State v. Hughes,
106 Wn.2d 176, 721 P.2d 902 (1986) 8

State v. Mannering,
150 Wn.2d 277, 75 P.3d 961 (2003) 6, 7

State v. Peterson,
73 Wn.2d 303, 438 P.2d 183 (1968) 7

State v. Riker,
123 Wn.2d 351, 869 P.2d 43 (1994) 7, 8, 10

State v. Salinas,
87 Wn.2d 112, 549 P.2d 712 (1976) 7

State v. Turner,
42 Wn. App. 242, 711 P.2d 353 (1985),
review denied, 105 Wn.2d 1009 (1986) 7

State v. Williams,
132 Wn.2d 248, 937 P.2d 1052 (1997) 7, 8, 10, 13

RULES, STATUTES, OTHERS

RCW 9A.16.060(1) 6

A. ASSIGNMENT OF ERROR

The trial court erred in failing to give a jury instruction on the affirmative defense of duress.

Issue Pertaining to Assignment of Error

Is reversal required because the trial court failed to give a jury instruction on duress when appellant introduced sufficient evidence to entitle him to the duress instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

On December 13, 2005, the state charged appellant, Joshua Harvill, with one count of delivery of cocaine, in violation of the Uniform Controlled Substances Act. CP 1; RCW 69.50.401(1). Following a trial on January 3 and 4, 2007, before the Honorable James E. Warme, a jury found Harvill guilty as charged. 14[1] RP 136. On January 9, 2007, the court sentenced Harvill to 14 months in confinement. CP 48; 15RP 6. Harvill filed this timely appeal. CP 55.

[1] There are 15 volumes of verbatim report of proceedings: 1RP - 12/9/05; 2RP - 12/20/05; 3RP - 12/29/05; 4RP - 2/23/06; 5RP - 3/16/06; 6RP - 6/22/06; 7RP - 6/27/06; 8RP - 7/20/06; 9RP - 9/14/06; 10RP - 12/6/06; 11RP - 12/12/06; 12RP - 12/15/06; 13RP - 1/3/07; 14RP - 1/4/07; 15RP - 1/9/07.

2. Substantive Facts

a. Trial testimony

Deputy Darren Ullman, of the Cowlitz County Sheriff's Office, testified that he was the case agent in Harvill's case. 13RP 33-34, 38. Ullman was responsible for controlling the buy, controlling the informant, and directing other agents on the case. 13RP 38. Ullman used Michael Nolte as an informant for a buy arranged on April 18, 2005. 13RP 39, 45. Ullman and another detective listened while Nolte called Harvill for a half ounce of cocaine. Harvill said he was at Chuck E. Cheese and could not get away at the moment. Ullman and Nolte waited for about twenty minutes then Nolte called Harvill again. Harvill said he had to call Nolte back and a few minutes later Harvill called and agreed to meet with him. 13RP 46-49.

Ullman provided Nolte with a hundred and eighty dollars for the "one-half ounce controlled buy." 13RP 51. Nolte met Harvill at a Les Schwab/Fred Meyer parking lot in Longview. 13RP 55. After the transaction, Nolte met Ullman at a pre-determined location and gave him a small sack of "chunky white stuff." 13RP 60. Ullman took the substance back to the Hall of Justice, field tested it, and submitted the substance into evidence. 13RP 61.

Bruce Siggins, of the Washington State Patrol Crime Laboratory, testified that he examined the evidence in Harvill's case. 13RP 166-67, 169. Siggins tested the substance and found the presence of cocaine. 13RP 175-76.

Michael Nolte testified that he agreed to work as an informant for Ullman to reduce charges against him for possession with intent to deliver and manufacturing marijuana. 13RP 81-84. On April 18, 2005, Nolte called Harvill for a half ounce of cocaine and told him, "I needed a half." 13RP 95-96. Nolte met Harvill at Fred Meyer and "did the deal." 13RP 100. Nolte claimed that he bought cocaine from Harvill at least ten different times before the controlled buy. 14RP 49.

Nolte knew Harvill for seven or eight years and they worked together at the mill. 13RP 104-05. Nolte admitted that he was convicted of second degree assault for striking someone with a beer bottle. 13RP 111. In another incident, he stabbed someone with a pocket knife but the charges were dismissed because witnesses said he acted in self-defense. 14RP 46-49. Nolte denied threatening or harming Harvill at any time. 13RP 103-06; 14RP 46. He acknowledged that he is about five foot ten and weighed two hundred pounds. 13RP 111.

Harvill testified about Nolte's aggressive and violent nature. 14RP 4-6. He met Nolte through his younger brother and had known him for

about ten years. 14RP 4. His brother told him that Nolte nearly broke his arm in a wrestling match and that Nolte used steroids. 14RP 4, 6, 36-37. Nolte also told Harvill about his steroid use and bragged about smashing a man in the face with a beer bottle. 14RP 5-6. One day at work, Harvill overheard Nolte boasting about taking a gun away from a man and slicing him with a knife. 14RP 19. Nolte always acted tough and pushed his weight around. 14RP 5.

Over a two-day period before April 18, 2005, Nolte called Harvill about nine or ten times telling him, "You gotta get me something." 14RP 6-7. Nolte told him, "I need it," and Harvill assumed that he meant drugs. 14RP 7. Then Nolte called him on April 18th and told him, "You better get me some cocaine." 14RP 37. Harvill was at Chuck E. Cheese with his family and felt threatened, "I thought he was gonna come over there and drag me or my kids or my fiancé out of there, and do whatever he had to do to me to make me get what he wanted." 14RP 13-14. Harvill, who is five foot five and one hundred forty pounds, feared for his life, knowing that Nolte would use a knife or beer bottle as a weapon or break his arm. 14RP 20, 35-38. After repeated calls from Nolte, Harvill delivered the cocaine, "I ended up havin' to take off and go try to do whatever I could to get what he wanted." 14RP 7-9.

b. Duress Jury Instruction

During discussion of the jury instructions, defense counsel argued that Harvill was entitled to an instruction on duress because he presented testimony that he felt threatened by Nolte and believed that Nolte would harm him if he did not obtain the cocaine. 14RP 67-68. Counsel emphasized the significance of Harvill's belief, "The threat, we believe, although maybe not expressed in the most clear and certain terms, was certainly expressed to my client; my client felt as though that were, indeed, a threat; he's testified that the way that verbiage was expressed to him, that constituted a threat." 14RP 67.

The state argued against an instruction on duress contending that Harvill failed to show that Nolte made a threat, "there is no threat, based on the testimony of all parties taken in the light most favorable to the Defendant; there was no threat to the Defendant of any harm whatsoever." 14RP 68. Over defense counsel's objection, the court refused to give an instruction on duress, finding that "there was no testimony about any threat" and consequently "the defense of duress fails as a matter of law." 14RP 68-69.

C. ARGUMENT

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN FAILING TO GIVE A JURY INSTRUCTION ON DURESS.

The trial court erred in failing to give a jury instruction on duress because Harvill introduced sufficient evidence to entitle him to the duress instruction. The court's error requires reversal.

The defense of duress derives from the common law and is premised on the notion that it is excusable for a person to break the law if he is compelled to do so by threat of imminent death or serious bodily injury. State v. Mannering, 150 Wn.2d 277, 281, 75 P.3d 961 (2003). Duress is a defense because a person who is threatened with death or grievous bodily harm chooses the lesser of two evils by committing the crime he is being compelled to do. Id. at 285.

RCW 9A.16.060(1) sets forth the defense of duress:

> (1) In any prosecution for a crime, it is a defense that:
>
> (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 that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and
>
> (b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved. [2]

"[T]he duress statute does not require that it actually be possible for the harm to be immediate. Rather, it directs the inquiry at the defendant's *belief* and whether such belief is reasonable." State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)(emphasis added by the court). The reasonableness of the defendant's perception of immediate harm should be evaluated in light of the defendant's experience. Id.

The jury determines whether a defendant reasonably believed that he was in immediate harm. Mannering, 150 Wn.2d at 286. When the defense of duress is asserted, immediacy of the danger is to be determined by the trier of fact. State v. Turner, 42 Wn. App. 242, 246-47, 711 P.2d 353 (1985), review denied, 105 Wn.2d 1009 (1986).

A defendant must prove duress by a preponderance of the evidence. State v. Riker, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994). A defendant is entitled to have the jury instructed on his theory of the case if there is

---

[2] Grievous bodily injury is not defined by statutes or pattern jury instructions. However, grievous bodily harm has been defined in cases involving second degree assault. State v. Salinas, 87 Wn.2d 112, 121, 549 P.2d 712 (1976)("Grievous bodily harm" includes a hurt or injury calculated to interfere with the health or comfort of the person injured; it need not necessarily be an injury of a permanent character. By "grievous" is meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature); State v. Peterson, 73 Wn.2d 303, 305 n.2, 438 P.2d 183 (1968)(Grievous bodily harm is any physical injury of serious or aggravated nature; it includes any hurt or injury calculated to interfere with health or comfort of the person injured and need not necessarily be an injury of a permanent nature.).

evidence to support that theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to so instruct constitutes reversible error. State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983).

In Williams, 132 Wn.2d at 260, the Washington Supreme Court remanded the case for retrial because the trial court failed to give a jury instruction on duress. Williams and her two children had moved into the home of William Wellen. Wellen wanted her to keep receiving public assistance so he directed her not to notify DSHS of his income. When Williams left Wellen after six years, he reported her to DSHS and the State charged her with welfare fraud. Id. at 251-52.

At trial, Williams never disputed receiving excess benefits but asserted that she did not act willfully. Williams' sole defense was that she acted under duress. She testified that she believed she and her children would suffer severe abuse, or even death, if she disobeyed Wellen. Id. at 253. The Supreme Court held that the reasonableness of Williams' belief of immediate harm was a question of fact to be resolved by the jury and the court's failure to give a duress instruction was reversible error. Id. at 259-60.

In Riker, 123 Wn.2d at 354, 356, the trial court instructed the jury on the defense of duress even though Riker did not testify to any explicit threats. Riker raised the defense of duress to charges of delivery and

possession of cocaine. She asserted that a police informant coerced her into committing the crimes. Id. at 354. Riker testified that when the informant told her "you will know the consequences," she believed that the consequences would be physical harm if she did not obtain the cocaine. Id. at 356. However, she also testified that she had never experienced any harm and the informant had never made his threat more specific. Id. Riker's testimony was vague as to the threats employed by the informant but the trial court gave a jury instruction on the affirmative defense of duress. Id.at 354, 356.

Here, Harvill testified that he had known Nolte for about ten years and knew of his aggressive and violent nature. 14RP 4-5. Nolte always pushed his weight around and acted tough. 14RP 5. Harvill knew that Nolte was convicted for second degree assault because Nolte told him about the incident and bragged about smashing a beer bottle "in a guy's face, and like the guy's mentally challenged now, because of it." 14RP 5. Nolte also told him that he used steroids and Harvill heard stories about how the steroids affected him. 14RP 6, 27. Harvill overheard Nolte boasting about taking a gun out of a man's hand and slicing him with a knife that he carried, "that just freaked me out, just gave me another reason to think what kind of guy he is." 14RP 19-20. Harvill's brother

told him that Nolte nearly broke his arm in a wrestling match and he saw his brother with his arm in a sling. 14RP 36-37.

As in Williams and Riker, Harvill believed that he or his family would be severely harmed if he did not obtain the cocaine that Nolte demanded. Over a two-day period before the day of the controlled buy, Nolte called Harvill nine or ten times, telling him, "You gotta get me something," and "I need it." 14RP 6-7. Following repeated calls from Nolte on the day of the controlled buy, Harvill's fear compelled him to comply:

> Q. He told you you needed to get him some cocaine?
>
> A. Yeah.
>
> Q. Okay. And, then, he calls back, again, another fifteen minutes later; you're still at Chuck E. Cheese's?
>
> A. Um-hum.
>
> Q. In your head, what did you think would happen if you didn't get him some cocaine right away?
>
> A. I thought he would probably come over there and drag me out and -- I don't know what he was going to do to me, because I knew he was -- he had been taking steroids, or whatever. I mean, I've heard stories of how people get when they take that -- those things.
>
> Q. Okay.
>
> A. And I just feared (sic).

Q. Okay. Did you think he was gonna immediately come over there if you didn't --

A. Yeah.

Q. -- go and do something?

A. Yeah, right away, and come do something to me or my kids, or anything. I mean, I've got three little girls that I care a lot about.

Q. Were they with you at Chuck E. Cheese?

A. Yeah, my whole family was there.

Q. Okay. And, so, after the -- fourth call that day, the second call while you were at Chuck E. Cheese's, from Mr. Nolte, what did you do, at that point?

A. I ended up havin' to take off and go try to do whatever I could to get what he wanted.

. . . .

Q. Let me ask you this, Mr. Harvill: If you could explain to the jury what you feared would happen to you, if you didn't leave Chuck E. Cheese at the time you did.

A. Like I said earlier, I thought he was gonna come over there and drag me or my kids or my fiancé out of there and do whatever he had to do to me to make me get what he wanted.

Q. When you say, "whatever he had to do," are you referring to physical injury?

A. Definitely.

14RP 8-9, 14.

Harvill felt threatened by the tone of Nolte's voice, telling him, "You better get me some cocaine." 14RP 37. Nolte was not simply making a request, "It wasn't like that . . . . It was his gruff, brisk attitud-y (sic) voice on the other line." 14RP 39. Harvill feared that if he did not obtain the cocaine, Nolte would use a knife, beer bottle, fists, or break his arm. 14RP 35-38.

The record substantiates that Harvill provided sufficient evidence that he perceived Nolte's calls as a threat and believed that he or his family would suffer grievous bodily injury if he did not obtain the cocaine. If the trial court had been properly instructed the jury, it could have found that Harvill's apprehension was reasonable based on his fear of Nolte's propensity for violence. The jury could have concluded that Harvill, who is five foot five and one hundred forty pounds compared to Nolte's size of five foot ten and two hundred pounds, acted under duress.

The trial court erred in refusing to give a duress instruction based on its misapprehension of the law that an explicit threat is necessary to prove duress. 14RP 68-69. To the contrary, the correct inquiry is whether Harvill reasonably believed that he faced immediate harm, which is a question of fact to be resolved by the jury. Mannering, 150 Wn.2d at 286.

The trial court's failure to instruct the jury on the defense of duress constitutes reversible error. Williams, 132 Wn.2d at 260.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Harvill's conviction.

DATED this 7th day of September, 2006.

Respectfully submitted,

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Joshua Harvill, 605 30th Avenue, Longview, Washington 98632.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of September, 2007 in Des Moines, Washington.

Valerie Marushige

Valerie Marushige
Attorney at Law
WSBA No. 25851

RECEIVED
SEP 10 2007
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON