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No. 96777-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN ALAN WHITAKER,

Petitioner

On Appeal from Snohomish County Superior Court
The Honorable Linda Krese, Presiding

REPLY TO ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF REPLYING PARTY

John Alan Whitaker replies to the issues raised in the *Answer to Petition for Review* (“*Answer*”) that were not raised in his petition for review.

B. NEW ISSUES RAISED BY THE STATE

1. Whether there was sufficient evidence to support the giving of a duress instruction if such an instruction could legally be given as a defense to the kidnapping element of the crime of aggravated murder?

2. Did Mr. Whitaker waive any arguments about the issues flowing from the harassment of Juror No. 2 when his attorneys asked the judge to reserve ruling on a pending mistrial motion?

3. If Mr. Whitaker did not preserve his motion for a mistrial properly, are the issues still reviewable and should review be granted of this issue as the State argues?

C. ARGUMENT IN REPLY

1. *The Court of Appeals Correctly Held that There Was Sufficient Evidence to Support a Duress Instruction*

The trial court denied Mr. Whitaker’s proposed duress instruction on the basis that there was not sufficient evidence to support giving the

instruction. 6/24/16 (PM) RP 61-62. The Court of Appeals held to the contrary: “We agree that there was evidence that Anderson threatened and used force against Whitaker and others as the events of Burkheimer's murder evolved,” but “[b]ecause duress is not a defense to first degree murder, the trial court did not err in refusing to instruct the jury on duress.” Slip Op. at 7. The State now argues that this analysis was not correct and that, if the Court accepts review, it “should also consider whether the instruction was properly rejected because there was insufficient evidence to support giving it.” *Answer* at 8.

The State’s analysis is incorrect. The standard for obtaining a duress instruction is quite low. A person accused of a crime is entitled to have his or her theory of the case submitted to the jury when there is substantial evidence that supports that theory. *See State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). “When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence *in the light most favorable to the party that requested the instruction.*” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (emphasis added). “In evaluating whether the evidence is sufficient to

support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008) (quoting *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000)).¹ Here, viewing the evidence in the light most favorable to Mr. Whitaker, it is apparent that, if the law allows for duress to be a defense to kidnapping that is a predicate element for the crime of aggravated murder, there was sufficient evidence to support the instruction.

In *Harvill*, this Court reversed a conviction for selling cocaine to an informant where the trial court denied a duress instruction. The defendant requested such an instruction based upon the size difference with the informant and based upon his knowledge that the informant had allegedly caused others physical harm at various points in the past, even though there was no evidence that the informant explicitly threatened the defendant with harm if he did not sell him drugs. *Harvill*, 169 Wn.2d at 256-58. The trial court denied a duress instruction because the informant

¹ See also *State v. Harvill*, 169 Wn.2d at 257 n. 1 ("For purposes of this case, we accept Harvill's account as true: the question is whether Harvill introduced evidence that, *if believed by the jury*, would support a duress defense.") (emphasis in original).

never communicated any intent to do Harvill harm, and Harvill's fear was just based on his general knowledge of the informant's past behavior. *Id.* at 259. This Court reversed, cataloging the common law history of duress and concluding:

But there is no legal authority that requires a "threat" to be an *explicit* threat. The text, history, policy, and judicial interpretations of the duress statute indicate that an implicit threat arising indirectly from the circumstances can suffice to establish a threat.

Id. at 263 (emphasis in original).

Here, in this case, there was uncontested evidence that Mr. Anderson was inexplicably violent, punching Mr. Whitaker (who was at the time quite young, just 22 years old), brandishing a gun, barking orders, and threatening to kill others. There was also testimony from many witnesses about how afraid they were of Mr. Anderson. *See* BOA at 7-8, 17-18. Given Mr. Whitaker's confession to law enforcement about his fear of Anderson,² seen in the light most favorable to Mr. Whitaker, there was sufficient evidence for a duress instruction to be given to the jury.

² Tracking *Harvill*, there was a size difference here as well. *See* Ex. 232 ("Whitaker stated that he was intimidated by Diggy [Anderson] because he was physically much bigger than him.").

In the Court of Appeals, the State argued that such an instruction could be denied on legal grounds alone because Mr. Whitaker supposedly recklessly put himself in a position where he was compelled to participate in the kidnapping and robbery of Ms. Burkheimer. *BOR* at 22. However, although Mr. Whitaker had been aware of Anderson's violent nature, this was the first time that Anderson was violent to Whitaker, when Anderson suddenly started punching Whitaker. At that point, Mr. Whitaker would have reasonably believed that his supposed friend was now quite willing to deal with him just as harshly as he had dealt with others.

In its legal analysis regarding "recklessly" placing oneself in a position where one is compelled to commit crimes, the State cited *State v. Healy*, 157 Wn. App. 502, 237 P.3d 360 (2010). *BOR* at 22. While the Court of Appeals in *Healy* did recognize cases suggesting that "issue of recklessness can be decided as a matter of law in some cases so that the defendant is not entitled to a duress instruction at all," *id.* at 515, the Court of Appeals actually followed this Court's lead in *Harvill* to conclude that the issue of duress was one for the jury, and that ultimately the issue of recklessness should be decided by the jury pursuant to a jury instruction. *Healy*, 157 Wn. App. 515-16. Here too, given the evidence of Mr.

Anderson's unexpected violent behavior, the issue of duress was one that properly should have been decided by the jury.

Accordingly, if this Court accepts review, it should reject the State's argument that there was not an evidentiary basis for the giving of a duress instruction. The trial court's failure to instruct on duress violated Mr. Whitaker's right to due process and to present a defense, protected by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 21 and 22 of the Washington Constitution.

2. *Mr. Whitaker Did Not Waive the Mistrial Motion*

In its cross-appeal, the State argued that Mr. Whitaker waived the issues regarding juror misconduct because at one point while the jury was deliberating, Whitaker's attorneys asked the trial court to reserve ruling on the mistrial motion. *BOR* at 43-47. The trial court ruled that Mr. Whitaker had not waived his mistrial motions. *RP* 3080-81. The Court of Appeals did not address this issue, *Slip Op.* at 20 n.1 & 25 n.2, and the State now argues: "Should this Court accept review of the issues the defendant raises relating to the events concerning Juror 2, this Court should also consider whether the defendant waived the issues by asking

the trial court to defer ruling on his mistrial motion.” *Answer* at 11. This issue is without merit.

Although the State accuses the defense of gambling on the outcome of the trial, it is clear that it was the State that was playing games. As the trial court recognized, the State was also making predictions about jury outcomes as it shifted its litigation strategy during the trial. RP 3080.³

In any event, the cases cited by the State about waiver are completely off-point and do not apply to this situation. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), is a double jeopardy case where a defendant asked for a mistrial after his attorney was barred from the courtroom, and the Supreme Court held that double jeopardy was not violated by a retrial. That is in keeping with the settled principle that double jeopardy is violated only if the prosecutor intentionally committed misconduct for the purpose of causing a mistrial. *See State v. Cochran*, 51 Wn. App. 116, 119-20, 751 P.2d 1194 (1988).

³ The State may also have wanted a mistrial because of issues related to a jail informant witness, Christian White. The State had just been caught withholding impeachment evidence related to Mr. White, and, then, at the last minute, decided not to call him at the trial. *See* RP 2275-2302, 2334-38, 2391-2437, 2504. It is possible that when the State realized that there was a “hold-out” juror and that it might be the case that there would be a mistrial or a verdict on lesser offenses, the State changed its position regarding a mistrial, hoping that it could use Mr. White at a retrial in a “cleaner” fashion - that is, rather than to lose the trial with a lesser offense conviction, it would take a mistrial and have a retrial with less “baggage” surrounding Mr. White’s testimony.

Otherwise, a retrial is proper, even over the defense objection, if prompted by “manifest necessity” and “extraordinary and striking” circumstances.

State v. Juarez, 115 Wn. App. 881, 889, 64 P.3d 83 (2003).⁴

As for *State v. Williams*, 96 Wn.2d 215, 226, 634 P.2d 868 (1981) and *State v. Lord*, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007), both cases involved situations where the defendant failed to make a motion for a mistrial -- not a situation, as here, where the defense made a motion for mistrial, but then asked the court to reserve ruling. Here, Mr. Whitaker was never silent about his desire for a mistrial and never withdrew the motion – at one point when it looked like the jury might reach a verdict, he simply asked that the court defer ruling, a decision that makes sense.

The procedure that Mr. Whitaker suggested following conserves scarce resources. If the jury had returned “not guilty” verdicts, not only would the trial court not have had to rule on the mistrial motion, but there would have been no need for a new trial for a decades-old case that had already been tried twice. In a case not discussed by the State, this is exactly the procedure that was followed in *State v. Corn*, 95 Wn. App. 41,

⁴ See also *Arizona v. Washington*, 434 U.S. 497, 503-17, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (upholding retrial based on State’s motion based upon improper defense opening).

51, 975 P.2d 520 (1999), and a procedure that is fairly standard. As the

Florida Supreme Court once held:

We hold that a motion for a mistrial coupled with a request that the court reserve ruling on the motion does not constitute a waiver and therefore prohibit appellate review of the motion . . . [I]t is quite reasonable for a trial judge to reserve ruling until after the jury deliberates in the hope that the jurors can rise above the alleged prejudice and cure the error. If the verdict cures the error, the court will save the expenditure of additional time, money and delay associated with a new trial. On the other hand, if the judge, after the verdict, incorrectly grants the motion for mistrial and orders a new trial, that order is reviewable on appeal. The appellate court could then reverse the order granting the new trial and order the trial court to enter a judgment on the jury verdict.

Ed Ricke and Sons, Inc. v. Green, By and Through Swan, 468 So. 2d 908, 910 (Fla. 1985).⁵

Mr. Whitaker's attorneys followed this standard procedure, and the trial court correctly ruled that there was no waiver.

⁵ See also *Commonwealth v. Brangan*, 475 Mass. 143, 148, 56 N.E.3d 153, 157-58 (2016) (“[A] judge’s decision to defer ruling on the motion until after the jury return their verdict enhances judicial efficiency and preserves valuable judicial resources by obviating the need for a retrial should the verdict result in an acquittal.”) (internal quotes omitted); *Robinson v. Commonwealth*, 13 Va. App. 574, 577, 413 S.E.2d 885, 886-87 (1992) (“Defense counsel had every right to expect that the trial judge would rule on the motion when the judge deemed appropriate. It is not uncommon for trial judges to defer ruling on mistrial motions until after the jury has reached a verdict, thereby possibly obviating the need for a retrial should the verdict result in an acquittal.”).

3. *The State Properly Requests Review Although Any Alleged Waiver Should Not Bar Review*

The State recognizes that the Court of Appeals in fact decided to review the juror misconduct issues, but itself seeks review under RAP 13.4(b)(4) on the issue of what standards a court should utilize when reviewing an unpreserved claim of error:

There is a tension between the rules that require issue preservation and the rule that the court may nonetheless exercise its discretion to review an unpreserved claim of error. What factors guide that exercise of discretion is an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4).

Answer at 13. While Mr. Whitaker disagrees that he did not preserve the error in this case, he agrees with the State that this Court should accept review of his case. However, the Court should reverse even if there was a technical waiver.

The State points to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), where this Court reviewed challenges to Legal Financial Obligations (“LFOs”) even though there had not be a challenge to them at all in the trial court. The Court’s decision to review the issues was based upon a national interest: “National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and

reach the merits of this case.” *Id.* at 835. The Court recognized its own power on a discretionary basis to make decisions about the cases it wishes to review. *Id.* at 834-35.

There is nothing unusual about this discretion. Appellate courts have always had the power and authority to address issues that were not raised below. *See State v. McCullum*, 98 Wn.2d 484, 487, 656 P.2d 1064 (1983); *State v. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996); *State v. Laviollette*, 118 Wn.2d 670, 680, 826 P.2d 684 (1992). Indeed, the Court has the power to address issues *sua sponte*, where the parties have not raised them at all. *See Siegler v. Kuhlman*, 81 Wn.2d 448, 461-62, 502 P.2d 1181(1972) (Neill, J., dissenting). As Justice Rosselini once wrote for this Court in 1970:

The exception to the rule is a salutary one. Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

Although Mr. Whitaker in fact preserved his challenges to the many constitutional violations related to Juror No. 2, even if his attorneys somehow did not when they asked the trial court to delay ruling on the mistrial motion, the Court should still review the errors. Where a juror comes to court for jury service and is threatened with violence because of his views of the evidence, and ends up having a heart attack as result, or when another juror violates the judge's instructions and not only prejudices the case, but loudly exclaims to other jurors during a recess her wish that Mr. Whitaker be executed, these are the types of errors that call out for review by this Court. Violence against sitting jurors is never acceptable and even there had been silence below (which there was not), the Court should still review the constitutional issues that arose as a result. The damage to the legal system by allowing some jurors to threaten violence against a holdout juror is at least as important as the issue of LFOs being imposed on indigent defendants.

Accordingly, the Court should follow the State's suggestion and accept review, but reverse the convictions. Everything that took place with the entire sequence of events regarding Juror No. 2 violated CrR 6.15, Mr. Whitaker's rights to due process, to an unanimous and impartial

jury chosen through the jury selection process, to be present and to an public and open trial, all protected by the First, Sixth and Fourteenth Amendments and article I, sections 3, 10, 21 and 22.

D. CONCLUSION

This Court should accept review and reverse the convictions.

DATED this 26th day of February 2019.

Respectfully submitted,

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

Declaration of Service

I hereby certify that on the 26th day of February 2019 I electronically filed the foregoing pleading with the Clerk of the Court using the Appellate Courts Portal which will send notification of such filing and an electronic copy to attorneys of record for the Respondent and any other party.

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

Dated this 26th day of February 2019 at Seattle, WA.

s/ Neil M. Fox

WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

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