

Supreme Court No. 86145-5
Court of Appeals No. 28868-4-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON SCOTT CORISTINE,

Petitioner.

CLERK

DEBORAH A. CARPENTER

2011 NOV -4 AM 9:49

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

FILED
NOV 04 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
ap

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

The Honorable Michael P. Price

SUPPLEMENTAL BRIEF OF PETITIONER

LISA E. TABBUT
Attorney for Petitioner
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

	Page
A. STATEMENT OF THE FACTS AND PRIOR PROCEEDINGS .	1
B. ISSUES BEFORE THE COURT.....	4
1. Does Mr. Coristine have a constitutional right to control his own defense?.....	4
2. Can the State prove it was harmless beyond a reasonable doubt to force Mr. Coristine to present an affirmative defense?	4
3. Did the trial court, by instructing the jury that Mr. Coristine had an obligation to prove an affirmative defense, shift the burden of proof to Mr. Coristine?	4
C. ARGUMENT.....	5
1. MR. CORISTINE HAS THE CONSTITUTIONAL RIGHT TO CONTROL HIS OWN DEFENSE.	5
a. <i>State v. Jones</i> and <i>State v. McSorley</i> establish that a defendant has the right to control his own defense.....	5
b. The State cannot bear its burden of proving the constitutional error was harmless beyond a reasonable doubt.....	16
2. THE AFFIRMATIVE DEFENSE INSTRUCTION IMPROPERLY SHIFTED THE BURDEN OF PROOF.....	19
D. CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

Page

Cases

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)
..... 17, 20

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562
(1975)..... 7, 8

In re Pers. Restraint of Hubert, 138 Wn. App. 924, 158 P.3d 1282 (2007)
..... 10, 13, 14, 15

In re Winship, 397 U.S. 358, 90 S.Ct 1068, 25 L.Ed 2d 368 (1970)..... 19

Neder v. United States, 527 U.S. 1, 44 L. Ed. 2d 35, 119 S.Ct. 1827
(1999)..... 17, 20

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162
(1970)..... 7, 8

State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993)..... 17

State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005) 19

State v. Coristine, 161 Wn. App. 945, 252 P.3d 403 (2011)4

State v. Cronin, 142 Wn.2d 568, 14 P.2d 752 (2000)..... 20

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) 13

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 16

State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009) 5

State v. Jackson, 87 Wn. App. 801, 944 P.2d 403 (1997), *aff'd*, 137
Wn.2d 712 (1999) 20

State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983)..... i, 5, 6, 7, 8, 9, 16

<i>State v. McSorley</i> , 128 Wn. App. 598, 116 P.3d 431 (2005).....	i, 5, 8, 9
<i>State v. Perez</i> , 137 Wn. App. 97, 151 P.3d 249 (2007)	6
<i>State v. Powell</i> , 150 Wn. App. 139, 206 P.3d 703 (2009) 10, 11, 12, 13, 14	
<i>State v. Rice</i> , 102 Wn.2d 120, 683 P.2d 199 (1984).....	16
<i>State v. Tang</i> , 75 Wn. App. 473, 878 P.2d 487 (1994).....	15
<i>Tremblay v. Overholser</i> , 199 F. Supp. 569 (D.D.C. 1961).....	16
<i>United States v. Laura</i> , 607 F.2d 52 (3 rd Cir. 1979)	7, 16

Statutes

RCW 9A.40.090(2).....	8
RCW 9A.44.030(1).....	2
RCW 9A.44.050(1).....	6
RCW 9A.44.050(1)(b)	2

Other Authorities

U.S. Const. Amend VI, XIV	16
Wash. Const. Art. I, § 3	16

A. STATEMENT OF THE FACTS AND PRIOR PROCEEDINGS

Mr. Coristine and his fiancée Ashley threw a pre-wedding party at the home they shared with various other family members, friends, and one new roommate, L.F. 2RP at 86, 252-53; 3RP at 305-06. Virtually everyone, to include Mr. Coristine and L.F., drank alcohol at the party. 2RP at 86, 92, 254; 3RP 307. The party eventually came to an end. 2RP at 94, 259; 3RP at 309. The guests left and the various housemates retreated to their bedrooms.

Before falling asleep, Mr. Coristine heard a loud noise upstairs and went to check on things. 3RP at 354. While he was upstairs, he had sex with L.F. 3RP at 355-58. L.F. initiated the sex and was an active participant. *Id.*

L.F. told a different story. She said that she'd had too much to drink and "just remembered coming to and realizing my pajamas were around my knees and realizing something wasn't right." 2RP at 92, 98, 107.

L.F. went to the hospital the next day for a sexual assault examination. 2RP at 108, 152. A DNA test later confirmed that she'd had sex with Mr. Coristine. 2RP at 193-208.

The police were called. 1RP at 64; 2RP at 173-74, 210-16. After an investigation, Mr. Coristine was charged with second degree rape of

L.F. who was allegedly incapable of consent because she was physically helpless or mentally incapacitated. CP 1; RCW 9A.44.050(1)(b).

Prior to trial Mr. Coristine made his defense clear: the State could not prove that L.F. was incapable of consenting to sex. 1RP at 26-27. Mr. Coristine maintained that defense through the three days of trial testimony. 1RP, 2RP, 3RP. After the presentation of all the evidence, the trial court, sua sponte, brushed aside Mr. Coristine's reasonable tactical choice for his defense. The court decided that Mr. Coristine's actual defense was the affirmative defense that Mr. Coristine should have to prove by a preponderance of evidence that he reasonably believed L.F. had the mental and/or physical capacity to consent to sex. 3RP at 395. Over Mr. Coristine's objection, the court gave the following affirmative defense instruction:

It is a defense to the charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [L.F.] was not mentally handicapped 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 of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established the defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 20 (Court's Instruction No. 3); See RCW 9A.44.030(1).

The court also gave the following "to convict" instruction:

To convict the defendant of the crime of rape in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on December 7, 2008, the defendant engaged in sexual intercourse with [L.F.];

(2) That the sexual intercourse occurred when [L.F.] was incapable of consent by reason of being physically helpless or mentally incapacitated;

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 16 (Court's Instruction No. 9).

The court did not give the jury any guidance as to how to reconcile Mr. Coristine's burden of proof on the affirmative defense with the State's burden of proof on the "to convict" instruction.

Instead, the jury was told that all of the instructions were equally important. "The order of these instructions has no significance as to their relative importance. They are all important...During your deliberations, you must consider the instructions as a whole." CP 8.

The jury deliberated "for at least two full days," before reaching its guilty verdict. 3RP at 460. At sentencing, Mr. Coristine received a life

sentence with the possibility of release only after serving a minimum term of 78 months. CP 25-29. Mr. Coristine appealed.

In its published opinion¹, the Court of Appeals did not discuss Mr. Coristine's constitutional right to control his own defense even though Mr. Coristine raised that issue in his brief. (Slip Op. at 1-8.) Instead, the court held that the affirmative defense instruction was required by the evidence and any error in giving it was harmless. (Slip Op. at 1.) Because the court did not recognize constitutional error, it did not require the State to prove beyond a reasonable doubt that any instructional error could not have affected the verdict. (Slip Op. at 7-8.)

Mr. Coristine argues in his Petition for Review the issues set forth below.

B. ISSUES BEFORE THE COURT

1. Does Mr. Coristine have a constitutional right to control his own defense?
2. Can the State prove it was harmless beyond a reasonable doubt to force Mr. Coristine to present an affirmative defense?
3. Did the trial court, by instructing the jury that Mr. Coristine had an obligation to prove an affirmative defense, shift the burden of proof to Mr. Coristine?

¹ *State v. Coristine*, 161 Wn. App. 945, 252 P.3d 403 (2011)

C. ARGUMENT

1. MR. CORISTINE HAS THE CONSTITUTIONAL RIGHT TO CONTROL HIS OWN DEFENSE.

A defendant has the constitutional right to control his own defense. Mr. Coristine was denied that right when the trial court ignored his reasonable tactical choice of making the State prove that L.F. was incapable of consent. Mr. Coristine had no interest in presenting an affirmative defense and no interest in having to prove anything by a preponderance of the evidence. The State cannot prove that this constitutional error was harmless beyond a reasonable doubt. Mr. Coristine's second degree rape conviction and life sentence should be reversed.

- a. *State v. Jones* and *State v. McSorley* establish that a defendant has the right to control his own defense.

Every competent defendant "has a constitutional right to at least broadly control his own defense." *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). Accordingly, neither the State nor the trial court may compel a defendant to raise or rely on an affirmative defense. *State v. McSorley*, 128 Wn. App. 598, 605, 116 P.3d 431 (2005). Claimed denials of a constitutional right are reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (a court "necessarily abuses its

discretion by denying a criminal defendant's constitutional rights") (quoting *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

For Mr. Coristine to be guilty of second degree rape, the State had to prove to a jury beyond a reasonable doubt that Mr. Coristine had sex in Washington with L.F., a person who was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1); CP 1. Mr. Coristine's reasonable tactical choice for his defense was that the State could not prove L.F. was helpless or incapacitated. That meant that the State, and the State alone, had the burden of proving beyond a reasonable doubt that L.F. was incapable of consent. In choosing this defense, Mr. Coristine wanted the focus to remain on the State's case and the State's burden of proof. This was a reasonable tactical choice. But after the court foisted the affirmative defense instruction onto Mr. Coristine, the focus shifted. Mr. Coristine was burdened with proving he reasonably believed L.F. was capable of consent by a preponderance of the evidence. This was a burden he did not want. Precedent establishes that it was error to foist this burden onto Mr. Coristine.

In *Jones*, this Court held a trial court could not compel a defendant to raise and rely on the affirmative defense of insanity because every

defendant has the constitutional right to control his own defense. *Jones*, 99 Wn.2d at 740. Reasoning that a defendant's right to raise or waive the defense of insanity should be no different from a defendant's right to assert or waive other defenses like alibi or self defense, *Jones* observed "courts do not impose these other defenses on unwilling defendants." *Jones*, 99 Wn.2d at 743.

In *Faretta v. California*, the United States Supreme Court held "the California courts [had] deprived [Faretta] of his constitutional right to conduct his own defense" when they refused to accept his knowing and voluntary choice to represent himself. *Faretta v. California*, 422 U.S. 806, 836, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). *Jones* recognized, "The language and reasoning of *Faretta* necessarily imply a right to personally control one's own defense. In particular, *Faretta* embodies 'the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.'" *Jones*, 99 Wn.2d at 740 (quoting *United States v. Laura*, 607 F.2d 52, 56 (3rd Cir. 1979)).

Jones embraced the proposition that "[courts] should not force any defense on a defendant in a criminal case." *Jones*, 99 Wn.2d at 740 (quoting *North Carolina v. Alford*, 400 U.S. 25, 33, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (holding courts properly permit defendants to plead

guilty (and thus to waive all possible defense) based on the State's evidence rather than his own admission of guilt).

McSorley also recognized the constitutional right to control one's own defense. In that case, the trial court erred by instructing on an affirmative defense at the State's request and over the defendant's objection. *McSorley*, 128 Wn.App. at 600. *McSorley* was charged with child luring under RCW 9A.40.090. *Id.* at 601-02. The jury was instructed in accordance with RCW 9A.40.090(2), which provides: "It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor." *McSorley*, 128 Wn. App. at 602-03.

Based on *Jones*, *Faretta*, and *Alford*, the court held "neither the State nor the trial court may compel a defendant to raise or rely on the affirmative defense stated in RCW 9A.40.090(2), and that the trial court erred by giving instruction 6 over *McSorley*'s objection. Hence a new trial is required." *McSorley*, 28 Wn. App. at 605.

Jones and *McSorley* establish Mr. Coristine has the right to control his own defense. Mr. Coristine chose to forego an affirmative defense. The trial court should have respected that decision. Whether the defendant

seeks an affirmative defense instruction is an important tactical decision. The defense, not the trial judge, has the power to control the defense presented to the jury. The court cannot hijack a defendant's trial strategy by forcing the defendant to assume an unwanted burden of proof.

In wrongly affirming Mr. Coristine's conviction, the Court of Appeals failed to recognize and even mention *McSorley* even though *McSorley* was argued in Mr. Coristine's brief. (See Opening Brief of Appellant at 11-13). Although the Court of Appeals mentions *Jones*, it doesn't recognize *Jones*' reasoning that "respect for a defendant's individual freedom requires us to permit the defendant himself to determine his [defense]." *Jones*, 99 Wn.2d at 742.

The Court of Appeals' failure to recognize *McSorley* is particularly inexplicable as *McSorley* is on point. In *McSorley*, the trial court felt that the defendant's testimony established the affirmative defense so it gave the defense at the State's request and over the defendant's objection. In its opinion, the *McSorley* court corrected the trial court's mistake. After all, the defense chooses the trial defense. It is a tactical choice. Without any effort to distinguish *McSorley*, here the Court of Appeals concludes, just like the trial court did in *McSorley*, that because the testimony of Mr. Coristine "supports a 'reasonable belief' instruction," one must be given. (Slip Op. at 7.) The Court of Appeals goes further and notes, "Indeed, the

failure to give the instruction, might well have been in error; it certainly would have compromised the legal implications of Mr. Coristine's evidence of his reasonable belief." (Slip Op. at 7). But Mr. Coristine made a tactical choice to "compromise the legal implications" of his supposed "reasonable belief." He made a tactical choice to defend the case by making the State prove L.F. lacked capacity.

The Court of Appeals' concern that failure to give the reasonable belief instruction was error seems to be based on a misapplication of *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007) and *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009). (Slip Op. at 6 - 7.) Neither case supports the Court of Appeals' decision.

PLM had been in Seattle drinking and smoking marijuana with friends. *Powell*, 150 Wn. App. at 142. She was on her way home to Bremerton when Powell saw her at the ferry terminal. *Id.* at 142, 147. A police officer was asking PLM if she needed assistance. *Id.* at 147-48. Powell decided to step in because he was concerned that the officer would take PLM to detox. *Id.* at 147. Powell told the officer that PLM was his wife and that she did not speak English. *Id.* at 147-48. Because PLM grinned at Powell and nodded her head yes, he thought that PLM got the hint that he was looking out for her. *Id.* at 148. Powell bought PLM a ferry ticket. *Id.* They boarded the ferry. *Id.* Once on the ferry, Powell

napped until the ferry docked in Bremerton. *Id.* When he woke up, Powell told PLM that he was taking a cab to a motel and that she was welcome to join him. *Id.* They went to a motel and got a room. *Id.* at 148. Powell initiated oral sex on PLM. *Id.* at 149. Per Powell, PLM seemed to enjoy it. *Id.*

PLM had a different take on things. PLM said that she blacked out from drinking in Seattle and woke up in a Bremerton motel room with Powell performing oral sex on her. *Id.* at 143. She had no idea how she got to the motel and would not have gone there with Powell as she was openly gay. *Id.* at 142-43. Because she was scared, she went along with the sexual activity. *Id.* at 143. To get Powell out of the room, she suggested that he get some ice. *Id.* As soon as Powell left, she ran for help. *Id.*

The State charged Powell with second degree rape of PLM alleging that she was physically helpless or mentally incapacitated. *Id.* at 142. At trial, Powell presented evidence that PLM was not helpless or incapacitated and that from his perspective, she appeared to consent. *Id.* at 147-50. Defense counsel did not propose a “reasonable belief” instruction. *Id.* at 150. Nothing in the opinion suggests that Powell made a tactical choice not to present the “reasonable belief” affirmative defense. *Id.* at 152-58. Powell was convicted and appealed. *Id.* at 142. On appeal,

Powell argued that his counsel was ineffective for failing to request the “reasonable belief” instruction. *Id.* at 152. The *Powell* court agreed, finding that “reasonable belief” was Powell’s defense and that without the instruction, the jury had no way to recognize and weigh the legal significance of Powell’s testimony and closing argument. *Id.* at 154-57.

Powell is distinguishable from Mr. Coristine’s case. Unlike *Powell*, Mr. Coristine talked about his chosen defense in court and disavowed any desire to rely on the “reasonable belief” affirmative defense. 3RP at 396-98. Defense counsel made it very clear that Mr. Coristine’s defense was not “reasonable belief.” Rather, Mr. Coristine’s defense was that the State could not prove that L.F. was physically helpless or mentally incapacitated.

MR. COMPTON:² First of all, an element of the crime as it’s been charged is that [L.F.] was incapacitated. Therefore, the State must prove beyond a reasonable doubt that [L.F.] was incapacitated. It’s been our defense that in fact she was not incapacitated. The mere fact that she may have had some alcohol does not necessarily make you incapacitated. That instruction I think would be more applicable where you had a fact pattern where, in fact, we concede, yes, L.F. was incapacitated, however, it was reasonable for Mr. Coristine to have believed that, in fact, she was not. But from our point of view, she was, although drinking, still capable of realizing what was going on and engaging in that behavior that may have affected her judgment, but that does not means she’s incapacitated and that’s why we took such pains to talk about her behavior at the party, about why she slurred words, that sort of stuff. So I think we have to be careful about shifting the burden of proof because

² Defense counsel

that's what that instruction does. So from our point of view she was not incapacitated therefore and, of course, they engaged in sexual relations. It was consensual but, of course, if it wasn't consensual we would be talking about rape of another form but I think that's how the consent form fact fits into this fact pattern.

3RP at 397-98.

This was a reasonable tactical choice and one that the defense is constitutionally entitled to make. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (“When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.”) Legitimate trial strategies cannot serve as the basis for a claim of ineffective assistance of counsel. *Id. Powell* does not hold an affirmative defense must be given over a defendant's objection.

In *Hubert*, the defendant met Noel and her roommate, Sallee, at a bar where they were drinking with a friend. *Hubert*, 138 Wn. App. at 926. Noel and Sallee invited Hubert back to their home where they drank and possibly smoked marijuana. *Id.* Eventually the women went to their respective bedrooms and Hubert was allowed to sleep on a couch. *Id.* Early in the morning, Hubert went into Noel's bedroom. *Id.* Per Hubert, they kissed and fondled each other and undressed. *Id.* at 926-27. Hubert thought they were going to have sex, but Noel suddenly jumped out of bed and said that she was too drunk, she had a boyfriend, and what they were doing was wrong. *Id.* at 927. Noel left. *Id.* Noel returned home about an

hour later and found Hubert asleep in her bed. *Id.* Hubert left when Sallee asked him to leave. *Id.*

Hubert was charged with second degree rape for having sex with Noel while she was physically helpless. *Id.* at 937. He was convicted of the lesser offense of attempted second degree rape. *Id.* at 927-28. His attorney did not raise a “reasonable belief” defense. *Id.* at 929. After withdrawing his direct appeal, Hubert filed a personal restraint petition (PRP) claiming ineffective assistance of counsel. *Id.* at 928. Included with the PRP was a declaration from defense counsel attesting that he had only become aware of the statutory “reasonable belief” defense when appellate counsel brought it to his attention. *Id.* at 929. The court reversed Hubert’s conviction finding, “Where defense counsel fails to identify and support the sole available defense, and there is evidence to support that defense, the defendant has been denied a fair trial.” *Id.* at 932.

Hubert, like *Powell*, is distinguishable from Mr. Coristine’s case. As in *Powell*, there was no discussion on the record about the tactical choice to forego the “reasonable belief “ defense and defend the case by making the State prove that the complaining party was incapacitated. Unlike *Hubert*, Mr. Coristine’s counsel was aware of the “reasonable belief” defense and made a tactical choice not to assert it. Like *Powell*,

Hubert does not hold an affirmative defense must be given over a defendant's objection.

In its opinion, the Court of Appeals writes, “[Coristine], then, supplied the factual predicate for the instructions but did not want the legal implications of that factual predicate.” (Slip Op.at 7). In other words, the Court believed that the testimony of Mr. Coristine and his witnesses interjected the “reasonable belief” defense into the case. This is incorrect. An affirmative defense for jury deliberations purposes does not exist unless the jury is instructed on one. See *State v. Tang*, 75 Wn. App. 473, 476, 878 P.2d 487 (1994) (Jury instructions are meant to instruct the jury on what law to apply on the facts it finds.)

Mr. Coristine objected to the affirmative defense instruction. Mr. Coristine did not “supply” an affirmative defense. The defense presented evidence that L.F. was not physically helpless or mentally incapacitated and Mr. Coristine relied on that evidence to argue the State failed to prove the incapacitated element of its case. The defense did not want to be saddled with the burden of proving anything. Defense counsel did not even mention the affirmative defense instruction in closing argument. How could he? It simply wasn't Mr. Coristine's defense.

The Court of Appeals erred when it held that the affirmative defense instruction was actually “required by the evidence in this record.”

(Slip Op. at 1). The issue is controlled by well-settled law favorable to Mr. Coristine.

- b. The State cannot bear its burden of proving the constitutional error was harmless beyond a reasonable doubt.

The right to control one's own defense is grounded in the Sixth Amendment and constitutional due process. *Jones*, 99 Wn.2d at 740 (Sixth Amendment, citing *Faretta*); *Laura*, 607 F.2d at 56 (Sixth Amendment); *Tremblay v. Overholser*, 199 F. Supp. 569, 570 (D.D.C. 1961) (forcing any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which he does not desire to advance constitutes a due process violation).

The trial court, in instructing the jury on the affirmative defense over Mr. Coristine's objection, therefore committed constitutional error. U.S. Const. Amend VI, XIV; Wash. Const. Art. I, § 3. "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); see also *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) ("Erroneous instructions given on behalf of the party in whose favor the verdict was returned are presumed prejudicial unless it affirmatively appears they were harmless).

The test for determining whether a constitutional error is harmless is whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The presumption of prejudice may be overcome if and only if the reviewing court is able to express an abiding conviction that the error cannot possibly have influenced the jury adversely to the defendant. *State v. Ashcraft*, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The Court of Appeals never addressed the harmless error standard because it never acknowledged that Mr. Coristine has a constitutional right to control his own defense. Proving that the instructional error cannot possibly have influenced the jury adversely is something the State cannot do.

The jury deliberated for over two days after listening to three days of testimony. From the length of the deliberation alone, it is obvious that the jury struggled to reach a verdict. The jury should have had a single issue to decide: whether the State met its burden of proving that L.F. could not consent to sex because she was incapacitated. Instead, the jury also had to decide if Mr. Coristine proved by a preponderance of evidence that he reasonably believed L.F. was incapable of consent. The jury

received no guidance in how to resolve these seemingly inconsistent instructions and likely was confused. Taken as whole as they must be, the instructions told the jury that Mr. Coristine had a burden to prove he reasonably believed L.F. consented to sex. But the only reason why he would have to do that is if the State had already proven L.F. was incapacitated. This implied that L.F.'s incapacitation was a given and undermines Mr. Coristine's chosen defense. After all, it is one thing to say the State cannot prove lack of capacity and another to say L.F. did not have capacity although Mr. Coristine reasonably thought she did. This is akin to throwing inconsistent defenses out to a jury hoping they bite on one of them. This undercut Mr. Coristine's credibility. In a "he said-she said" case such as this, credibility is key.

There are other considerations. By foisting a burden of proof on Mr. Coristine, it shifted the focus of the case away from just making the jury decide if the State proved the charge beyond a reasonable doubt. Also, in all criminal cases, a defense is selected based on what is discovered in trial preparation. Tactical trial choices follow, such as who to interview pre-trial, who to call as a defense witness, and what questions to ask each witness at trial. Trial is a big production. A lot of thought and tactical choices go into the performance. When a judge changes the defense when all but closing argument remain of the trial performance,

subtle but significant defense tactics dissolve. Here, for example, Mr. Coristine's reasonable belief was never any issue during the presentation of evidence but was suddenly thrown into the case by the court by its affirmative defense instruction. Had Mr. Coristine been able to anticipate that he may very well have made different tactical choices in both pre-trial preparation and at trial.

There is no "one size fits all" approach to prejudice. Simply because defense theories may not seem inconsistent does not categorically mean the error is harmless. Whether an error is harmless beyond a reasonable doubt in a particular case depends on the particular circumstances of the case. See *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) ("Whether a flawed jury instruction is harmless error depends on the facts of a particular case.") Whether the defense wants to pursue an affirmative defense is a time-honored matter of trial strategy that has historically rested in the defense judgment. Because the Court of Appeals' opinion ignores this, the Court of Appeals should be reversed.

2. THE AFFIRMATIVE DEFENSE INSTRUCTION IMPROPERLY SHIFTED THE BURDEN OF PROOF.

As a matter of due process of law, the State bears the burden of proving every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct 1068, 25 L.Ed 2d 368 (1970). An

instruction which relieves the State of the burden of proof is constitutional error. *See e.g., State v. Cronin*, 142 Wn.2d 568, 14 P.2d 752 (2000); *State v. Jackson*, 87 Wn. App. 801, 804, 944 P.2d 403 (1997), *aff'd*, 137 Wn.2d 712 (1999). As constitutional error, it is harmless only if “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder v. United States*, 527 U.S. 1, 18, 44 L.Ed. 2d 35, 119 S.Ct. 1827 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Under *Neder* and *Chapman*, the error in this case could not be harmless.

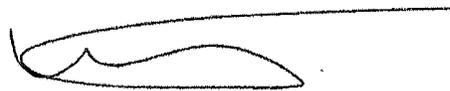
The affirmative defense instruction necessarily shifted the burden of proof. Under the Court of Appeals’ rationale, the only defense against a charge of rape of an incapacitated victim that would not bring on the “reasonable belief” affirmative defense instruction would be that there was no rape. In other words, either there was no sex or there was consent which would always open up the defendant to the affirmative defense instruction. Offering any evidence that the victim was not incapacitated brings on the affirmative defense instruction regarding incapacitation. There is no point to the instruction because how could a jury not reject the defense if it has already found the elements of the crime beyond a reasonable doubt in order to even come close to consideration of the affirmative defense? Instructing the jury that the defendant must prove by

a preponderance of the evidence that he reasonably believed the victim was not incapacitated while at the same time instructing them that the State must prove incapacitation beyond a reasonable doubt can hardly do anything less than confuse the jury. It's actually telling them the defendant must prove that the victim wasn't incapacitated. That is an improper shifting of the burden of proof. And one that the State cannot prove was harmless beyond a reasonable doubt.

D. CONCLUSION

Mr. Coristine, as a matter of trial strategy, was constitutionally entitled to pursue his theory that the State failed to meet its burden of proof on the incapacitation element in light of the evidence to the contrary. He was entitled to pursue that theory without being fettered by a burden of proof he never sought or accepted. Moreover, the "reasonable belief" instruction shifted the burden of proof to Mr. Coristine. Because the State cannot prove these instructional errors harmless, Mr. Coristine's conviction must be reversed.

Respectfully submitted this 4th day of November 2011.



LISA E. TABBUT/WSBA #21344
Attorney for Brandon S, Coristine

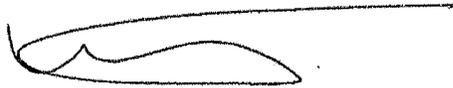
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Petitioner's Supplemental Brief with: (1) Mark Erik Lindsey, Spokane County Prosecutor's Office, by sending it to his support staff at KOWens@spokanecounty.org; and (2) the Supreme Court; and (3) I mailed it to Brandon S. Coristine/DOC#337530, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 4, 2011, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Brandon S. Coristine

OFFICE RECEPTIONIST, CLERK

To: Lisa Tabbut
Cc: Kathleen Owens
Subject: RE: No. 86145-5 Brandon Scott Cristine Supplemental Brief of Petitioner

Rec. 11-4-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lisa Tabbut [<mailto:lisa.tabbut@comcast.net>]
Sent: Friday, November 04, 2011 9:04 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Kathleen Owens
Subject: No. 86145-5 Brandon Scott Cristine Supplemental Brief of Petitioner

Petitioner's Supplemental Brief is attached.

Lisa E. Tabbut
Attorney at Law
P.O. Box 1396
Longview, WA 98632
(360) 425-8155
(360) 425-9011 fax
WSBA No. 21344
lisa.tabbut@comcast.net