

No. 306381

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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

KURT DEAN BONSER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL G. McCARTHY, JUDGE

RESPONDENT'S RESPONSE AND CROSS APPEAL BRIEF

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the deputy prosecutor's closing argument, that there was no evidence before the jury as to whether the defendant reasonably believed that the alleged victim was at least sixteen years of age, was improper and prejudicial?
2. Whether the court erred in overruling a defense objection to improper argument on the part of the prosecution?
3. Whether the court erred in imposing an indeterminate term of community custody?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no prosecutorial misconduct, as the deputy prosecutor only argued what inferences the jury should draw from the evidence admitted, or not admitted, at trial. Such argument was not improper, as it was the defendant who bore the burden of proving the affirmative defense, by a preponderance of the evidence, that he reasonably believed that the victim was at least sixteen years of age.
2. The court did not err in overruling the defense objection to the State's argument. In any event, the defense did not request a curative instruction, but instead asked the court to

review an instruction with the jury, previously given, which stated that the defendant was not required to testify.

3. The State concedes the Appellant's third assignment of error that the trial court erred in imposing an indeterminate term of community custody.

II. ASSIGNMENT OF ERROR ON CROSS REVIEW.

A. ASSIGNMENT OF ERROR.

1. The trial court erred in instructing the jury that it could find the defendant Mr. Bonser not guilty, if it was persuaded by a preponderance of the evidence that he reasonably believed that the victim was at least sixteen years of age pursuant to RCW 9A.44.030(2); (3)(c). **(CP 119; Instruction No. 9)**

B. ISSUE PRESENTED BY ASSIGNMENT OF ERROR.

1. Whether a jury should be instructed on the RCW 9A.44.030(2) affirmative defense, where there has been no evidence introduced at trial as to just what the defendant believed the victim's age to be?

III. STATEMENT OF THE CASE

The State supplements Mr. Bonser's Statement of the Case with the following.

Mr. Bonser proposed certain jury instructions, including the affirmative defense instruction based upon RCW 9A.44.030(2). **(CP 105)**

The State objected to the proposed affirmative defense instruction, arguing unsuccessfully that as Mr. Bonser did not testify at trial, there was no evidence of his reasonable belief that R.M.J. was at least sixteen years of age. **(RP 412-417)** Specifically, the State argued that it would have presented a much different case if it had believed that the court would give the affirmative defense instruction:

MR. SOUKUP: Thank you Your Honor. Mr. Scott has stated that the defense- the defense was going to rely on was statutory affirmative defense and one of the elements of that is that the defendant reasonably believed, that the defendant himself reasonably believed, that the defendant himself reasonably believed that the victim was over – was sixteen years or older based on the statements made to her – by her to him.

Well, there's – there is possible evidence to support that she made statements but there's no evidence, as a matter of fact, it seems like the only source from which evidence could come would be him. But we know there's not going to be any evidence from him or anyone else because he's not going to testify and they're going to rest their case.

Now, so – I'm – I'm asking the Court because it's important – on – on that basis I assume the Court would refuse any instruction on this issue. If the Court would

given an instruction on this – on that issue I’m going to ask to reopen the case because essentially Mr. Scott has been able to litigate that issue to some degree – that was at the State’s request so that we didn’t have to call the witness back. But if that instruction is going to be given we’d like to put on more evidence on – on that point but really it should be – that shouldn’t even be necessary because based on the fact that there’s no evidence of his reasonable belief, or his belief reasonable or otherwise for that matter, that she was sixteen. That instruction should clearly not be given.

(RP 412-13)

As described in the Appellant’s Statement of the Case, R.M.J. testified that she lied to Bonser as to her age, telling him first that she was sixteen when they met. She later told him she was seventeen. **(RP 291, 294, 295, 306, 310-11, 314, 316-17)**

Defense counsel argued at the conclusion of the trial that as R.M.J. lied, it was reasonable for the defendant to think she was sixteen. **(RP 469)**

The court also instructed the jury that: “[t]he defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.” **(Instruction No. 9; CP 119)**

When the defense objected to the State’s closing argument, there was no request for a curative instruction, but rather to reference an instruction already given by the court: “[y]our Honor I’ll – I’ll object at

this point and ask that the Court – review with the jury Instruction No. 9.”

(RP 485)

Immediately after the defense objection was overruled, the deputy prosecutor continued his closing statement:

MR. SOUKUP: Thanks. The evidence shows that no reasonable person would have – would have actually believed she was sixteen in his shoes, from his point of view, given the history, given what the police officers told him, given her appearance. How old did she look when she came in here? Did she look like a person that looks a lot older than they look? You had a chance to see him – to – to see her.

(RP 485)

IV. ARGUMENT.

1. **There was no prosecutorial misconduct, and the court did not err in overruling the defense objection.**

Mr. Bonser argues on appeal that the deputy prosecutor committed misconduct by stating that there was no evidence of what Bonser actually believed, thus impermissibly commenting on his failure to testify, in violation of the his Fifth Amendment rights. The argument did not constitute misconduct, and the court was correct in overruling the objection.

By claiming prosecutorial misconduct, Bonser bears the burden of establishing that the prosecutor’s conduct was both improper and prejudicial. State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006).

Prejudice only occurs if “ there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Misconduct claims are reviewed in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). *See, also*, State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004), *citing* State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553 (2009).

A prosecutor has “wide latitude” in arguing inferences from the evidence presented. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). It is of course, inappropriate for a prosecutor to suggest that the defendant bears any burden of proof. State v. Fiallo-Lopez, 78 Wn. App. 717, 728-29, 899 P.2d 1294 (1995). However, once a defendant presents evidence, a prosecutor can fairly comment on what was not produced. State v. Barrow, 60 Wn. App. 869, 871-73, 809 P.2d 209 (1991); State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

Challenged arguments are considered in context. Dhaliwal, 150 Wn.2d at 577-78. Here, while Bonser elected not to take the stand, and did not present any evidence, he still advocated, through his counsel, the affirmative defense, which he had the burden of proving by a

preponderance of the evidence, i.e., that it would have been reasonable for him to believe the victim was at least sixteen years of age.

This would be contrary to the clear language of the statute:

In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

RCW 9A.44.030(2).

It was not misconduct, then, in light of the testimony, as well as the court's decision to give the affirmative defense instruction, for the prosecutor to comment on what had *not* been produced: any evidence whatsoever of Bonser's belief, reasonable or otherwise.

“When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence.” Contreras, 57 Wn. App. at 476.

In light of the above, the trial court was correct in overruling the defense objection made during closing argument. The deputy prosecutor

did not suggest directly that Mr. Bonser should have taken the stand, and the jury was instructed that he need not. (CP 119)

2. The State concedes that the court erred in imposing an indeterminate term of community custody.

State has reviewed the record, as well as the authorities cited by the Appellant, and is of the opinion that the judgment and sentence must be corrected as to the term of community custody.

RCW 9.94A.701(9) was amended in 2009 to require a reduction in the term of community custody when the combined terms of confinement and community custody exceed the statutory maximum. This court has described this a clear three-stop process: “impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary”. State v. Winborne, 167 Wn. App. 320, 329, 273 P.3d 454 (2012). Indeed, the substitution of community custody for earned early release time, as is present in Mr. Bonser’s judgment and sentence, was repealed by the 2009 amendments. Id. This matter must be remanded for correction of the judgment and sentence.

3. The court erred in giving the affirmative defense instruction.

There must be sufficient evidence to support an affirmative defense instruction. State v Yates, 64 Wn. App. 345, 351, 824 P.2d 519 (1992). The evidence is sufficient if “the jury could reasonably infer the

existence of the facts needed to use it.” Id. A court must review “the entire record in the light most favorable to the defendant” to determine whether the instruction is appropriate. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997); State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

Division II of the Court of Appeals has held that the affirmative defense set forth in RCW 9A.44.030(2) is not available where:

The defendant testified that neither girl told him how old she was. Defendant’s legal argument is that “declarations” as to age by the victim can consist of her behavior, appearance and general demeanor. We disagree. A reading of RCW 9A.44.030(2) makes it clear that something more positive is intended. Without the proviso, the statute states it is no defense that a defendant believes the victim to be older.

State v. Bennett, 36 Wn. App. 176, 181-82, 672 P.2d 772 (1983).

Here, it is true that R.M.J. testified that she lied about her age to the defendant, but Bonser presented no other evidence about what *he* believed. The defense should not have been available to him.

V. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction, but remand for correction of the community custody provisions. Further, if the Court reverses the conviction and orders a new trial, the trial court should be instructed not to instruct the jury on the

RCW 9A.44.030(2) affirmative defense unless Bonser presents evidence that he believed the victim's age to have been at least sixteen years of age.

Respectfully submitted this 24th day of April, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima WA this 24th day of April, 2013

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