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STATE OF WASHINGTON
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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.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. When the defendant is charged with aggravated first degree murder, and the aggravating factors are crimes, is he entitled to a duress instruction as to those aggravating factors?

2. If so, was there sufficient evidence produced that the defendant acted under duress when committing crimes that were the alleged aggravating circumstances to merit an instruction on that defense?

II. STATEMENT OF THE CASE

The facts of the case are set out in the Brief of Respondent, pages 3-11. The defendant was convicted of Aggravated First Degree Murder and conspiracy to commit first degree murder for his participation in the kidnap and murder of Rachel Burkheimer. 1 CP 54.

The defendant was associated with John Anderson in a group who worked together to commit crimes in order to make money. 7 RP 1483-85. In September 2002 the defendant participated with the group in an attempted burglary of a former roommate, J.J. Brazwell. 5 RP 830, 845-859, 869-70.

Rachel Burkheimer dated John Anderson for a time. 4 RP 741. After they broke up Anderson was jealous of Rachel's

relationships with other men. 5 RP 834, 840. Anderson distrusted Rachel and threatened to assault her after learning that she had started dating Brazwell. 5 RP 1009. A few days before her murder Rachel invited the defendant and another member of the group, Jihad, to a party. When they got there the defendant thought he saw someone that was associated with Brazwell. 5 RP 1032-41; 9 RP 1673. When they returned home the defendant convinced Jihad that Rachel had set them up. When the defendant told Anderson what happened, Anderson became enraged. 9 RP 1671-83.

Anderson arranged to have Rachel come to the duplex where members of the group often met. 6 RP 1196-97. While she was there she was socializing with the defendant and other members of the group until Anderson arrived. 6 RP 1206-07. When Anderson came inside he was angry. He struck the defendant and another man, Barth. 6 RP 1209; 8 RP 1543. Barth and Anderson were both armed and had a stand-off for about 30 seconds. 6 RP 1210-11; 9 RP 1694-96.

During the stand-off Rachel tried to leave. Anderson grabbed her and threw her to the ground. 6 RP 1211-12. Without prompting the defendant went over and kicked her. 8 RP 1545-56. He then helped Anderson tie-up Rachel. They then carried her to the garage

where she was concealed behind a locked door. 7 RP 1481-82. 8 RP 1550-55.

When Jihad's girlfriend, Trissa Conner, came home and ultimately found out Rachel was tied up in the garage she ordered the men out of the house. 6 RP 1111-12, 1122-25, 1130. The defendant and others placed Rachel in an athletic bag, and carried her out to a Jeep owned by a member of the group named Durham. 10 RP 1939-40. The defendant, Durham, and another man Rivas then drove away with Rachel. 10 RP 1943-44.

Eventually Rivas and Rachel were dropped off while the defendant and Durham went back for Anderson. 10 RP 1952-55. After they got Anderson and some shovels they picked up Rivas and Rachel. 10 RP 1057-58. The men then drove Rachel out to a remote area. Once there the defendant, Anderson, and Rivas dug a grave. 10 RP 1963-64, 1970. Rachel was ordered to get in the grave and remove her clothing and jewelry. 10 RP 1971. Anderson then shot Rachel, killing her. 10 RP 1977; 13 RP 2507.

III. ARGUMENT

A. THE DURESS DEFENSE APPLIES TO THE CHARGED CRIME AND NOT DISTINCT ELEMENTS OF THE CRIME. IT MAY NOT BE USED TO DEFEND AGAINST MURDER.

The defendant was charged with first degree murder. The charge alleged as aggravating circumstances that the murder was committed in the course of, furtherance, or in immediate flight from Kidnapping in the First Degree and Robbery in the First or Second Degree. 6 CP 1794. At trial the defense proposed a duress instructions for the robbery and kidnapping aggravating factors. 2 CP 573-74. The trial court rejected the proposed instructions, finding there was no factual basis to support the instructions. It did not reach the legal question whether duress applied to the aggravating factors or not. 6/24 (PM) RP 61-62.

The Court of Appeals held the defendant was not entitled to the duress instructions. The Court reasoned that the statutory defense was not available to the crime of murder. Since the defendant had been charged with murder, and not kidnapping or robbery, under the plain language of the statute he was not entitled to the defense. State v. Whitaker, 6 Wn. App. 2d 1, 13-14, 429 P.3d 512 (2018). This Court granted review "on the duress issue only."

1. Under The Rules Of Statutory Construction The Defense Does Not Apply To Distinct Elements Of The Offense.

The legislature has permitted the defense of duress in the following circumstances:

> (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) The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.

RCW 9A.16.060.

The defendant initially argued to the court that the defense applied to the statutory aggravating factors because the statute does not specifically disallow that application. He argued that the defense is available because the aggravating factors themselves are stand-alone crimes, which the jury had to find beyond a reasonable doubt.

The defendant's argument present a question of statutory construction. When construing a statute the Court's objective is to give effect to the Legislative intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the statute is clear on its face it meaning is derived from the plain language of the statute alone. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The plain meaning of the statute may be discerned from what the Legislature had said in the statute and related statutes that disclose legislative intent about the provision in question. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The court will not read into the statute terms the Legislature may have left out even unintentionally. State v. Heiskell, 129 Wn.2d 113, 122, 916 P.2d 366 (1996).

Court of Appeals found the statute unambiguously applied the defense to the crime charged, not the aggravating factors. The Court was correct. A statute is only ambiguous, and therefore subject to the rules of statutory construction, when it can reasonably be interpreted in more than one way. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The duress statute unambiguously relates to a "prosecution for a crime." (emphasis added). It does not apply when "the crime charged" is murder.

(emphasis added). It does not allow for the defense to an element or aggravating factor of the crime charged.

The defendant argues that he was charged, tried, and convicted of premeditated murder and kidnapping in the first degree. Petition for review at 9. He claims that this result is compelled by a line of cases starting with Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and culminating with this Court's decision in State v. Allen, 192 Wn.2d 526, 431 P.3d 117 (2018). Before Apprendi the aggravating factors were viewed as "aggravation of penalty" factors which were not elements of the crime as such. State v. Kincaid, 103 Wn.2d 304, 307, 692 P.2d 823 (1985). After Apprendi, other than the fact of prior conviction, any fact that increases the penalty for a crime is an element that must be submitted to the jury and proved beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 103, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Whether felonies charged as aggravating factors to murder are "aggravation of penalty" factors or "elements" makes no difference to the analysis here. This Court has already held that when a felony functions as an element of murder, duress may not act as an affirmative defense to the underlying felony. State v.

Moretti, 66 Wash. 537, 120 P. 102 (1912). In Moretti the Court considered an earlier version of the duress defense statute. That statute made it a defense

> [w]henever any crime, except murder, is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats creates a reasonable apprehension in the mind of such participator that in case of refusal he is liable to instant death or grievous bodily harm, such threats and apprehension constitute duress, which will excuse such participator from criminal prosecution.

Moretti, 66 Wn.2d at 540 quoting 2256 Rem. & Bal. Code.

Like, RCW 9A.16.060, the prior statute precluded the duress defense if the crime charged was murder. The defendant sought to have the jury consider the defense in relation to the robbery that he participated in which resulted in the victim's death. Id. at 539. This Court rejected the argument in part because the plain language of the statute precluded the defense. Id. at 541.

This Court reaffirmed that duress is not a defense to felony murder pursuant to RCW 9A.16.060 in State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988). Since the only substantive change to the statute occurring after Ng was to add the crimes of manslaughter and homicide by abuse, the holding in Ng remains valid. See Laws of Washington 1999, Ch. 60, § 1. And, since for charging purposes

individual crimes that form the basis for the predicate felony in felony murder are treated the same as individual crimes that serve as aggravating factors for murder, the duress defense is no more available for those factors in aggravated first degree murder than they are for the predicate felonies in first degree felony murder.

Finally, related statutes also lend support to the conclusion that the duress defense may not be asserted for felonies charged as aggravating circumstances to murder. The Legislature provided an intoxication defense to rebut any mental state which is a necessary element of a particular crime or degree of crime. RCW 9A.16.090. Entrapment may be asserted to rebut the intent element of a crime. RCW 9A.16.070. Unlike these statutes, the duress defense is limited to the crime charged. It does not allow the defense to individual elements of the offense.

Since the defendant was charged with murder and he was not charged with kidnapping, he was not entitled to a duress instruction on the kidnapping aggravator. The Court of Appeals should be affirmed.

2. Apprendi, Alleyne, and Allen Rely On Different Constitutional Provisions. They Do Not Determine The Charged Offense. In Turn They Do Not Require The Court To Hold Duress May Be A Defense To An Aggravating Factor.

Apprendi, Alleyne, and Allen should also be rejected as authority for the defendant's position because they relied on different constitutional provisions than are at issue here. Apprendi and Alleyne dealt with the Sixth Amendment right to a jury trial. Apprendi, 530 U.S. at 476; Alleyne, 570 U.S. at 103. Allen dealt with the Fifth Amendment protection against double jeopardy. Allen, 192 Wn.2d at 532. Neither dealt with the constitutional right to notice of the "nature and cause of the accusation" provided in the Fifth and Sixth Amendments and Washington Constitution Art 1, §§ 3 and 22. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 690, 782 P.2d 552 (1989).

The constitutional right to notice is satisfied if the information contains all of the essential elements of the crime. State v. Tandecki, 153 Wn.2d 842, 846, 109 P.3d 398 (2005). This Court considered the sufficiency of an information alleging aggravating factors in three recent cases: State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012), State v. Kosewicz, 174 Wn.2d 683, 278 P.3d 184 (2012), and State v. McEnroe, 181 Wn.2d 375, 333 P.3d 402

(2014). In Siers this Court considered whether Due Process required aggravating factors to be alleged in the information as an essential element. The Court followed the reasoning from other courts which held that it did not. Those court recognized that the Sixth Amendment right to jury trial serves a different purpose that the Due Process notice requirement. As long as the defendant receives notice of the aggravating factors in some form, those factors are not essential elements which must be included in the information. Id. at 280.

In Kosewicz this Court relied on its reasoning in Siers to conclude that the elements of a crime alleged as an aggravating factor does not require the State to plead the elements and alternative means of that offense. Kosewicz, 174 Wn.2d at 190. It again relied on the reasoning in Siers to conclude that the absence of sufficient mitigating circumstances to merit leniency was not an essential element that was required to be proved in a charge of aggravated first degree murder where the death penalty was sought. McEnroe, 181 Wn.2d at 384-85.

As this Court has made clear in Kosewicz, the elements of felonies charged as aggravating factors are not themselves essential elements of the charged murder. While the State bears

the burden of proving those felonies as a distinct element of first degree aggravated murder, they are not themselves distinct crimes for which the defendant was required to be given notice in a charging document. Because they were dealing with different constitutional provisions, neither Apprendi, Alleyne, nor Allen dictate that a felony charged as an aggravating factor becomes a separate offense for which the defendant was charged, tried, and convicted. He was therefore not entitled to a duress defense as to the felony aggravators under the plain language of the statute.

3. Out-of-State Authority Does Not Provide Support To Conclude That Duress Is A Defense To Aggravating Factors.

The defendant has also cited out of state authority in support of his argument that duress can be a defense to aggravating factors when the charge is murder, citing State v. Getsy, 702 N.E.2d 866 (Ohio 1998), State v. Bockorny, 863 P.2d 1296 (Or. 1993). As the Court of Appeals noted the Ohio Court in Getsy did not analyze why duress was "arguably" a defense to aggravating circumstances in murder for hire. Whitaker, 6 Wn. App. 2d at 14-15. In Bockorny the Court did not decide whether the defense was applicable to the underlying felonies that aggravated the murder. Instead it

concluded there was no evidence to support such a defense. Bockorny, 863 P.2d at 1298.

One Court has considered the question in light of that state's case law. McMillan v. State, 51 A.3d 623 (Md. 2012). The Court concluded that duress was a defense to the predicate felony in a felony murder charge in Maryland. But it also recognized that Washington, as well as other states, have precluded the defense to that charge statutorily. Id. at 635. Thus, the out-of-state authority has either not addressed the issue directly or comes from a state that does not have a statute similar to RCW 9A.16.060 does not support the argument that duress is a defense to a felony which is charged as an aggravating factor to murder.

B. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A DURESS DEFENSE.

The trial court did not rule on whether the defense of duress was legally available to the felony aggravators. Rather it found there was insufficient evidence to support the defense. 6/24 (PM) RP 61-62. The Court of Appeals ruled the defense was not available as a matter of law. Whitaker, 6 Wn. App. 2d at 14. The Court of Appeals did not analyze whether there was sufficient evidence to support the defense other than to note that "Anderson

threatened and used force against Whitaker and others as the events of Burkheimer's murder evolved." Id. at 15. Should the Court affirm the Court of Appeals on the legal analysis, it is not necessary to address the factual sufficiency for the defense. However, should this Court disagree with the lower court's legal analysis and to the extent that court's comments on the facts can be interpreted to mean that there was sufficient evidence to support the defense, it should be rejected.

To support the duress instruction there must be evidence of threats that created a reasonable apprehension of death or grievous bodily harm in the defendant's mind. "Mere fear or threat by another is not sufficient to constitute a defense." State v. Harris, 57 Wn.2d 383, 385, 357 P.2d 719 (1960) quoting 1 Wharton's Criminal Law and Procedure 262, § 123. The threat of harm may be implicit from the circumstances. State v. Harvill, 169 Wn.2d 254, 234 P.3d 1166 (2010).

In Harvill the defendant had known the confidential information through work. He knew that the C.I. had bragged about causing one man brain damage by smashing a bottle over his head. The defendant knew that the C.I. had stabbed another man after grabbing a gun from the man. The defendant sought a duress

instruction on the basis that, in light of this knowledge, when the C.I. aggressively demanded the defendant procure cocaine for the C.I., the defendant believed he would seriously injured or killed if he did not do so. Id. at 257-58. This Court held it was error to refuse to give a duress instruction under these facts. Id. at 263. It distinguished the facts in Harvill from the facts Harris on the basis that in Harris there was no evidence of any threat, implicit or otherwise, that prompted the defendant's fear in that case. Id.

Here the defendant relied on testimony that (1) Anderson hit him and Barth when Anderson first entered the residence where they were with Burkheimer, (2) the defendant told police that he was shaking after Anderson began barking orders, and (3) the defendant told police that he was intimidated by Anderson due to the size difference between them. BOA at 17. Anderson's assault on the defendant and Barth, a second man present, was no more than an Assault 4. 6 RP 1209; 8 RP 1542; 9 RP 1694-95. Anderson only obtained a gun after Barth threatened Anderson with Barth's gun. Even then Anderson only yelled at Barth; he did not point the gun at Barth. 6 RP 1210-11; 8 RP 1543; 9 RP 1695-96. Since Anderson's assault on the defendant and Barth did not threaten grievous bodily injury or death, that assault could not have caused

the defendant to reasonably believe that if he did not participate in Burkheimer's kidnapping that he would suffer death or grievous bodily injury.

Nor do the defendant's statements about his mental state at the time support the defense. Although the defendant said he was intimidated by Anderson, he did not say that was the reason he did anything in connection with the kidnapping. The defendant stated that he did not recall if he helped subdue Burkheimer, even when Anderson was "loudly giving out orders to those that were there." 6/16 RP 1386. The defendant recalled trying to help tie her up, but was not successful because he was shaking. However, he was not so intimidated by Anderson to suggest that Anderson let Burkheimer go. 6/16 RP 1386-87, 1399.

Unlike Harvill there was no evidence that the defendant was aware of circumstances prior to the kidnapping and murder that would imply to the defendant that if he did not participate in the kidnapping, Anderson would inflict death or grievous bodily injury on him. Nor is there a reasonable inference from the evidence at the duplex where Burkheimer was first restrained indicating that the defendant subjectively believed he was in such danger when Anderson attacked Burkheimer and began barking orders. To the

contrary, the evidence showed that Barth left unhindered when the assault on Burkheimer began. 7 RP 1213; 8 RP 1551; 9 RP 1698.

The evidence also did not support giving a duress instruction because it revealed that the defendant intentionally or recklessly put himself in a situation in which it is probable that he would be subject to duress. A person does so when he intentionally participates with others in criminal acts, and is then charged with committing one of those acts. State v. Healy, 157 Wn. App. 502, 514, 237 P.3d 360 (2010); State v. McKinney, 19 Wn. App. 23, 573 P.2d 820 (1978).

Here the defendant associated himself with Anderson and others. That group worked together to make money by committing crimes, including robbery. 9 RP 1661-64. The group understood that if anyone said anything about the group's criminal activities there would be violent repercussions. 8 RP 1533-34. The defendant told Anderson about Burkheimer "setting them up" at the hotel party where he thought an associate of one of Anderson's rivals was present. 9 RP 1671-78. Thereafter the defendant was present with Anderson when Anderson plotted to get back at Burkheimer. 9 RP 1679-82. This evidence shows that the defendant intentionally or recklessly placed himself in a position where it was likely he would

be forced to take action against Burkheimer, who it was believed had acted against the interests of the group. Thus the defense was not available under the facts of the case.

The defendant argues that whether the defendant recklessly placed himself in position to commit the criminal act was a decision for the trier of fact, citing Healy, supra. Healy recognized that other cases have permitted the trial court to consider the issue as a matter of law. However under the circumstances of that case the court agreed that allowing the jury to consider the issue of recklessness was consistent with this Court's decision in Harvill, supra. Healy, 157 Wn. App. at 515. The Court did give a duress instruction that permitted jurors to consider whether the defendant was reckless. Id. at 510. The Court did not decide whether the trial court could determine whether the evidence was insufficient to support a duress defense on the basis that the defendant had recklessly placed himself in a position where it was probable that he would be subject to duress. It therefore does not stand for the proposition that the court may not find insufficient evidence to overcome this bar to the defense in order to deny the instruction.

Under these circumstances the trial court did not err when it concluded there was insufficient evidence to support a duress

defense to the kidnaping and robbery aggravating factors. If the Court reaches this issue, it should nonetheless affirm the Court of Appeals.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to find the defendant was not entitled to a duress instruction as to the kidnapping aggravator. The State asks the Court to affirm the judgment and sentence for aggravated first degree murder.

Respectfully submitted on June 18, 2019.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, JOHN ALAN WHITAKER, Petitioner.	No. 96777-6 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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The undersigned certifies that on the 18th day of June, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

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I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Neil Martin Fox; nf@neilfoxlaw.com

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 18th day of June, 2019, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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