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WASHINGTON STATE
SUPREME COURT

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June 29, 2016
Court of Appeals
Division III
State of Washington

Supreme Court No. 93370-7
Court of Appeals No. 33021-4-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CHRIS LITO,

Defendant/Petitioner.

PETITION FOR REVIEW

DAVID N. GASCH
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I. IDENTITY OF PETITIONER.

Petitioner asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed June 2, 2016, affirming his conviction and sentence. A copy of the Court's unpublished opinion is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW.

Did Jury Instruction No. 12 violate due process because it shifted the burden to Mr. Lito to prove the alleged victim was capable of consent?

IV. STATEMENT OF THE CASE.

Chris Lito was convicted by a jury of second degree rape where the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 17, 26. The jury was instructed in pertinent part:

> It is a defense to a charge of rape in the second degree that at the time of the acts the defendant reasonably believed that Hannah Hansen was not mentally incapacitated or physically helpless. The defendant has the burden of proving this defense by a preponderance of the evidence . . .

Jury Instruction No. 12, CP 20.

Following his conviction, Mr. Lito moved for a new trial based on the Washington Supreme Court's then recent decision in *State v. W.R.*, which held due process prohibits shifting the burden to the defendant to prove consent by a preponderance of the evidence as a defense to a charge of rape by forcible compulsion.[1] CP 27-31; RP 272-76. W.R. was decided 41 days after Mr. Lito's conviction. CP 58, *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). The Court denied the motion. RP 280-82.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)) and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

<u>Jury Instruction No. 12 violated due process because it shifted the burden to Mr. Lito to prove the alleged victim was capable of consent.</u>

The due process clause of the Fourteenth Amendment and Washington Constitutuion, Article 1, § 3 require the State to prove beyond

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[1] 181 Wn.2d 757, 768, 336 P.3d 1134 (2014)

a reasonable doubt every fact necessary to convict the defendant of the charged crime. *State v. W.R.*, 181 Wn.2d 757, 761–62, 336 P.3d 1134 (2014); *State v. Lozano*, 189 Wash. App. 117, 122, 356 P.3d 219 (2015), *review denied*, 184 Wash. 2d 1032, 364 P.3d 120 (January 6, 2016). "A corollary rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged." *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134. Whether due process prevents the legislature from allocating the burden of proof of a defense to the defendant depends on the relationship between the elements of the charged crime and the elements of the defense. *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134. A defense that merely excuses conduct that would otherwise be punishable is a true affirmative defense, and the burden of proving it may be allocated to the defendant. *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134; *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). But where a defense necessarily negates an element of the crime, the legislature may not allocate to the defendant the burden of proving the defense. *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134.

"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, 336 P.3d 1134. In *W.R.*, the Washington Supreme Court held consent necessarily negates forcible compulsion; therefore, due

process prohibits shifting the burden to the defendant to prove consent by a preponderance of the evidence as a defense to a charge of rape by forcible compulsion. 181 Wn.2d at 768, 336 P.3d 1134.

However, in *State v. Lozano*, Division II held an instruction in a rape case allocating to the defendant the burden of proving he reasonably believed the victim was capable of consent, did not violate due process because the instruction did not impose a burden on the defendant to prove any element of the charged crime. *Lozano*, 189 Wash. App. at 124. The Court further stated:

> Unlike in *W.R.*, Lozano's burden to prove his "reasonable belief" that the victim was not mentally incapacitated and physically helpless did not negate an element of the charged crime. Here, the State retained its burden to prove beyond a reasonable doubt that Lozano had sexual intercourse with A.B. when she could not consent by reason of being physically helpless or mentally incapacitated. The challenged instruction did not negate this element; *i.e.*, the instruction did not require Lozano to prove that the victim could actually consent. It merely placed the burden on Lozano to prove that he reasonably believed A.B. could consent, which is a statutory defense to the crime.
> The "reasonable belief" defense may coexist with the charged crime because the elements of the crime are based on the inability of the person to consent, whereas the defense is concerned with the reasonableness of the defendant's belief that the person was able to consent. The "reasonable belief" defense is merely an excuse for conduct that would otherwise be punishable. Therefore, the trial court's instruction did not violate due process.

Id.

The Court's reasoning in *Lozano* is flawed and this Court should decline to follow it. First, the instruction does not qualify as an affirmative defense that does not violate due process, i.e. a defense that merely " 'excuses[s] conduct that would otherwise be punishable . . .' " *W.R.*, 181 Wn.2d at 762 (citing *Smith v. United States,* —— U.S. ——, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013) (quoting *Dixon v. United States,* 548 U.S. 1, 6, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006)). The conduct here would not otherwise be punishable, since consensual sexual intercourse is not a crime.

Second, the instruction does in fact negate the element that the victim was incapable of consent. The key word in the instruction is "reasonable." "Reasonable" means "thinking, speaking or acting according to the dictates of reason; not immoderate or excessive;" synonyms include "rational; just; honest; equitable; fair; suitable; moderate; tolerable." *Black's Law Dictionary* (Fifth Ed., 1979, West Publishing Company); *Cass v. State*, 124 Tex. Crim. 208, 216, 61 S.W.2d 500 (1933). Thus, if the defendant's belief that the victim was able to consent was "reasonable," the victim would have had to necessarily convey consent in some manner "according to the dictates of reason." If

the victim conveyed such consent, that act negated the element that she was incapable of consent.

Therefore, like *W.R.*, the "reasonable belief" instruction requires the defendant to prove the victim was capable of consent, which negates the element that she was incapable of consent, thus shifting the burden and violating due process.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted June 29, 2016,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on June 29, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

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CASE # 330214
State of Washington v. Chris Lito
SPOKANE COUNTY SUPERIOR COURT No. 131013771

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and <u>two copies</u> of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Harold D. Clarke
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FILED
June 2, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CHRIS LITO, Appellant.	No. 33021-4-III UNPUBLISHED OPINION

KORSMO, J. — Chris Lito appeals his conviction for second degree rape, arguing that the standard "reasonable belief" in the victim's ability to consent instruction impermissibly shifted the burden to the defense. We reject that argument and decline to consider his challenges to two financial components of his sentence.

FACTS

The victim, H.H., went out on April 2, 2013, to have a good time. She drank, smoked marijuana, and eventually blacked out. She awoke later in a strange apartment with her clothes off. She immediately went to a hospital and reported being raped.

Mr. Lito was arrested and charged with one count of second degree rape under the theory that H.H. was incapable of consent as a result of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b). The case proceeded to jury trial. H.H.

and several witnesses testified, but Mr. Lito did not. Nonetheless,[1] the prosecutor agreed to defendant's request to instruct the jury that it was a defense to the charge that Mr. Lito had a reasonable belief that the victim had the ability to consent. Report of Proceedings (RP) at 203-205. The instruction provided:

> It is a defense to a charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [H.H.] 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.

Clerk's Papers (CP) at 20.

The jury returned a verdict of guilty. Shortly thereafter the Washington Supreme Court released its decision in *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), holding that the affirmative defense of consent negated the forcible compulsion element of a rape prosecution. Mr. Lito moved for a new trial on the basis of *W.R.* The court denied the motion and subsequently imposed an indeterminate sentence of 96 months to life in prison, along with community supervision for life. The court additionally imposed court costs, consisting of the crime victim's penalty assessment, the filing fee, and the

---

[1] Our record does not establish the factual basis for the instruction. While there was evidence suggesting that the victim was capable of consenting, there is no indication that Mr. Lito believed she was capable.

DNA collection fee, totaling $800.00. The court also imposed restitution of $552.86. The trial judge also noted that "it doesn't appear in the future there will be the ability to pay." RP at 292. Mr. Lito then timely appealed to this court.

ANALYSIS

Mr. Lito primarily argues that instruction 12 misstated the law and wrongly placed the burden on him to establish his reasonable belief that the victim could consent. He also contends the trial court erred in imposing legal financial obligations, including the DNA collection fee. We first address the new trial argument before turning, summarily, to the remaining two claims.

This court reviews a ruling on a motion for a new trial for abuse of discretion. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A trial court abuses its discretion when it exercises discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). However, the court reviews the legal accuracy of jury instructions de novo. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

The Due Process clause of the Fourteenth Amendment to the United States Constitution requires that the State bear the burden of proving, beyond a reasonable doubt, all the elements of the charged crime. *W.R. Jr.*, 181 Wn.2d at 762 (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, the State is not required to bear the burden on an affirmative defense that excuses a defendant's

otherwise illegal conduct. *Id.* at 762 (citing *Smith v. United States*, 568 U.S. __, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013)). The relevant inquiry is whether the defense negates an element of the charged crime, *i.e.*, whether the defense and the element can coexist. *W.R., Jr.*, 181 Wn.2d at 765. Where the defense negates an enumerated element of the crime, the defense cannot be forced to bear the burden of proof. *Id.* at 762. *W.R.* concluded that consent to sexual intercourse negated the forcible compulsion element of second degree rape, thus making it error to place the burden of proving consent on the defendant. *Id.* at 763.

Mr. Lito argues that the trial court should have granted his motion for a new trial in light of *W.R.* He contends that the reasonable belief affirmative defense negated an element of the crime that the victim was *incapable* of consent, thus violating his due process rights by forcing him to bear the burden of proof. Division II recently addressed, and rejected, this argument. *State v. Lozano*, 189 Wn. App. 117, 124, 356 P.3d 219 (2015), *review denied*, 184 Wn.2d 1032 (2016). Mr. Lito argues that the logic of *Lozano* is flawed. Because *Lozano* is persuasive, his argument fails.

To prove rape by incapacity the State must prove two elements: (1) that the defendant "engage[d] in sexual intercourse with another person", and (2) that the sexual intercourse occurred "[w]hen the victim [was] incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1). However, a defense to the crime exists where "the defendant reasonably believed that the victim was not

mentally incapacitated and/or physically helpless." RCW 9A.44.030(1). "[T]he defendant must prove [this defense] by a preponderance of the evidence." *Id.* Here, the issue is whether the second element of the crime and the defense negate one another.

Lozano involved a similar issue. There a man and a woman (C.C.) met online through social media. 189 Wn. App. at 120. C.C. brought a friend (A.B.) to their arranged meeting, and they all eventually went to Lozano's house. *Id.* He gave them both a beer and took them up to his room. *Id.* A.B. slept, while Lozano and C.C. talked, watched a movie, and had sex. *Id.* Eventually, C.C. also fell asleep. *Id.* Sometime later C.C. woke to see Lozano having sex with A.B., who appeared to be asleep. *Id.* The State charged Lozano with rape in the second degree on the theory that A.B. was physically helpless or mentally incapacitated. *Id.* at 120-121. At trial, Lozano's theory was that A.B. consented to sexual intercourse and that he reasonably believed she was capable of that consent. *Id.* at 121. The trial court instructed the jury on the "reasonable belief" defense, but the jury found him guilty. *Id.* On appeal, Lozano argued that the jury instruction on the "reasonable belief" defense impermissibly shifted the burden of proof. *Id.* at 121-122.

This court rejected Lozano's argument, noting that the key to whether a defense negates an element on the crime is whether the defense and crime can coexist. *Id.* at 123. It held, in this situation, the defense and crime *can* coexist: "Lozano's burden to prove his 'reasonable belief' that the victim was not mentally incapacitated and physically helpless

did not negate an element of the charged crime." *Id.* at 124. The court specifically noted that the affirmative defense instruction "did not require Lozano to prove that the victim could actually consent. It merely placed the burden on Lozano to prove that he *reasonably believed* [she] could consent." *Id.* (emphasis added).

Mr. Lito argues that the reasoning in *Lozano* is flawed because requiring him to prove that he *reasonably* believed she could consent essentially requires him to show she *actually* could consent. He relies on an old legal dictionary's definition of the word "reasonable." Appellant's Br. at 11 (citing the Fifth Edition of Black's Law Dictionary). Black's currently defines "reasonable belief" as "A sensible belief that accords with or results from using the faculty of reason." Black's Law Dictionary 184 (10th ed. 2014). Nothing in this definition requires that the belief be *actually true* in order to be *reasonable*. In other words, *subjectively* a person could reasonably believe that another was capable of consent, while simultaneously that person is *objectively* incapable of consent. Because those facts can coexist, the affirmative defense does not negate an element of the crime of rape by incapacity.

The pattern instruction correctly stated the "reasonable belief" affirmative defense and did not err by assigning the burden of proof to Mr. Lito.

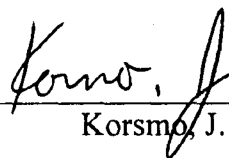
Mr. Lito additionally argues that the trial court erred in imposing the noted financial requirements despite the fact that he cannot pay them. However, all of the noted costs are mandatory assessments that are made without concern for the defendant's

ability to pay. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, that include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate without the court's discretion by legislative design); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (victim assessment and DNA collection fee mandatory).

His remaining argument is that his due process rights were violated by imposition of the DNA collection fee. He did not raise that argument to the trial court. Hence, this argument is not manifest and we lack the basis to review it. *State v. Stoddard*, 192 Wn. App. 222, 228-229, 366 P.3d 474 (2016).

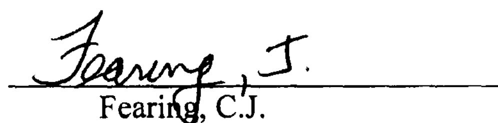
The conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

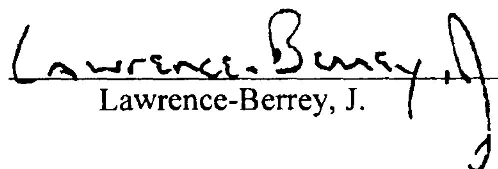


Korsmo, J.

WE CONCUR:



Fearing, C.J.



Lawrence-Berrey, J.

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