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FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

NO. 35821-2-II
Cowlitz Co. Cause NO. 05-1-01583-4

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA HARVILL,

Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent agrees with the procedural facts cited by appellant. Respondent agrees with the substantive facts with the following additions.

Deputy Darren Ullman testified that the nature of the conversation between the informant, Michael Nolte, and Joshua Harvill, at the time that the controlled buy was being arranged was not threatening. 13 RP 46. Some period of time went by after the initial call from Nolte to Harvill, and Nolte then called the defendant back. 13 RP 49. Deputy Ullman overheard Harvill tell Nolte that Harvill could meet him and was on his way. 13 RP 49. A complete search of Nolte was performed before he went to meet Harvill, and Nolte, who made no stops between meeting Harvill and the time of the search, was tracked by Sergeant Tate to the location of the controlled buy at the Fred Meyers on Ocean Beach Highway in Longview. 13 RP 52-57. After Nolte met Harvill, he then met the agents at a predetermined location and handed them a sack with chunk white stuff inside. 13 RP 60. The substance was then field tested and submitted into evidence. 13 RP 61.

Michael Nolte testified that when he met with Deputy Ullman initially, no specific names were mentioned, but that Deputy Ullman wanted Nolte to call some people on the list that Nolte had provided to

detectives as part of his contract. 13 RP 93-94. At some point Nolte suggested that he could buy from Joshua Harvill and Nolte was then directed by Ullman to call Harvill. 13 RP 94. Harvill indicated to Nolte that he was at Chuck E Cheese and that he'd have to get back to Nolte. 13 RP 96. Nolte called Harvill back about ten-twenty minutes before going to meet him where Harvill instructed Nolte to go to the Fred Meyers on Ocean Beach Highway. 13 RP 97. There were no drugs or contraband in Nolte's vehicle prior to meeting with Harvill. 13 RP 97-99. Nolte then met with Harvill in the Fred Meyers parking lot. 13 RP 99-100. Harvill then got in Nolte's vehicle real quick, did the deal and then got out and went into the store. 13 RP 100. Nolte told detectives about everything that had transpired between him and Harvill and Nolte had no contact with anyone else between time of buy and meeting with detectives. 13 RP 101-102. Nolte testified that he did not threaten Harvill, has never threatened Harvill, and had never been in a fight with Harvill. 13 RP 103. Nolte testified that although he and Harvill worked at the same mill, they work on opposite sides and had no regular contact. 13 RP 104. Nolte admitted to having been convicted of assault in the second degree in the past. 13 RP 111.

Harvill testified that he'd known Nolte for about ten years through his little brother. 14 RP 4. Harvill was about two to three years older than

Nolte. 14 RP 22. Harvill testified that Nolte acted tough around everyone and that at some point Nolte had told him about having been convicted of the assault in the second degree and generally bragged about stuff like that. 14 RP 5. Harvill testified that he saw Nolte everyday on lunch breaks at work and that Nolte was more aggressive and bully like. 14 RP 6. Harvill also testified that he had never sold Nolte cocaine on any other occasion. 14 RP 12. But Harvill also testified that when Nolte called and said he "needed some" he knew that meant drugs, and it took him only a few minutes to get the drugs which were involved in the controlled buy for Nolte at the couple locations he stopped at. 14 RP 26-30. When asked if Harvill had been threatened with force against himself or family or friends, Harvill testified that "You better get me some cocaine," or "You need to get me some cocaine" seemed like a threat to Harvill. 14 RP 37. Harvill did not remember there being an "or else" involved in the request to get cocaine for Nolte. 14 RP 38. Harvill then testified that he believed that if he did not get Nolte cocaine on this occasion, then his body would be severely injured. 14 RP 13. Harvill also testified that Nolte had previously bragged in the lunchroom about a guy pulling a gun on Nolte and Nolte slicing him with a knife. 14 RP 19. Harvill admitted there were never any specific threats in any way made to him by Nolte. 14 RP 41. Harvill further admitted that Nolte had no hiring or firing ability at work,

and further than Nolte had never expressed a desire to write him up or get him fired. 14 RP 23, 33.

Nolte then testified in rebuttal that Harvill took separate breaks from Nolte as Harvill was a smoker and that they generally had no contact at work, nor did Nolte have any hiring or firing ability at work. 14 RP 44-45. Similarly, Nolte had no authority to write Harvill up at work. 14 RP 46. Nolte testified that he had purchased drugs from Harvill on at least ten different occasions in the past. 14 RP 49.

The trial court heard argument at the close of the case and found that a fear that doesn't result from threats is insufficient to establish the defense of duress, and that there was no testimony about any threat, but rather only testimony about Harvill's fear based on his knowledge of Mr. Nolte's history. 14 RP 56-57, 68.

II. ISSUE PRESENTED ON APPEAL

1. Was Appellant entitled to a duress instruction where there was no substantial evidence to support it?

III. SHORT ANSWERS

1. No.

IV. ANALYSIS

1. The trial court did not commit error by failing to instruct the jury on duress where there was no substantial evidence to support a duress instruction.

The defense of duress is covered by RCW 9A.16.060:

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 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.
>
> * * *
>
> (3) The defense of duress is not available if the actor intentionally or recklessly places himself in a situation in which it is probable that he will be subject to duress.

RCW 9A.16.060; *See Also State v. Turner*, 42 Wash. App. 242, 245, 711 P.2d 353 (1985). Duress is an affirmative defense, and should not be considered by the jury unless there is substantial evidence to support it. *State v. Turner*, 42 Wash. App. 242, 245, 711 P.2d 353 (1985) *citing State v. McKinney,* 19 Wash.App. 23, 25, 573 P.2d 820 (1978); *See also State v. Niemczyk,* 31 Wash.App. 803, 807, 644 P.2d 759 (1982).

In *State v. Turner,* after finding that neither the statute nor case authority define the term "immediate" for purposes of the duress defense, the court looked to the dictionary definition of immediate, and held that the question of whether a threat of *immediate* death or *immediate* grievous bodily injury occurred is generally a question of fact for the jury. *State v. Turner,* 42 Wash. App. 242, 245, 711 P.2d 353 (1985). The court in *Turner* then looked to the decision of the court in *People v. Maes,* where the court summarized its view of the law in this area, stating:

> It has generally been held that where the threat of unlawful use of force is alleged, the defense is available only if the threat is one of present, impending, and imminent use of force, and that a threat of future injury is not enough.

State v. Turner, citing People v. Maes, 41 Colo.App. 75, 583 P.2d 942, 944 (1978); *People v. Harmon,* 53 Mich.App. 482, 220 N.W.2d 212, *aff'd* 394 Mich. 625, 232 N.W.2d 187 (1975); *see generally,* Annot. 60 A.L.R.3d 678; Annot. 40 A.L.R.2d 908; 1 *Wharton's Criminal Law and Procedure,* § 123 (R. Anderson ed. 1957). This was in contrast to a generalized fear of retaliation, which did not warrant a choice of evils instruction in *People v. Robertson. State v. Turner,* 42 Wash. App. 242, 711 P.2d 353 (1985) *citing People v. Robertson,* 36 Colo.App. 367, 543 P.2d 533 (1975); *See Also Pittman v. Commonwealth,* 512 S.W.2d 488 (Ky.App.1974).

In *State v. Turner*, the defendant, Mrs. Turner, admitted possessing the contraband in question and she offered evidence explaining the possession was under duress and necessity. *State v. Turner,* 42 Wash. App. 242, 711 P.2d 353 (1985). The evidence offered was that Mrs. Turner's husband was incarcerated at the penitentiary in Walla Walla, and that when she first arrived in Walla Walla, her husband introduced her to Marnie Rigsby as a possible roommate. *Id.* Mrs. Rigsby's husband was also an inmate in the penitentiary, and at some point Mrs. Rigsby, who knew of Mrs. Turner's frequent visits to the penitentiary, approached Mrs. Turner about carrying contraband into the prison and threatened Mrs. Turner that if she refused to do so, Mrs. Turner's husband would be hurt. *Id.* Subsequently, Mrs. Turner entered the prison for a visit, and she was followed into a bathroom by Mrs. Rigsby where threats about hurting her husband were renewed and Mrs. Turner believed Mrs. Rigsby to be capable of carrying such threats out. *Id.* Mrs. Rigsby then gave Mrs. Turner contraband to pass on to Mrs. Rigsby's husband. *Id. at* 354. The evidence showed that this belief was based on a statements by Mrs. Rigsby that Mrs. Turner's husband had already purposely been hurt, Mrs. Rigsby had friends in the wing where Mr. Turner was held, and some "biker friends" of Mrs. Rigsby had intimidated Mrs. Turner in the past. *Id. at* 254. Consequently, after receiving the contraband, Mrs. Turner

attempted to carry the contraband inside the prison in a fashion indicating that she was not attempting to conceal it, and was apprehended in doing so. *Id.* After she was arrested, Mrs. Tuner then received threatening letters about what would happen to her, her husband, and her son, if she reported the reasons for delivery of the contraband, and then later Mrs. Turner's roommate also received additional threats about what would happen to Mrs. Turner and her son if the threats were revealed. *Id.* The trial court in *State v. Turner* refused to give a duress instruction, and the reviewing court found that this was error because the circumstances presented by Mrs. Turner were sufficient to allow the defense of duress to go to the jury, because the jury could have decided this was a threat of "immediate" injury or death if it believed Mrs. Turner's testimony. *Id.*

In contrast, in the case at bar, when asked if Harvill had been threatened with force against himself or family or friends, Harvill testified that "You better get me some cocaine," or "You need to get me some cocaine" *seemed like a threat* to Harvill. 14 RP 37 (emphasis added). However, there was never any explanation of what differentiated Nolte's request from a threat. Harvill did not remember there being an "or else" involved in the request to get cocaine for Nolte. 14 RP 38. Harvill then testified that he believed that if he did not get Nolte cocaine on this occasion, then his body would be severely injured. 14 RP 13. There was

never any specific threat either express or implied which Harvill could reasonably believe would be carried out. Rather, any fear on Harvill's part was based on a generalized fear of Nolte based on his knowledge of Nolte's history. Harvill even admitted there were never any specific threats in any way made to him by Nolte. 14 RP 41. Where there was no specific threat, not only is there no present threat, nor an impending, and/or imminent use of force, but there is also no threat of future injury. And in either instance, Harvill's claim of duress falls short of the standard set in *State v. Turner. See State v. Turner,* 42 Wash. App. 242, 711 P.2d 353 (1985).

Additionally, where the testimony was that Nolte had purchased drugs from Harvill on at least ten different occasions in the past, and that Harvill was readily able to get the drugs he thought Nolte was requesting (he assumed that the request immediately was for drugs), there is some evidence that Harvill would have participated in the crime aside from any fear he may have had of Nolte, and that Harvill had engaged in such participation in the past. 14 RP 26-30, 14 RP 49.

The court's refusal to give the duress instruction focused on the statutory requirement of apprehension of "immediate death or immediate grievous bodily injury". On the facts presented, the court did not believe there was sufficient evidence to create a jury question on the immediacy

requirement because there was no express or explicit threat but rather just a generalized apprehension on the defendant's part not based on anything the informant had said or done. Because there was no evidence or testimony of any direct, explicit or immediate threats, and because there was evidence that Harvill had engaged in this activity independent of threats in the past, there was no error in refusing to give a duress instruction.

IV. CONCLUSION

For all of the above reasons, this Court should affirm the trial court with respect to Appellant's convictions.

Respectfully submitted this 28th day of December, 2007.

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COURT OF APPEALS, STATE OF WASHINGTON
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STATE OF WASHINGTON,	)	**NO. 35821-2-II**
	)	**Cowlitz County No.**
Appellant,	)	**05-1-01583-4**
	)	
vs.	)	**CERTIFICATE OF**
	)	**MAILING**
JOSHUA HARVILL,	)	
	)	
Respondent.	)	
	)	

I, Audrey J. Gilliam, certify and declare:

That on the 3 day of January, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Valerie Marushige
Attorney at Law
2136 S. 260th St., #BB304
Des Moines, WA 98198

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

Dated this 3 day of January, 20087.

Audrey J. Gilliam

Audrey J. Gilliam