IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 64507-2-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
JORAWAR SINGH,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 13, 2011
	)	

Ellington, J. — Jorawar Singh appeals his conviction for first degree robbery. He challenges the jury instructions on the defense of duress, and argues his counsel was ineffective for accepting the instruction. We conclude the jury was properly instructed and his counsel was not ineffective for failing to object. Pro se, Singh contends the "to convict" instruction improperly relieved the State of its burden to prove the jurisdictional element of the crime, the court erred in certain evidentiary rulings and by refusing to grant a mistrial, and his counsel was ineffective for failing to timely lodge the same evidentiary objections. We find no merit in the arguments, and affirm.

BACKGROUND

Jorawar Singh robbed a convenience store with Jacob Kaiser and Matthew Wagner and was charged with robbery in the first degree. At trial, Singh testified he participated in the robbery only because Kaiser threatened him with a gun. According to

Singh, Kaiser approached him at the bus stop, pointed a gun at him and, after taking his money and cigarettes, threatened to kill Singh if he did not come with him and Wagner.

Singh testified they walked to a nearby 7-Eleven store. Kaiser directed Singh to steal cigarette lighters while Wagner stole beer. Once in the store, Singh was surprised when Kaiser displayed the gun and took money from the cashier. Singh grabbed a 100-count box of lighters and fled, with the other men, into the wooded area behind the store. Kaiser demanded the lighters, forcibly removed the sweatshirt Singh wore during the robbery, and ordered him to lay down by some bushes. A police K-9 unit soon found him there and Singh was arrested. The police found the other men shortly thereafter.

Bianca Domingue, a friend of Singh's girlfriend, testified for the defense. Domingue said she saw three men walking near the convenience store on the night of the robbery. She said one of the men looked like he had a weapon pointed at the head of another. She could not identify any of the individuals involved. She was frightened by the situation and walked the other way, but never called the police.

Singh's and Domingue's accounts were substantially at odds with other evidence in the case. Wagner, who had pleaded guilty to the crime, testified that Singh had spent the evening of the robbery drinking with him at Kaiser's apartment. Wagner and Kaiser had discussed robbing a store on another occasion. Kaiser showed Singh and Wagner his gun, and when they ran out of beer, a loose plan evolved to rob the convenience store. Singh did not object and no one threatened him.

The three men walked to the store, explored the nearby wooded area to plan their getaway, and waited for some police officers to leave the area. One of the officers

observed the three men walking at a normal pace, three abreast, at equal distance from one another. None of the men were being pushed or held, and the officer saw no weapons. When the last of the customers left the store, Singh, Wagner, and Kaiser entered. Wagner went to the back of the store to get two cases of beer. Singh and Kaiser approached the counter, where Kaiser displayed his gun to the cashier. According to Wagner, both Singh and Kaiser shouted demands at the cashier, who opened the register as directed. Kaiser grabbed the money and Singh grabbed the lighters. The three exited the store and ran into the wooded area. Before they separated, Singh advised Wagner to be quiet. Each was quickly apprehended and identified by the cashier. The cashier recognized Singh as a frequent customer.

The State charged Singh with robbery in the first degree. The jury convicted him as charged. He appeals.

DISCUSSION

Duress Instruction

The primary issue on appeal is whether the court properly instructed the jury as to duress and whether any error was preserved.

Duress is a statutory defense requiring the defendant to show he participated in the crime by compulsion by another who, by threat or use of force, created a reasonable apprehension in his mind that he would be liable to immediate death or grievous bodily injury if he refused, and but for the duress involved, he would not have participated in the crime.[1] The defense does not apply if the defendant intentionally or recklessly placed

[1] RCW 9A.16.060(1); State v. Healy, 157 Wn. App. 502, 504-05, 237 P.3d 360 (2010), review denied, 170 Wn.2d 1019 (2011).

himself in a situation in which it was probable he would be subject to duress.[2]

Singh proposed a jury instruction on the duress defense taken from the Washington pattern jury instruction, which tracks the statute.[3] The pattern instruction includes the statutory exception as optional language to be used "as applicable."[4] Although Singh originally requested a version that omitted the optional language, he and the State later presented the court with an agreed set of instructions that included it. He now contends the court erred by giving that instruction.

"'A party may not request an instruction and later complain on appeal that the requested instruction was given.'"[5] This is so even where the instructional error is one of constitutional magnitude.[6] Singh is therefore precluded from directly challenging the jury instruction on appeal.[7] Our review is therefore limited to whether or not he received

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[2] RCW 9A.16.060(3); Healy, 157 Wn. App. at 505.

[3] The instruction provides that duress is a defense 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] . . . would be liable to immediate death or imminent 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 [himself] . . . in a situation in which it was probable that [he] . . . would be subject to duress.]" 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 18.01, at 274 (3d ed. 2008).

[4] Id.

[5] State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)) (alteration omitted).

[6] State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

[7] Singh contends the invited error doctrine does not apply because he originally proposed a duress instruction without the optional language. In State v. Vander Houwen, 163 Wn.2d 25, 37, 177 P.3d 93 (2008), the Supreme Court found the doctrine inapplicable where the court rejected the defendant's original, correct instruction, and the defendant requested a less applicable instruction to preserve his ability to argue a justification defense. Here, however, Singh does not argue, and there is no indication in

effective assistance of counsel.[8]

To establish ineffective assistance of counsel, Singh must show both that his counsel's conduct was deficient and that the deficient representation resulted in actual prejudice.[9] He argues his counsel fell below an objective standard of reasonableness by agreeing to an instruction containing the exception to the defense. Because the evidence supported the instruction, he is mistaken.

The State produced evidence that Singh, Kaiser, and Wagner devised a plan to rob the convenience store while the three were drinking at Kaiser's home. Kaiser showed Singh he had a gun. Then, together, the three surveilled the store, planned their getaway, and waited for police officers and customers to leave the area before entering the store.

Even if the jury believed Singh acted under duress, this evidence supports the inference that Singh intentionally or recklessly placed himself in a situation in which he would be subject to that pressure. Accordingly, the State was entitled to have the jury instructed that such conduct is an exception to the defense of duress.[10] The instruction provided accurately conveyed the law, allowed both parties to argue their theories of the case, and properly left to the jury the task of determining whether Singh proved the

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the record, that the court considered or rejected Singh's original proposed instruction. Rather, the record indicates that the parties each submitted proposed instructions, after which they worked together to produce a final, complete set to which neither excepted. See RP (Oct. 12, 2009) at 3.

[8] Doogan, 82 Wn. App. at 188.

[9] Id.; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[10] Healy, 157 Wn. App. at 505 ("Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.").

defense. The instruction was not error, and counsel is not ineffective for proposing and accepting proper instructions.[11] Because Singh has not shown deficient representation, we need not reach the question of prejudice.[12]

To Convict Instruction

In his pro se statement of additional grounds for review, Singh contends the to convict instruction for first degree robbery relieved the State of its burden of proof by improperly stating the jury need only find that "any" of the elements of the crime occurred in the state of Washington.[13] He argues, "Unlike most crimes . . . robbery in the first degree requires all of the above mentioned acts to have occurred in the state."[14] The argument is without merit.

Washington's criminal jurisdiction statute provides that "[a] person who commits in the state any crime, in whole *or in part*" is liable to punishment in this state.[15] An offense

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[11] See State v. Bradley, 96 Wn. App. 678, 685, 980 P.3d 235 (1999) ("counsel was not deficient for proposing and accepting a self-defense jury instruction that is entirely consistent with the case law").

[12] In re Personal Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004) (failure to establish either element of the test for ineffective assistance of counsel defeats the claim).

[13] The instruction provided as follows: "To convict the defendant of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about the 3rd of May, 2009, the defendant unlawfully took personal property from the person or in the presence of another; (2) That the defendant intended to commit theft of the property; (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of anther; (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking; (5) That in the commission of these acts or in immediate flight therefore the defendant displayed what appeared to be a firearm or other deadly weapon; and (6) That any of these acts occurred in the [s]tate of Washington." Clerk's Papers at 92.

[14] Statement of Additional Grounds for Review at 3.

is committed "in part" in Washington "when an 'essential element' of the offense has been committed here."[16] Accordingly, the jurisdictional component of a to convict instruction need only require the jury to find that "any" of the essential elements occurred in the state. We are aware of no exception for first degree robbery.

Evidence Of Prior Plea Agreement

During direct examination, Singh testified that he had pleaded guilty to a number of prior crimes "because I did those crimes, and I think I should be punished on those crimes."[17] Because the testimony implied that Singh went to trial on the current charge because he did not commit the crime, the prosecutor sought the court's leave to inquire whether Singh had also received any benefits or consideration by pleading guilty to the other charges. The court ruled such inquiry was "valid cross examination."[18]

The prosecutor limited his inquiry to exactly what the court permitted:

> Q: And you were testifying on direct examination related to the fact that you had pled to those, but you received additional benefits and considerations for that plea; is that correct?
>
> A: Yes, sir, probably.[19]

At the next break, Singh's counsel asked the court for permission to ask Singh on redirect whether he would have also received any benefit or consideration if he had pleaded guilty in this case. The court ruled that the proposed testimony was

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[15] RCW 9A.04.030(1) (emphasis added); State v. Lane, 112 Wn.2d 464, 471, 771 P.2d 1150 (1989).

[16] Lane, 112 Wn.2d at 471; see also State v. Dodson, 143 Wn. App. 872, 877-88, 182 P.3d 436 (2008).

[17] Report of Proceedings (RP) (Oct. 8, 2009) at 25.

[18] Id. at 57.

[19] Id. at 126.

inadmissible under Evidence Rule (ER) 410. Singh's counsel then asked for a mistrial because he was ineffective for failing to object to the prosecutor's question on cross-examination. The court denied the motion.

In his statement of additional grounds, Singh challenges the court's rulings allowing the State to inquire whether he received benefits from his prior guilty pleas and disallowing defense counsel from asking about benefits he would receive if he had pleaded guilty in this case. He contends his counsel was ineffective for failing to object to the State's question and the court abused its discretion by refusing to grant a mistrial.

"Interpretation of an evidentiary rule is a question of law, which we review de novo."[20] When the trial court has correctly interpreted the rule, we review its decision whether to admit or exclude evidence for abuse of discretion.[21] We also review a court's denial of a motion for mistrial for abuse of discretion.[22] A court abuses its discretion when its decision when its decision is manifestly unreasonable or based upon untenable grounds or reasons.[23]

The court did not abuse its discretion when it allowed the State to inquire whether Singh received any benefit from pleading guilty in previous cases. Singh opened the door to inquiry into his motivation to plead guilty by testifying that he did so because he had committed the crimes and deserved punishment.[24] The open door was not wide

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[20] State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

[21] State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

[22] State v. Rodriquez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

[23] Stenson, 132 Wn.2d at 701.

[24] State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (when a party opens up a subject of inquiry on direct examination, the opposing party may inquire further into that subject during cross-examination).

enough, however, to allow Singh to testify that he would have similarly obtained benefits in exchange for pleading guilty in the present case. Such evidence was outside the scope of testimony concerning prior convictions, falls squarely within ER 410, and was properly excluded.[25]

Singh's arguments concerning ineffective assistance of counsel and the court's denial of his motion for a mistrial depend on our agreement that the evidence concerning prior plea agreements was improperly admitted and the evidence concerning plea offers in the current case was improperly excluded. Because we find no error in the respective rulings, we reject these claims.

Affirmed.

Ellington, J.

WE CONCUR:

Leach, A.C.J.

Cox, J.

[25] ER 410 provides, in part: "Except as otherwise provided in this rule, *evidence of* a plea of guilty, later withdrawn, or a plea of nolo contendere, or of *an offer to plead guilty* or nolo contendere *to the crime charged* or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, *is not admissible in any civil or criminal proceeding against the person who made the plea or offer*." (Emphasis added.)