

NO. 44075-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREAN BARNES,

Appellant.

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

The Honorable Kenneth William Judges

SUPPLEMENTAL BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
P.O. BOX 2711
VASHON, WA 98070

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A. ASSIGNMENT OF ERROR

The trial court violated Miller's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over Miller's objections.

Issue Pertaining to Assignment of Error

Did the trial court violate Miller's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over Miller's objections?

B. STATEMENT OF THE CASE

Relevant Facts

Mr. incorporates by reference the facts set forth in his opening and reply briefs.

Over defense objection, the trial gave the following "consent" instruction:

A person is not guilty of rape in the second degree if the *sexual intercourse* is consensual. Consent means that at the time of the act of *sexual intercourse* there are actual words or conduct indicating freely given agreement to have *sexual intercourse*.

The defendant has the burden of proving that the *sexual intercourse* was consensual 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 this defense, it will be your duty to return a verdict of not guilty *[as to this charge]*

RP 488; CP 61; WPIC 18.25.

C. ARGUMENT

THE TRIAL COURT VIOLATED
BARNES' SIXTH AMENDMENT RIGHT
TO CONTROL HIS DEFENSE BY
GIVING A "CONSENT" INSTRUCTION
OVER HIS OBJECTION.

Barnes objected to the "consent" jury instruction number 12 because it created an unwanted shifting of the burden of proof to the defense. RP 488.

I'd object to instruction number 12, forcing consent instruction on us when it's not requested and the evidence regarding consent basically would be relevant as to whether or not there was forcible compulsion. Additionally, I know the Court has said they took some precautions since it's pretty much an element of all of the charges here, but I think frankly it's going to be extremely confusing to a jury when what happened, who's (sic) burden it is, and who has to prove consent when. So, I'd object to instruction number 12

RP 488.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Under the Sixth Amendment, a criminal defendant has the implicit right to control his defense. *State v. Lynch*, 87882-0 (September 19, 2013), at page 6 *citing*, *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This Court reviews constitutional violations de novo. *Id.*

“Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense.” *Lynch*, *quoting*, *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013). In *Coristine*, the defendant, charged with second degree rape of a person incapable of consent, argued that the state failed to prove the victim's inability to consent. *Coristine*, 177 Wn.2d at 375. Coristine objected to the instruction because he did not want the burden of proving lack of consent. *Coristine*, 177 Wn.2d at 374.

Over Coristine's objection, the trial court gave a “reasonable

belief” instruction. The Supreme Court reversed the trial court and the Court of Appeals, and held that “[i]mposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges.” *Coristine*, 177 Wn.2d at 377.

Four months later the Supreme in *Lynch* gave the identical “consent” instruction objected to in Barnes’ case. *Lynch*, at page 8. *Lynch*, like Barnes objected to the instruction and directed his cross-examination of witnesses in a manner designed to undermine the state’s ability to prove forcible compulsion. RP 5-9; *Lynch*, at page 8 The Court in *Lynch*, citing, *Corisitne*, held that the use of the consent instruction “on an unwilling defendant,” “impinge[d]” Lynch’s autonomy to conduct his defense. *Coristine*, 177 Wn.2d at 377.

These cases control the outcome of this case. As in *Lynch*, the use of the consent instruction over defense objection violated Barnes’ Sixth Amendment right to control his defense.

In both *Lynch* and *Coristine*, the Supreme Court rejected the state’s argument that the instruction was justified because the defendants introduced evidence of consent. *Lynch*, at page 8; *Coristine*, 177 Wn .2d at 377. The same reasoning applies to Mr. Barnes case. Even though Barnes introduced evidence of consent,

this evidence did not justify the instruction on consent; the instruction violated Barnes Sixth Amendment right to control his defense.

The error was not harmless because prejudice is presumed when the error is of constitutional magnitude; and the state bears the burden of proving it was harmless beyond a reasonable doubt. *Lynch, citing, Coristine*, 177 Wn .2d at 380.

In *Lynch*, the Supreme Court considering the same consent instruction given in in Barnes' case, held that the error was not harmless because "a deprivation of [a defendant's right to control his defense] is error even if the trial court's" consent instruction was an accurate statement of the law. *Lynch*, quoting, *Coristine*, 177 Wn.2d at 381. The Court also held that "if seizing control over a defendant's trial strategy were harmless so long as the court correctly instructed the jury in the defense it chose, little would remain of the Sixth Amendment right to control one's defense." *Id.*

The consent instruction given in Barnes and in *Lynch* was an accurate statement of the law derived from 11 *Washington Practice: Washington Pattern Jury Instructions Criminal* 18.25 (3d ed. 2011).

Prior to *Lynch* the Supreme Court in *State v. Gregory*, 158

Wn. 2d 759, 801, 147 P. 3d 1201 (2006) approved the same instruction under a similar fact pattern. Since *Lynch*, however, giving such an instruction over the defendant's objection violates the defendant's right to control his defense, regardless of the instruction's accuracy. *Lynch* at page 9.

According to *Lynch*, the giving of the instruction in Barnes' case was prejudicial error requiring reversal and remand for a new trial.

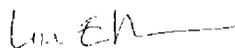
D. CONCLUSION

Mr. Barnes respectfully requests this Court reverse his conviction and remand for a new trial for violation of his Sixth Amendment right to control his defense.

DATED this 13th day of October 2013

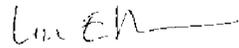
Respectfully submitted,

LAW OFFICES OF LISE ELLNER



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office lschrawyer@co.clallam.wa.us; and Corean Barnes DOC# 317817 Airway heights Corrections Center P.O. Box 2049 Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on October 13, 2013. Service was made by electronically to the prosecutor and to Mr. Carter by depositing in the mails of the United States of America, properly stamped and addressed.



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