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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRANDON S. CORISTINE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....2

 A. THE TRIAL COURT DID NOT ERR IN
 GIVING INSTRUCTION NO. 13 AS THE
 INSTRUCTION WAS NEEDED IN ORDER
 FOR THE DEFENDANT TO ARGUE HIS
 CASE TO A CONCLUSION2

 B. THE “REASONABLE BELIEF” INSTRUCTION
 DID NOT SHIFT THE BURDEN OF PROOF9

 C. THE GIVING OF INSTRUCTION NO. 13
 WAS NOT A COMMENT ON THE EVIDENCE.....10

CONCLUSION.....12

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE HUBERT, 138 Wn. App. 924,
158 P.3d 1282 (2007)..... 9

STATE V. CAMARA, 113 Wn.2d 631,
781 P.2d 483 (1989)..... 6

STATE V. CHASE, 134 Wn. App. 792,
142 P.3d 630 (2006)..... 5

STATE V. DEAL, 128 Wn.2d 693,
911 P.2d 996 (1996)..... 10

STATE V. FOSTER, 91 Wn.2d 466,
589 P.2d 789 (1979)..... 10

STATE V. GEER, 13 Wn. App. 71,
533 P.2d 389 (1975)..... 7

STATE V. JONES, 99 Wn.2d 735,
664 P.2d 1216 (1983)..... 4

STATE V. POWELL, 150 Wn. App. 139,
206 P.3d 703 (2009)..... 3, 8, 9

STATE V. SWAGERTY, 60 Wn. App. 830,
810 P.2d 1 (1991)..... 7

STATE V. SWAN, 114 Wn.2d 613,
790 P.2d 610 (1990)..... 10

STATE V. THEROFF, 95 Wn.2d 385,
622 P.2d 1240 (1980)..... 5

CONSTITUTIONAL PROVISIONS

WASH. CONST. Art. IV, § 16 10

COURT RULES

CrR 4.2(a) 4

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in giving, over defense objection, Court's Instruction No. 13, an affirmative defense instruction, in violation of Coristine's state and federal constitutional right to control his own defense.
2. The Court's Instruction 13, under the circumstances of the case unconstitutionally shifted the burden of proof in violation of Coristine's state and federal constitutional rights to due process of law.
3. Because there was insufficient evidence to support the giving of Court's Instruction No. 13, the instruction constituted a comment on the evidence in violation of the state constitution.

II.

ISSUES PRESENTED

- A. DID THE DEFENDANT HAVE AN UNLIMITED RIGHT TO CHOOSE HIS DEFENSE?
- B. DID THE GIVING OF THE "REASONABLE BELIEF" INSTRUCTION SHIFT THE BURDEN OF PROOF?

- C. DID THE TRIAL COURT COMMENT ON THE EVIDENCE BY GIVING THE “REASONABLE BELIEF” INSTRUCTION?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant’s Statement of the Case.

IV.

ARGUMENT

- A. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 13 AS THE INSTRUCTION WAS NEEDED IN ORDER FOR THE DEFENDANT TO ARGUE HIS CASE TO A CONCLUSION.

The defendant wants this court to find fault in the fact that the trial court in this case gave the affirmative defense instruction of “reasonable belief” over the defendant’s objections. The defendant cites to *U.S. v. Laura*, 607 F.2d 52 C.A.Pa. 1979, and proposes that *Laura* stands for the idea that a defendant has a constitutional right to decide the type of defense he wishes. Brf. of App. 12. The defendant has taken part of *Laura* out of context. The *Laura* opinion does not stand for the

proposition claimed by the defendant. The *Laura* case is about the right of a defendant to select his defense attorney. Immediately following the sentence extracted by the defendant, the *Laura* opinion states: “It is from this principle and belief that the defendant’s right to select a particular individual to serve as his attorney is derived. For the most important decision a defendant makes in shaping his defense is his selection of an attorney.” *Laura, supra* at 56. In other words, the *Laura* opinion stands for the uncontested principle that a defendant has a right to choose his defense *counsel*. Nothing in the *Laura* opinion gives a defendant a constitutional right to any defense he or she might want.

In none of the caselaw cited by the defendant, is a defendant given a constitutional right to choose a defense that will, by its nature, ensure trial errors and appellate issues.

Had the trial court not given the contested instruction, the defense counsel probably would have been found to be ineffective. The court in *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009) stated: “We are aware of no objectively reasonable tactical basis for failing to request a ‘reasonable belief’ instruction when (1) the evidence supported such an instruction; (2) defense counsel, in effect, argued the statutory defense; and (3) the statutory defense was entirely consistent with the defendant’s theory of the case.”

In *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983), the Court discussed the defendant's right to select his defense and concluded that a defendant has the right to "broadly control" his defense. *Jones, supra* at 740. The *Jones* Court cited to CrR 4.2(a) which outlines the general parameters of the various pleas open to a defendant. *Id.* However, in upholding the defendant's right to choose his defense, the Court stated, "...*Faretta* embodies 'the conviction that a defendant has the right to decide, *within limits*, the type of defense he wishes to mount.'" *Jones, supra* at 740 (emphasis added). The Court echoed a limit to its holding in the next paragraph of the opinion. "The rights to plead guilty and control one's own defense are not absolute, however." *Jones, supra* at 740.

The defendant is trying to expand the right of a defendant to pick his attorney, enter certain pleas, etc. into a general absolute right to present any sort of defense the defendant desires, even one that defies logic.

Had the trial court *not* given the "reasonable belief" instruction, the defendant would have purposely helped to create an erroneous set of instructions. According to the defendant he wanted to proceed with a "State prove your case" defense, but the defense counsel could not have properly argued his closing argument without Inst. No. 13.

The trial court's decision whether to give a particular jury instruction is reviewed for an abuse of discretion. *State v. Chase*,

134 Wn. App. 792, 142 P.3d 630 (2006). “Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case.” *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980).

The defendant told the trial court that he did not want the “reasonable belief” instruction because his defense was based on making the State prove the elements of second degree rape. In this case, there is zero doubt that there was sexual intercourse. The DNA provided a positive match to the defendant’s sperm and the defendant admitted he had sex with the victim. There was no contest to any element except whether the victim was incapable of consent because she was intoxicated. Under the scenario posited by the defendant, the State would have to prove that the victim was too intoxicated to consent.

The defendant’s claims that he never asserted in argument and no evidence was introduced at trial that he reasonably believed that the victim was *not* incapacitated or physically helpless. This is a counterfactual claim given the course of the trial. The defendant presented testimony from his wife, Ashley Coristine, regarding the events on the night in question. Ms. Coristine’s testimony appeared to be nearly totally for the purpose of setting up a “reasonable belief” defense. Ms. Coristine

testified that she saw Ms. Fjelstad consume two drinks. RP 307. Ms. Coristine testified that Ms. Fjelstad was "...very flirtatious with Brandon." RP 308. Ms. Coristine testified that Ms. Fjelstad was "...walking normally and standing fine." According to Ms. Coristine, her husband-to-be "... seemed all right." RP 310. Ms. Coristine's testimony was essentially one long attack on the victim's claim of "incapable of consent" due to intoxication.

The defendant testified that Ms. Fjelstad was able to move "Just fine." RP 352. The defendant stated that he had not noticed the victim stumble or lose her balance. RP 352. He did not notice the victim slurring her speech. RP 353. The defendant was asked by defense counsel if he ever noticed Ms. Fjelstad to be overly intoxicated. RP 353. The defendant replied: "No. I -- absolutely not." *Id.*

There was no reason for defense counsel to ask those questions if the defense was not setting up for a "reasonable belief" type defense. If the defense was to be as the defendant has argued on appeal, i.e. make the State prove all the elements, the questions asked of the defendant by his counsel and the answers given by the defendant make no sense. The defendant has the burden of proving consent on the part of the victim. *State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989). Placing the

burden of proving the defense of “consent” on the defendant is not a violation of due process. *Id.* at 639-40.

The testimony by the defendant that *he* had consumed a significant quantity of alcohol was irrelevant. Voluntary intoxication is not a defense in a rape case. *State v. Geer*, 13 Wn. App. 71, 75, 533 P.2d 389 (1975); *See also, State v. Swagerty*, 60 Wn. App. 830, 810 P.2d 1 (1991).

Certainly consent to sex would be a defense, but the defense did not want an instruction that would allow them to use information on any alleged consent by the victim. The questions and answers in the defendant’s case bore on the issue of whether the victim had consented to sexual intercourse and how intoxicated (or not intoxicated) she might have been. As mentioned earlier, the State did not need to prove consent by the victim. In order to use a defense, the defendant needed to show that the victim consented. The defendant testified at length to various physical and verbal acts by the victim, designed to show that the victim was the aggressor. Yet again, the defendant did not submit an instruction that told the jury what to do with the material produced in the defendant’s case. If the jury instructions had been given as the defendant desired (without the “reasonable belief” instruction), the defendant would be arguing into a “brick wall.” There was no instruction *other* than the “reasonable belief” that told the jury that the defendant’s actions *could* be excused. With the

contested instruction, there was no language in the instruction pack that permitted the defendant to argue his case. The jury was told that the State needed to prove that the defendant engaged in sexual intercourse with Ms. Fjelstad. This element was not contested. The next element is that the victim was incapacitated and incapable of consent.

Ms. Fjelstad testified that she did not consent. This testimony alone would support the element of lack of consent.

As worded by the court in *Powell, supra* at 156, 57:

Without the “reasonable belief” instruction, the jury had (1) no way to recognize and to weigh the legal significance of Powell's testimony and portions of defense counsel's closing argument that it appeared to Powell that PLM had consented; and (2) no way of acquitting Powell even if it believed he had reasonably believed PLM was not mentally incapacitated or physically helpless. Instead, it would have appeared to the jury that it had no option but to convict Powell if it found beyond a reasonable doubt that PLM had been mentally incapacitated or physically helpless, regardless of whether it also found that Powell reasonably believed PLM had consented. The absence of this instruction essentially nullified Powell's defense.

State v. Powell, supra at 156-57.

The defendant seems to have been trying to set up a situation where he could have the best of all worlds. By arguing against the contested jury instruction, he sets up an appellate issue if the trial court gives the instruction. If the trial court had not given the instruction the jury would have been in a mess and the defendant would have a different

appellate issue. In a similar second degree rape case, the failure of the defense counsel to request the “reasonable belief” instruction was deemed ineffective assistance of counsel. *Powell, supra*.

If nothing else, the defense counsel could fall on his sword and argue that he (defense counsel) was ineffective and then seek a new trial.

“Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007).

Proving that the victim was not impaired does not prove the victim consented. However, proving the victim to be sober would bear on the question of whether the defendant reasonably believed that Ms. Fjelstad was not mentally incapacitated or physically helpless. RP 409.

**B. THE “REASONABLE BELIEF” INSTRUCTION
DID NOT SHIFT THE BURDEN OF PROOF.**

The “reasonable belief” instruction does not shift the burden of proof as to the elements that the State must prove. The defendant is correct in his assertion that every element of the crime must be proved beyond a reasonable doubt. There is nothing in the “reasonable belief” instruction that changes the burden of proof. This issue was resolved in *State v. Powell, supra*. As noted by *Powell*:

The jury would have had to find that the State had met its burden and proved every element of the rape charge beyond a reasonable doubt even if the trial court had given the reasonable belief instruction. This affirmative defense was relevant only once the State proved the elements of the offense. Thus, a “reasonable belief” instruction would not have shifted the initial burden of proof to Powell.

Powell, supra at 158, FN 12.

C. THE GIVING OF INSTRUCTION NO. 13 WAS NOT A COMMENT ON THE EVIDENCE.

A trial court is forbidden from commenting on the evidence presented at trial. Wash. Const. art. IV, § 16. “An impermissible comment is one which conveys to the jury a judge’s personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996) (quoting *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990)).

Jury instructions that are a correct statement of the law and used in other courts are not a comment on the evidence. *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979) “An instruction that states the law correctly and concisely and is pertinent to the issues raised in the case does not constitute a comment on the evidence.” *Foster, supra*. It is doubtful that the defendant would attempt to claim that the “reasonable

belief” instruction is not a correct statement of the law and never used in other second degree rape cases.

Using the logic of the defendant on this issue, nearly every jury instruction could be a “comment on the evidence” as the jury *might* conclude that charging the defendant at all must mean the trial court thinks the defendant is guilty.

The defendant cites to *U.S. v. Laura* 607 F.2d 52 C.A.Pa. (1979), and proposes that *Laura* stands for the idea that a defendant has the right to decide the type of defense he wishes. Brf. of App. 12. The defendant has taken a principle out of context. The *Laura* opinion does not stand for the proposition claimed by the defendant. The *Laura* case is completely about the right of a defendant to select his defense attorney. The next sentences in the *Laura* opinion after the line used out of context by the defendant read: “It is from this principle and belief that the defendant’s right to select a particular individual to serve as his attorney is derived. For the most important decision a defendant makes in shaping his defense is his selection of an attorney.” *Laura, supra* at 56.

The defendant wants this court to find fault in the fact that the trial court in this case gave the affirmative defense instruction over the defendant’s objections.

Even assuming (arguendo) that the defendant had the right to proceed with a suicidal defense that could only confuse the jury, the defendant has presented no support saying the trial court had to sit by like a potted plant while the defendant purposely set out to create an intolerable situation. The defendant has no right to bollix up a trial and then claim he had a right to do so. By objecting to the giving of the "reasonable belief" instruction, the defendant forced the trial court into a corner from which the logical exit was to give the instruction over the defendant's objections.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 18th day of November, 2010.

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