

No. 45242-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARCOS LOZANO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge
Cause No. 09-1-00446-7

SUPPLEMENTAL BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

Jury Instruction No. 9 did not impermissibly shift
the burden of proof to the defendant to disprove
an element of the offense of second degree rape 1

D. CONCLUSION 5

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. W. R., Jr.,
181 Wn.2d 757, 336 P.3d 1134 (2014) 2-5

Statutes and Rules

RCW 9A.44.010(4)..... 4

RCW 9A.44.050(1)(b) 4

A. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR.

Whether the court's instruction to the jury addressing the defense to a charge of second degree rape impermissibly shifted the burden of proof to the defendant.

B. SUPPLEMENTAL STATEMENT OF THE CASE.

The State accepts the appellant's supplemental statement of the case.

C. ARGUMENT.

Jury Instruction No. 9 did not impermissibly shift the burden of proof to the defendant to disprove an element of the offense of second degree rape.

Lozano was tried for one count of second degree rape. He was charged with having sexual intercourse with a person who was incapable of giving consent because she was either physically helpless or mentally incapacitated. Jury Instruction No. 10, CP 112. In his supplemental brief, he argues that Instruction No. 9 required him to disprove an element of the crime, rather than prove an affirmative defense. That instruction read as follows:

It is a defense to the charge of rape in the second degree that at the time of the acts the defendant reasonable (sic) believed that [A.B.] was not mentally incapacitated or physically helpless.

The defendant has the burden of proving this defense 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. If 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.

Instruction No. 9, CP 111.

Lozano relies on State v. W. R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014), to support his claim that Instruction No. 9 impermissibly shifted the burden to him to disprove an element of the offense. While it is true that it is a due process violation to shift the burden to the defendant, that did not happen in this case and W. R. does not support his argument.

“The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.” W.R., 181 Wn.2d at 765. In that case, the juvenile respondent was charged with second degree rape. Both parties admitted that sexual intercourse had taken place, but the respondent claimed the victim had consented and she said she did not. The trial court placed the burden of proving consent upon the respondent. Id. at 761. The Supreme Court reversed his conviction, holding that “the State cannot require the defendant to disprove any fact that constitutes the crime charged.” Id. at 762. The court further held that “consent necessarily negates forcible

compulsion.” *Id.* at 768. “*If consent does not always negate forcible compulsion, it would not offend due process to require W. R. to prove consent by a preponderance of the evidence.*” *Id.* at 765, emphasis added. There was no issue in W. R. of the victim’s capacity to give consent.

Lozano was not charged with sexual intercourse by forcible compulsion. Rather, he was charged with second degree rape by having sexual intercourse with a person who was incapable of giving consent by reason of being physically helpless or mentally incapacitated. Instruction No. 10, CP 112. While it is true that, as Lozano argues in his supplemental brief, he claimed that the victim did consent, “consent” alone does not negate an element of the offense. Supplemental Brief at 3. Even if the victim did apparently give consent, the State alleged that she was physically or mentally incapable of giving valid consent.

It was Lozano’s burden to prove by a preponderance of the evidence that he did hold a reasonable belief that the victim was not mentally incapacitated or physically helpless. Saying “she consented” does not negate an element of the offense as charged. “Consent” can coexist with the condition of being physically or mentally incapable of giving that consent. Lozano was not asked to

prove that she was not incapacitated, only that he reasonably believed that she was not. The court in W. R. held that “there can be no forcible compulsion when the victim consents.” 181 Wn.2d at 765. There can, however, be purported “consent” by a person who is incapable of giving it. The defense that Lozano believed she was not incapacitated can coexist with the element that she actually was incapacitated.

The second degree rape statute, RCW 9A.44.050(1)(b), contemplates that a person may appear to give consent.

“Mental incapacity” is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

RCW 9A.44.010(4). Lozano’s argument that the victim actually consented simply erases this definition out of the statute.

The State’s witnesses produced evidence that the victim was unconscious or asleep at the time of the intercourse. Trial RP 66, 71-72, 92, 208-09. Lozano testified that the victim was asleep but appeared to be waking up, so he offered her a blanket. She initiated the sexual intercourse. Trial RP 335-36. He further testified that he had no reason to think she was passed out or


otherwise incapacitated. Trial RP 339. Lozano now argues that he did not rely on a defense that she was capable of consent. Supplemental Brief at 3. However, if she gave valid consent she must have had the capacity to do so, and his argument infers that she did.

Because Lozano was not required to prove that the victim was not incapacitated, the holding of W. R. is inapplicable to this case.

D. CONCLUSION.

The jury was correctly instructed as to Lozano's burden of proving an affirmative defense under the facts of this case. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 5th day of March, 2015.



Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

March 05, 2015 - 1:32 PM

Transmittal Letter

Document Uploaded: 5-452421-Supplemental Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 45242-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Supplemental Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Caroline Jones - Email: jonescm@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com