IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONNA LEE DRECKMAN, Appellant.	No. 44131-4-II UNPUBLISHED OPINION AFTER REMAND FROM THE SUPREME COURT

LEE, J. — A jury found Donna Dreckman guilty of four counts of forgery. Dreckman argues that the duress instruction was erroneous. Because defense counsel proposed the duress instruction and the error is invited, she claims she received ineffective assistance of counsel. We agree. Accordingly, we reverse and remand for further proceedings.

FACTS

The State charged Dreckman with four counts of forgery. Dreckman admitted she forged the checks; however, she claimed that she was forced to do so by her boyfriend. She testified that her boyfriend hit her, threw things at her, and threatened her.

Dreckman requested that the trial court instruct the jury on a duress defense. She proposed the following instruction, which the trial court gave:

> Duress is a defense to a criminal charge if:
>
> (a) The defendant participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant or another person would be liable to immediate death or immediate grievous bodily injury; and
>
> (b) Such apprehension was reasonable upon the part of the defendant; and
>
> (c) The defendant would not have participated in the crime except for the duress involved.
>
> The defense of duress is not available if the defendant intentionally or recklessly placed herself in a situation in which it was probable that she would be subject to duress.
>
> The burden is on the defendant to prove the defense of duress 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.

Supplemental Clerk's Papers at 66. The jury found Dreckman guilty of all four counts of forgery. Dreckman appeals.

ANALYSIS

A. JURY INSTRUCTION

Dreckman claims that the trial court erred by giving the duress instruction because it did not instruct the jury that it had the duty to find Dreckman not guilty if she met her burden to prove she acted under duress. But because Dreckman proposed the jury instruction, she is precluded from challenging it on appeal.

The invited error doctrine "prohibits a party from 'setting up error in the trial court and then complaining of it on appeal.'" *State v. Armstrong*, 69 Wn. App. 430, 434, 848 P.2d 1322 (1993) (quoting *State v. Young*, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991)). Under the invited error doctrine, "even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). Here, Dreckman proposed the instruction

on the duress defense; therefore, any error in the instruction was invited, and we are precluded from reviewing it.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Although Dreckman originally stated that the State proposed the erroneous instruction, she concedes the error was invited in her reply brief. She then argues in her reply brief that she received ineffective assistance of counsel based on trial counsel proposing an erroneous instruction.[1] A defendant claiming ineffective assistance of counsel has the burden of establishing that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Our scrutiny of counsel's performance is highly deferential, and we strongly presume reasonableness. *McFarland*, 127 Wn.2d at 335. To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. *McFarland*, 127 Wn.2d at 337.

Here, defense counsel proposed a duress instruction. However, the duress instruction proposed by defense counsel omitted the final sentence of the standard jury instruction. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.01, at 274 (3d ed. 2008) (WPIC 18.01). The final sentence of the pattern jury instruction for duress states: "If

[1] Generally, we will not consider an issue raised for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). However, a commissioner of this court granted Dreckman's motion to supplement her assignments of error.

you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge]." WPIC 18.01.

When an ineffective assistance of counsel claim is based on defense counsel's failure to request a jury instruction, we must determine that the defendant was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction and that the failure to request the instruction was prejudicial. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Although defense counsel proposed a duress instruction, Dreckman argues that the error in the instruction nullified the instruction and was the equivalent of failing to request the instruction at all. By failing to instruct the jury on the effect of the duress defense, Dreckman was denied the benefit of the instruction. Moreover, we cannot see a tactical or strategic reason for proposing an instruction that does not accurately inform the jury of the effect of a defense. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (to show deficient performance, the defendant must show the absence of any conceivable legitimate trial tactic). Accordingly, we agree defense counsel's performance was deficient for proposing a duress instruction that did not inform the jury that, if Dreckman proved the elements of defense, the jury should find her not guilty.

Dreckman must also show prejudice—that there is a reasonable probability that the outcome of the trial would have been different. *McFarland*, 127 Wn.2d at 337. Here, Dreckman presented evidence that she participated in the crime because her boyfriend threatened her and she believed that he would cause her serious harm if she did not agree to participate in the crime. Dreckman's testimony, if believed by the jury, establishes the elements of a duress defense. However, the jury was never instructed on what to do if it found that Dreckman had met her burden to prove duress. Based on the record before us, we cannot tell whether the jury found that Dreckman failed to meet her burden to prove duress, or whether the jury found that Dreckman met

her burden but did not know that they should enter not guilty verdicts. Therefore, there is a reasonable probability that the outcome of the trial would have been different if the jury had been properly instructed on the effect of the duress defense.

Dreckman has met her burden to show both deficient performance and prejudice. Therefore, she has met her burden to show ineffective assistance of counsel. Accordingly, we reverse and remand for further proceedings.

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 in accordance with RCW 2.06.040, it is so ordered.

Lee J.

We concur:

Maxa, P.J.

Melnick, J.