

NO. 47057-8-II

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

STATE OF WASHINGTON, Respondent

v.

JARROD ALAN WIEBE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02414-4

RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR

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RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR

I. **The defendant was not denied his right to control his defense.**

Appellant has brought this supplemental assignment of error alleging that he was forced to raise an affirmative defense, and bear a burden of proof, against his will. He claims that RCW 9A.08.020 (5) (b), addressing when a person ceases to meet the definition of an accomplice, actually creates an affirmative defense to the charge in which the defendant is alleged to have acted as an accomplice. Further, he now argues that being forced to raise this “defense” violated his Sixth Amendment right to control his defense. But as the State argued in its opening brief, RCW 9A.08.020 (5) (b) does *not* create an affirmative defense in cases where a defendant is accused of committing a crime as an accomplice. Rather, RCW 9A.08.020 (5) (b) merely defines what it means to be an accomplice. The State incorporates by reference the arguments made in its opening brief on the question of whether RCW 9A.08.020 (5) (b) creates a statutory defense.

Because RCW 9A.08.020 (5) (b) does not create an affirmative defense to a charge in which a defendant is alleged to have acted as an accomplice, and because the defendant was not explicitly assigned a burden of proof by the trial court, *State v. Lynch*, 178 Wn.2d 487, 309

P.3d 482 (2013), and *State v. Coristine*, 177 Wn.2d 370, 300 P.3d 400 (2013), do not apply to Wiebe's case.

In *Coristine*, the defendant was charged with rape in the second degree by having sexual intercourse with a person who was incapable of consent by reason of being physically helpless or mentally incapacitated. *Coristine* at 373. His defense to the charge was that the alleged victim was not, in fact, physically helpless or mentally incapacitated—not that she *was* physically helpless or mentally incapacitated, but the defendant reasonably believed she wasn't. *Coristine* at 374. The trial court, believing that it was required to give the reasonable belief instruction—which was an affirmative defense that allocated to the defendant a burden of proof—gave the instruction over Coristine's objection. The Supreme Court reversed the defendant's conviction, holding that the right to control one's defense includes the right to decide whether to assert an affirmative defense. *Coristine* at 377-78. In giving the affirmative defense instruction over the defendant's objection, the trial court thereby violated the defendant's Sixth Amendment right to control his defense. *Coristine* at 379. Finally, the Court found that the error was not harmless as to the facts of that case, noting in its reasoning that the giving of the affirmative

defense instruction went beyond the trial court “merely...giving...a gratuitous or unnecessary correct instruction.” *Coristine* at 381.¹

In *State v. Lynch, supra*, the defendant was charged with rape in the second degree by forcible compulsion. *Lynch* at 489. Lynch’s defense to the rape was that the victim actually consented to the sexual intercourse, which negated the element of forcible compulsion. *Lynch* at 490. Relying on its decision in *Coristine*, the Court again reversed the defendant’s conviction, reminding trial courts that “[i]mposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges.” *Lynch* at 493, quoting *Coristine* at 377.

In order for Wiebe to be entitled to relief based upon *Lynch* and *Coristine*, he must first demonstrate that he was forced to raise an affirmative defense, and that he was unwillingly allocated a burden of proof. As the State previously argued, he has not shown either of these

¹ As the State noted in its Opening Brief, this instruction could be construed as unnecessary. But it is clear that the State was concerned that the defendant would advance a withdrawal theory (or, more specifically, the State’s failure to disprove withdrawal) during closing argument. In that event, the State likely wanted the jury to have heard that there are specific requirements for finding that an accomplice ceased to be an accomplice by way of withdrawal of complicity. Without such an instruction, the State would be left with no way to discuss the law of withdrawal in the event the defendant brought it up during closing.

things. As a result, this assignment of error fails.² The State asks this Court to affirm the defendant's conviction.

CONCLUSION

Wiebe's conviction should be affirmed.

DATED this 29th day of January, 2016.

Respectfully submitted:

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² The State agrees that if this Court were to find that RCW 9A.08.020 (5) (b) creates an affirmative defense that a defendant must prove by a preponderance of evidence, and further agrees that the jury would have understood Wiebe to have such a burden of proof in the absence of the trial court having instructed the jury as such, then the defense was imposed upon Wiebe against his will.

CLARK COUNTY PROSECUTOR

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