

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

THOMAS W. VANES
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ELLIOTT MCKINLEY MONTGOMERY,)

Appellant-Defendant,)

vs.)

No. 45A03-1012-CR-616)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0907-MR-8

June 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Elliott Montgomery appeals his conviction for murder in the perpetration of robbery following a jury trial. He presents a single issue for our review, namely, whether the trial court erred when it did not define the term “duress,” which was used in a jury instruction, for the jury.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 14, 2009, Montgomery, James Bailey, Stephen Haines, and Monte Ingram robbed a convenience store in Gary. In the course of the robbery, Haines fatally shot the store’s clerk. The robbery and shooting were recorded by a surveillance camera.

The State charged Montgomery with murder in the perpetration of a robbery and murder. At trial, Montgomery testified that Haines “demand[ed]” that he open the cash register, and Montgomery stated that he was “going to do what a man with a gun tells [him] to do[.]” Transcript at 375. Montgomery testified that he was “not about to make [Haines] do anything to kill [him.]” *Id.* In light of that testimony, the State proffered the following jury instruction:

You have heard evidence that the defendant was acting under duress. The defense of duress does not apply to a person who may have committed an offense against a person. Murder in the Perpetration of Robbery, Murder, and Robbery are considered crimes against a person.

Appellant’s App. at 82. Montgomery objected to that instruction on the grounds that he “never used the word duress and . . . never filed that as a defense with the Court[.]” Transcript at 456. The trial court gave the instruction over Montgomery’s objection. The jury found Montgomery guilty of murder in the perpetration of robbery, but acquitted

Montgomery on the murder charge. The trial court entered judgment and sentence accordingly. This appeal ensued.

DISCUSSION AND DECISION

Montgomery's sole contention on appeal is that the trial court erred when it did not instruct the jury on the definition of "duress" as used in the jury instruction on the defense of duress. However, Montgomery makes this argument for the first time on appeal. It is well-settled that a defendant may not object to an instruction upon one ground at trial and present a different ground upon appeal. Murray v. State, 798 N.E.2d 895, 901 (Ind. Ct. App. 2003). Montgomery has therefore waived any such error.

Waiver notwithstanding, Montgomery has not demonstrated that the trial court erred when it did not define "duress" for the jury. As our Supreme Court has explained:

"[t]erms used in instructions should be defined by the court where they have a technical meaning, or may be misapplied by the jury; but where the terms are in common use and are such as can be understood by a person of ordinary intelligence they need not be defined or explained in the absence of anything in the charge to obscure their meaning."

McFarland v. State, 271 Ind. 105, 390 N.E.2d 989, 994 (1979) (quoting 23A C.J.S. Criminal Law § 1191, p. 484). In McFarland, for example, our Supreme Court held that the trial court did not err when it refused to tender the defendant's instruction defining the term "malice" and the phrase "in a sudden heat." Id. And in Martin v. State, 262 Ind. 232, 314 N.E.2d 60, 70 (1974), our Supreme Court held that because the word "purposely" was not used in a technical legal sense and "is quite readily understood by the average layman," the trial court's refusal to instruct the jury on the definition of purposely was not error.

Here, we hold that the word “duress” was not used in a technical legal sense in the tendered instruction on the defense of duress, and we hold that the word is readily understood by a person of ordinary intelligence. The challenged instruction is a correct statement of the law based upon Indiana Code Section 35-41-3-8, where the term duress is used but not defined. The trial court did not err when it did not instruct the jury on the definition of duress.

Affirmed.

ROBB, C.J., and CRONE, J., concur.