

FILED  
COURT OF APPEALS  
DIVISION II

82358-8

08 OCT 30 AM 9:13

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 35821-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FRANK LEE HARVILL

Appellant.

---

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

The Honorable James E. Warme

---

PETITION FOR REVIEW

---

VALERIE MARUSHIGE  
Attorney for Petitioner

23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253)520-2637

FILED  
NOV - 3 - 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
[Signature]

**TABLE OF CONTENTS**

	Page
A. <u>IDENTITY OF MOVING PARTY</u> .....	1
B. <u>COURT OF APPEALS DECISION</u> .....	1
C. <u>ISSUE PRESENTED FOR REVIEW</u> .....	1
D. <u>STATEMENT OF THE CASE</u> .....	1
E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u> .....	6
THE TRIAL COURT VIOLATED HARVILL'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY FAILING TO GIVE A JURY INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF DURESS WHEN HARVILL INTRODUCED SUSTANTIAL EVIDENCE TO ENTITLE HIM TO THE DURESS INSTRUCTION. ....	6
F. <u>CONCLUSION</u> .....	15

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Griffin</u> , 100 Wn.2d 417, 670 P.2d 265 (1983) .....	8
<u>State v. Hackett</u> , 64 Wn. App. 780, 827 P.2d 1013 (1992) .....	13
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986) .....	8
<u>State v. Mannering</u> , 150 Wn.2d 277, 75 P.3d 961 (2003) .....	6
<u>State v. Peterson</u> , 73 Wn.2d 303, 438 P.2d 183 (1968) .....	7
<u>State v. Riker</u> , 123 Wn.2d 351, 869 P.2d 43 (1994) .....	8
<u>State v. Salinas</u> , 87 Wn.2d 112, 549 P.2d 712 (1976) .....	7
<u>State v. Turner</u> , 42 Wn. App. 242, 711 P.2d 353 (1985), <u>review denied</u> , 105 Wn.2d 1009 (1986) .....	7
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977) .....	14
<u>State v. Williams</u> , 132 Wn.2d 248, 937 P.2d 1052 (1997) .....	7

**TABLE OF AUTHORITIES** (CONT'D)

Page

**RULES, STATUTES, OTHERS**

RCW 9A.16.060 ..... 6

A. IDENTITY OF MOVING PARTY

Petitioner Joshua Frank Lee Harvill, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section

B.

B. COURT OF APPEALS DECISION

Harvill seeks review of the Court of Appeals decision in State v. Joshua Frank Lee Harvill, Court of Appeals No. 35821-2-II, filed on August 19, 2008, attached as appendix A. The Court denied Harvill's motion for reconsideration on October 1, 2008, attached as appendix B.

C. ISSUE PRESENTED FOR REVIEW

Did the trial court violate Harvill's constitutional right to a fair trial by failing to give a jury instruction on duress when Harvill introduced sufficient evidence to entitle him to the duress instruction?

D. STATEMENT OF THE CASE

On December 13, 2005, the state charged Harvill with delivery of cocaine and he stood trial on January 3-4, 2007. CP 1<sup>1</sup>

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,

---

<sup>1</sup> 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.

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 18<sup>th</sup> 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.

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. Defense 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. However, the court determined that it would instruct the jury on the defense of entrapment. 14RP 69.

A jury found Harvill guilty as charged. 14RP 136. On appeal, Harvill argued that the trial court erred in failing to give a jury instruction on duress because he introduced sufficient evidence to entitle him to the duress instruction. Brief of Appellant at 6-13, Reply Brief at 1-4. The Court of Appeals affirmed Harvill's conviction, holding that "any potential error in the trial court's refusal to give a duress instruction was clearly harmless beyond a reasonable doubt." Appendix A at 10.

Harvill seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE TRIAL COURT VIOLATED HARVILL'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY FAILING TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE OF DURESS WHEN HE INTRODUCED SUFFICIENT EVIDENCE TO ENTITLE HIM TO THE DURESS INSTRUCTION.

This Court should accept review under RAP 13.4(b)(3) because the trial court violated Harvill's constitutional right to a fair trial by refusing to instruct the jury on the defense of duress when he introduced sufficient evidence to entitle him to the duress instruction.

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.<sup>2</sup>

“[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 this 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).

---

<sup>2</sup> 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.).

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 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, this 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 Court of Appeals concluded that any potential error in the trial court's refusal to give a duress instruction was clearly harmless beyond a doubt because the court instructed the jury on the entrapment defense.<sup>3</sup> The Court determined that given the jury's conclusion that the evidence was insufficient to establish the less burdensome entrapment defense, the outcome of the trial would not have been any different had the trial court instructed the jury on the duress defense. Appendix at 9-10.

Importantly, the Court of Appeals overlooked the most crucial element that distinguishes duress from entrapment. The test for sufficiency of the jury instructions is whether the trial court's instructions afforded defense counsel a satisfactory opportunity to argue his theory to the jury. State v. Hackett, 64 Wn. App. 780, 786-87, 827 P.2d 1013 (1992). Although the trial court instructed the jury on the entrapment

---

<sup>3</sup> Entrapment is a defense to a criminal charge if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime which the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

The burden is on the defendant to prove the defense of entrapment 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.

defense, it did not afford defense counsel a satisfactory opportunity to argue his theory of the case because entrapment does not contain the element of “apprehension in the mind of the actor.” See, RCW 9A.16.060(1) at 6-7 supra. Consequently, because the jury was not instructed to decide whether Harvill’s apprehension was reasonable from his perspective, defense counsel could not draw the jury’s attention to this element and accentuate the facts that substantiated Harvill’s fear, which was the critical focal point of his defense. As this Court concluded, the duress statute “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 this Court). The record establishes 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.

“A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case*.” State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)(emphasis added by this Court). It is evident from the record that the jury could well have returned a different verdict had it been correctly apprised of the law and instructed on the affirmative defense of duress. Contrary to the Court of Appeals’

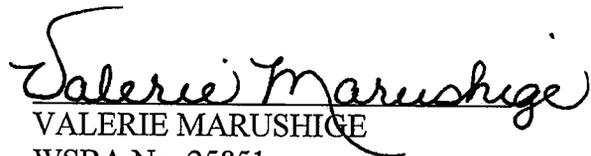
decision, the trial court's failure to instruct the jury on duress based on its misapprehension of the law was not harmless beyond a reasonable doubt.

F. CONCLUSION

For the reasons stated, this Court should accept review because the trial court abused its discretion in refusing to instruct the jury on the defense of duress, denying Harvill of his constitutional right to a fair trial.

DATED this 30<sup>th</sup> day of October, 2008.

Respectfully submitted,



VALERIE MARUSHIGE  
WSBA No. 25851  
Attorney for Petitioner

## **APPENDIX A**

FILED  
COURT OF APPEALS  
DIVISION II

08 AUG 19 AM 8:36

STATE OF WASHINGTON

BY \_\_\_\_\_

DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FRANK LEE HARVILL,

Appellant.

No. 35821-2-II

UNPUBLISHED OPINION

HUNT, J. — Joshua Frank Lee Harvill appeals his conviction for unlawful delivery of cocaine. He argues that the trial court erred when it failed to instruct the jury on the affirmative defense of duress. Because any potential error in failing to instruct the jury on a duress defense was harmless beyond a reasonable doubt, we affirm.

**FACTS**

**I. ARREST, CHARGES, AND PLEA**

On April 18, 2005, officers from the Cowlitz-Whakiakum Narcotics Task Force engaged in a controlled drug-buy operation using an informant, Michael Nolte. After Nolte successfully purchased cocaine from Harvill, the State charged Harvill with unlawful delivery of cocaine. Harvill pleaded not guilty and the case went to a jury trial. At trial, Harvill did not deny delivering the cocaine to Nolte; instead, he asserted duress and entrapment defenses.

## II. TRIAL

### A. State's Evidence

At trial, Detective Darren Ullmann, a member of the drug task force, testified that Nolte (1) was an informant under contract with the task force;<sup>1</sup> (2) provided task force officers with a list of individuals that were potential targets; and (3) then, under Ullmann's supervision, attempted to call the people on the list. On April 18, the first person on the list to answer was Harvill. As instructed by the officers, Nolte asked Harvill to sell him a half ounce of cocaine. Ullmann, who was present throughout this conversation, heard Harvill tell Nolte that he was at Chuck E. Cheese and was unable to get away at that time; Ullmann did not hear Nolte make any threats during the conversation.

Ullmann stated that after about 20 to 25 minutes, he directed Nolte to call Harvill again. During that conversation, Harvill told Nolte he (Harvill) would have to call him (Nolte) back. Harvill called back a few minutes later and told Nolte that he could meet him.

The officers searched Nolte and Nolte's vehicle and found no drugs, money, or other contraband. They then had Nolte call Harvill back to find out where he wanted to meet. Harvill told Nolte to meet him at a local Fred Meyer parking lot. The officers gave Nolte the buy money and followed him as he drove to the designated meeting spot. Nolte did not stop or contact anyone until he reached the parking lot.

Ullmann testified that, on the way to the meeting location, Nolte called him and told him

---

<sup>1</sup> Both Nolte and Ullmann testified at trial that Nolte had agreed to act as an informant in exchange for favorable treatment following his arrest on felony drug charges.

35821-2-II

that Harvill had called to say he would be unable to deliver the full amount of the drugs Nolte had requested. Ullmann told Nolte to continue with the buy. Once Nolte arrived at the designated location, Sergeant Kevin Tate took over observing the operation.

Tate testified that after Nolte contacted Harvill, he (Tate) had located Harvill at the Chuck E. Cheese and followed him as he got into his car and left the area, made two brief stops, and then drove to the Fred Meyer parking lot. Tate watched as Harvill got out of his car, waited for Nolte, got into Nolte's car, exited Nolte's car, went inside the store, and then returned to his own car.

Ullmann testified that when the transaction was complete, Nolte left the Fred Meyer parking lot and they met at a predetermined location. Nolte handed Ullmann a small bag of "chunky white stuff," which later tested positive for cocaine. Nolte told Ullmann that when Harvill arrived, he (Harvill) had gotten into Nolte's car on the passenger side and tossed the bag into Nolte's lap. Nolte then gave Harvill the buy money. And Harvill apologized for the bag's being "short."

After Nolte turned the drugs over to the officers, they searched him again and did not find any other drugs, money, or other contraband. Nolte ultimately made nine or ten buys from the people on the list of approximately 15 to 20 people whose names he had provided to the officers.

Nolte's testimony about the April 18 transaction was consistent with the officers' testimony. Nolte testified that he (Nolte) had (1) suggested Harvill might be someone from whom he could purchase drugs, (2) initiated this particular drug transaction at the officers'

behest,<sup>2</sup> (3) known Harvill for seven or eight years, (4) at no time during his contact with Harvill threatened to harm him, and (5) never injured or been in a fight with Harvill. Nolte did admit, however, to having been in "a little wresting match" with Harvill's younger brother several years earlier when he (Nolte) was about 16; but Nolte asserted, that there had been no injuries.

Nolte further testified that he worked at a local mill with Harvill, that they worked on opposite sides of the mill, that he did not have regular contact with Harvill, and that he was not in any kind of supervisory position over Harvill. Moreover, Nolte had never threatened to take any work-related action against Harvill if Harvill did not provide him with drugs. Nolte asserted that he rarely talked to Harvill and that when he did, Harvill did not seem afraid of him.

On cross examination, Nolte admitted he had a prior second degree assault conviction based on an incident in which he had struck someone with a beer bottle. He also testified that he is about five foot ten inches tall and weighed about 200 pounds.

## B. Defense Evidence

### 1. Duress

Harvill testified as the sole defense witness. He admitted that he had met with Nolte and sold him drugs on April 18, but he denied ever having provided Nolte with cocaine before the delivery at issue here. He asserted that he met with Nolte and supplied drugs to Nolte this time only because he was afraid Nolte would harm him or his family or retaliate against him at work

---

<sup>2</sup> Nolte also (1) testified that he had agreed to act as an informant after he was charged with several felony drug charges; and (2) admitted early on that he had sold some of his personal prescription medications during one of the drug buy operations in an attempt to avoid being discovered as an informant.

if he did not provide Nolte with cocaine. Harvill did not, however, testify about any direct threat against him or his family.

Harvill testified that (1) Nolte had called him several times between April 16 and 18, asking Harvill to procure drugs for him; (2) he (Harvill) knew Nolte through his younger brother, whose arm Nolte had nearly broken while they were wrestling around; (3) he (Harvill) knew that Nolte had gone to prison for assaulting someone with a beer bottle and causing serious injury; (4) he had heard Nolte talking about grabbing a gun from someone who was threatening him and then cutting that person with a knife; (5) Nolte was aggressive, pushy, and bullying at work; (6) they had frequent contact at work; and (7) Nolte took steroids. Harvill asserted that all of these factors contributed to his fear that Nolte would harm him or his family or retaliate against him at work if he did not comply with Nolte's request for drugs.

## 2. Entrapment

As for Nolte's request for drugs, Harvill testified that (1) Nolte had called nine or ten times between April 16 and 18, asking him repeatedly to get him "something"; (2) on April 18, Nolte had called him two times before they eventually met at Chuck E. Cheese's; (3) when he (Harvill) had spoken to Nolte, Nolte had said things like, "You gotta get me something," "I need it," "You better get me some cocaine," or "You need to get me some cocaine"; (4) Harvill interpreted these requests as threats; but (5) he could not recall whether Nolte had said he (Harvill) needed to get him the cocaine, "or else." Harvill also testified that he was about five feet five inches tall and weighed about 145 pounds.

### C. Rebuttal

The State recalled Nolte to rebut Harvill's testimony. Nolte denied having taken work breaks with Harvill or ever having threatened to harm him physically or through work. Nolte also explained that he had once grabbed a gun from a man who had threatened him and a carload of others, including Harvill's brother, at a high school graduation party and that he had cut the man with a knife in self defense. Nolte stated that although the State had brought charges related to this incident, the charges were eventually dismissed because he had acted in self defense.

In addition, Nolte testified that he had purchased cocaine from Harvill approximately ten times before April 18, which is why he had included Harvill in the list he provided to the drug task force.

### D. Jury Instructions and Verdict

The parties and the trial court discussed whether Harvill was entitled to a jury instruction on his duress defense. The State was reluctant to withhold the instruction, expressing concern that even though the evidence might not support the instruction, the jury might be confused if the trial court did not give the instruction because Harvill had clearly alluded to a duress defense in his opening statement. Nevertheless, the trial court concluded that the evidence did not support the duress defense instruction. Specifically, it stated that it would not give the instruction because there was no evidence that Harvill's fear resulted from threats.

Defense counsel argued that Harvill's testimony—that he subjectively felt threatened—was sufficient to support the duress defense instruction and that it was up to the jury to determine if there was or was not a threat. Reiterating that there was no testimony about any

threat, the trial court stated that the duress defense failed as a matter of law; and it denied Harvill's request to give the instruction.

Defense counsel renewed his objection. Although the trial court did not instruct the jury on duress, it instructed the jury on the entrapment defense.<sup>3</sup> The jury rejected the entrapment defense and found Harvill guilty of delivery of cocaine.

Harvill appeals.

### ANALYSIS

Harvill argues that the trial court erred by refusing to instruct the jury on the duress defense. We hold that any such potential error was harmless beyond a reasonable doubt.

#### I. STANDARD OF REVIEW

Each party "is entitled to have the jury instructed on its theory of the case if there is substantial evidence to support that theory." *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). We review a trial court's refusal to give a requested instruction, when based on lack of factual support, for an abuse of discretion; we review the trial court's refusal based on a question of law de novo. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) (citations omitted), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

But "[a]n error in instructions is harmless . . . if it has no effect on the final outcome of the case." *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (citing *State v. Rotunno*, 95 Wn.2d 931, 631 P.2d 951 (1981); *State v. Caldwell*, 94 Wn.2d 614, 618 P.2d 508 (1980)); *State*

---

<sup>3</sup> We describe this instruction in detail below.

v. *Hackett*, 64 Wn. App. 780, 787, 827 P.2d 1013 (1992) (citations omitted). Here, even assuming, but not deciding, that the trial court erred when it refused to instruct the jury on the duress defense, any such error was clearly harmless.

## II. DURESS DEFENSE

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 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.*

RCW 9A.16.060(1) (emphasis added). Duress is an affirmative defense that the defendant must prove by a preponderance of the evidence. *State v. Frost*, 160 Wn.2d 765, 773-74, 161 P.3d 361 (2007) (citing *State v. Riker*, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994)), *cert. denied*, 128 S. Ct. 1070 (2008).

Although the trial court did not instruct the jury on the duress defense, it did instruct the jury on the entrapment defense. The entrapment instruction provided:

Entrapment is a defense to a criminal charge if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and *the defendant was lured or induced to commit a crime which the defendant had not otherwise intended to commit.*

*The defense is not established if law enforcement did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.*

The burden is on the defendant to prove the defense of entrapment by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

Clerk's Papers at 38 (emphasis added). By convicting Harvill, the jury clearly rejected this entrapment defense.

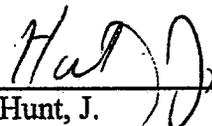
Although the question of whether the criminal design originated with law enforcement is not an element of duress, undisputed evidence clearly established that the drug buy operation here was conceived by and initiated by law enforcement. Thus, to prove entrapment, Harvill had to prove by a preponderance of the evidence and the jury had to find that (1) normally he would not have committed the offense, (2) he had committed the offense only because Nolte's actions induced him, (3) Nolte did more than merely give him an opportunity to commit the offense, and (4) Nolte used more than a "reasonable amount of persuasion to overcome [Harvill's] reluctance" to commit the offense. The jury found that Harvill failed to sustain his burden of proof to show entrapment.

Similarly, to have established duress, Harvill would have had to prove by a preponderance of the evidence that (1) he would not have participated in the offense "except for the duress involved," which is the equivalent of showing that he would not normally have committed the offense; and (2) he had participated in the crime "under compulsion by another" by threat or use of force. This second factor, at a minimum, is the equivalent of showing that Nolte's actions "induced" Harvill to commit the offense, that Nolte did more than merely offer Harvill the opportunity to commit the offense, and that Nolte had exerted more than a reasonable amount of persuasion to overcome Harvill's resistance. Thus, even if the trial court had instructed the jury on the affirmative duress defense, Harvill would have failed to sustain his burden of proof to show duress.

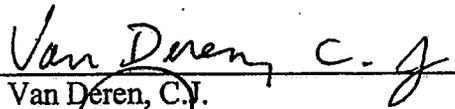
In sum, the entrapment defense either contained elements that were established without question or required a lesser burden of proof than his proposed duress defense. Given the jury's conclusion that the evidence was insufficient to establish the less burdensome entrapment defense, we can say beyond a reasonable doubt that the outcome of the trial would not have been any different had the trial court instructed the jury on the duress defense. Accordingly, we hold that any potential error in the trial court's refusal to give a duress defense instruction was clearly harmless beyond a reasonable doubt.

We affirm.

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

  
\_\_\_\_\_  
Hunt, J.

We concur:

  
\_\_\_\_\_  
Van Deren, C.J.

  
\_\_\_\_\_  
Penoyer, J.

## **APPENDIX B**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,  
v.  
JOSHUA HARVILL,  
Appellant.

No. 35821-2-II

ORDER DENYING MOTION TO  
RECONSIDER

FILED  
COURT OF APPEALS  
DIVISION II  
08 OCT 31 PM 12:59  
STATE OF WASHINGTON  
DEPUTY

APPELLANT moves for reconsideration of the Court's decision terminating review, filed August 19, 2008. Upon consideration, the Court denies the motion. Accordingly, it is SO ORDERED.

PANEL: Jj. Van Deren, Hunt, Penoyar

DATED this 15<sup>th</sup> day of October, 2008.

FOR THE COURT:

  
ACTING CHIEF JUDGE

Rebekah Keesann Ward  
Cowlitz County Prosecutor's Office  
312 SW 1st Ave Rm 105  
Kelso, WA, 98626-1799

Michelle L Shaffer  
Cowlitz Co Pros Attorney Office  
312 SW 1st Ave  
Kelso, WA, 98626-1799

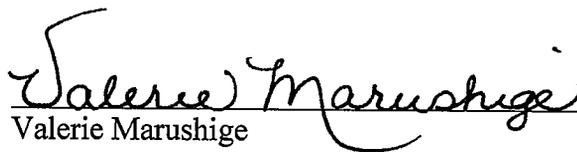
Valerie Marushige  
Attorney at Law  
23619 55th Pl S  
Kent, WA, 98032-3307

**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 Rebekah Keesann Ward, Cowlitz County Prosecutor's Office, 312 SW 1<sup>st</sup> Avenue, Kelso, Washington 98626.

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

DATED this 30<sup>th</sup> day of October, 2008 in Kent, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

FILED  
COURT OF APPEALS  
DIVISION II  
08 OCT 30 AM 9:14  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY