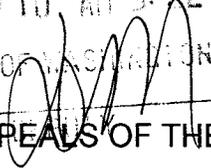


FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37122-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE POWELL,

Appellant.

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

The Honorable Sally F. Olsen
The Honorable Leila Mills

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The State asserts that Jesse Powell's trial lawyer made a reasonable strategic decision to not request the jury be instructed on the statutory defense that exactly reflected his theory at trial because defense counsel made the State "prove all the elements of the case", Br. Resp. at 13, but the State's claim suffers from a fatal flaw.

The elements of the crime of rape in the second degree provide no basis for an acquittal based on the defendant's reasonable belief that the victim was capable of consent. Thus, without instructions informing the jury that such a belief is, in fact, an affirmative defense to the crime, testimony regarding the defendant's belief becomes irrelevant to whether the State has met its burden. For this reason, there can have been no legitimate tactical basis to fail to submit instructions on the "reasonable belief" defense to the jury where this was the theory of the case.

With respect to the court's ruling on the State's last-minute request for a continuance, the State attributes statements to Powell that the record makes clear were uttered by the prosecutor. The State thereby suggests that Powell somehow concurred in the reason for the delay whereas in fact this emphatically was not so.

Powell objected to the State's continuance, the State failed to act with diligence, and the trial court abused its discretion in assuming without evidentiary support that it would take a long time to subpoena a toxicologist from the crime laboratory.

1. ABSENT A JURY INSTRUCTION, THERE WAS NO WAY THE JURY COULD HAVE KNOWN A REASONABLE BELIEF THE VICTIM WAS CAPABLE OF CONSENT WAS A DEFENSE TO THE CRIME OF RAPE IN THE SECOND DEGREE, THUS THERE WAS NO LEGITIMATE STRATEGIC REASON TO FAIL TO REQUEST AN INSTRUCTION WHERE THIS WAS THE DEFENSE THEORY.

"Where counsel in a criminal case fails to advance a defense authorized by statute and there is evidence to support the defense, counsel's performance is deficient." In re Personal Restraint of Hubert, 138 Wn. App. 924, 926, 158 P.3d 1282 (2007).

The charge of rape in the second degree under RCW 9A.44.050(1)(b) requires the State to prove, in pertinent part, that the defendant engaged in sexual intercourse "when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." This essentially is a strict liability offense. Stated differently, the defendant's state of mind is utterly irrelevant to the State's proof of the statutory elements of the crime. It is only

through the affirmative defense contained in RCW 9A.44.050(1) that the jury is permitted to consider the defendant's state of mind.

But even though Powell testified that he believed T.M. was capable of consenting to sexual intercourse with him, 5RP 93, 102, and defense counsel argued this theory at trial based both on Powell's testimony and the observations of other witnesses, 5RP 142, defense counsel did not propose jury instructions on the affirmative defense to rape in the second degree contained in RCW 9A.44.030(1).

Notwithstanding this remarkable omission, the State claims counsel's decision was a reasonable strategic decision to "hold[] the State to its burden rather than assuming the burden itself." Br. Resp. at 18. This is a meritless claim. The State contends,

The element that the victim lacked capacity to consent and the defense that the defendant believed the victim had the capacity to consent are separate issues in the abstract. In the context of the present case, however, they are virtually indistinguishable. Because [T.M.] testified that she did not recall what had occurred, the evidence tending to show whether or not she was or was not incapable of consent was essentially the same as the evidence tending [to] show whether Powell should or should not have *realized* she was incapable of consent.

Br. Resp. at 18 (emphasis in original).

The State's reasoning illustrates the State's error. T.M.'s own memory of what occurred had little bearing on whether or not Powell reasonably believed she was capable of consenting to sexual intercourse. Instead, this belief derived from other objective indicia – for example that T.M. was standing and walking about on her own, that Sizemore, the State Patrol cadet responsible for monitoring persons boarding the Bremerton Ferry, did not believe T.M. was excessively intoxicated, and that T.M. appeared to be responding to Powell's verbal cues.

But none of these objective signs tending to support the reasonableness of Powell's belief mattered if the jury found T.M. was *actually* incapable of consent and was not instructed on the affirmative defense contained in RCW 9A.44.030(1). For this reason, there cannot have been any legitimate strategic basis for counsel to have failed to pursue the only likely path to acquittal for his client.

As in Hubert, the State's argument only serves to underscore the prejudice occasioned by the missing defense. In Hubert, the Court explained,

There is no intent element for rape. To commit an attempt, however, the defendant must intend to

commit the crime charged.^[1] Here, that means the defendant must intend to have intercourse with a victim incapable of consent. The jury was so instructed. But this did not illuminate for the jury whether the defendant must be found to intend intercourse with a person who happens to be helpless whether or not the defendant realizes it. The jury was unaware that if Hubert reasonably believed Wood had capacity to consent, his belief constituted a defense to the charge. The jury thus had no way to understand the legal significance of the evidence supporting the reasonableness of Hubert's belief that Wood was awake and capable of consenting to his advances.

Hubert, 138 Wn. App. at 931-32..

Hubert was cited to this Court and the State,² but for unknown reasons the State has chosen not to discuss or attempt to distinguish the case. As in Hubert, this Court should conclude there could have been no objectively sound basis for defense counsel to fail to request instructions that would have explained the legal significance of the evidence supporting the reasonableness of Powell's belief that T.M. was capable of consent. By failing to present the sole available defense to the charged crime despite the evidence in support of that defense, defense counsel denied his client the effective assistance to which he is guaranteed by the

¹ In Hubert, under analogous facts, the defendant was charged with second-degree rape but was convicted of the lesser included offense of attempted second degree rape. 138 Wn. App. at 926-28.

² A statement of additional authorities citing Hubert was filed on June 19, 2008, nearly four months before the State filed its response.

Sixth Amendment. The remedy is reversal and remand for a new trial.

2. THE RECORD DOES NOT SUPPORT THE STATE'S CONTENTION THAT POWELL CONCURRED IN THE STATE'S MOTION FOR A CONTINUANCE.

Selectively citing to a portion of the hearing on October 2, 2007, the State contends that Powell concurred in the State's request for a continuance, but the record belies the State's claim. Powell agrees with the State that a likely typographical error in the transcript mistakenly attributes to the prosecutor statements made by defense counsel and vice versa, but Powell emphatically disagrees that Powell 'himself asserted that he wanted to "[r]einterview [the victim] and give us time to subpoena the lab, a toxicology expert, to talk about what these results could mean." See Br. Resp. at 25. Instead, Powell asserted he was ready to proceed and objected to the four week continuance. 1RP 2-3.

And, as is unequivocally established by the record of the subsequent hearing on October 24, 2007, it was the *prosecutor* – not defense counsel – who wanted to reinterview T.M., subpoena an expert, and discuss the results of the toxicology screen. See 2RP 2 (prosecutor explains "it was necessary for the State to

subpoena someone from the tox lab to explain what was found in [T.M.'s] urine"); 2RP 4 (defense counsel states, "I objected to any continuance, but I objected vociferously to a four week continuance. It was granted by Judge Olsen, two days short of a four-week continuance, which I thought was excessive for what needed to be done, which basically was to talk to the alleged victim."). In short, the State's claim that Powell concurred in the continuance motion is flatly contrary to the record.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN CONTINUING THE CASE BEYOND SPEEDY TRIAL WHERE THE STATE FAILED TO EXERCISE DILIGENCE AND DID NOT SHOW A CONTINUANCE BEYOND THE SPEEDY TRIAL EXPIRATION DATE WAS NECESSARY FOR THE STATE TO OBTAIN A WITNESS FROM THE TOXICOLOGY LABORATORY.

In asserting that having found good cause to continue the trial, the trial court's selection of a trial date is unreviewable, the State miscasts the issue on appeal, ignoring both its own lack of diligence and the trial court's failure to ascertain that the continuance sought was in fact necessary. The State claims the "primary issue" raised by Powell went not to the validity of the continuance but to its length. This is a false contention.

Powell assigned error to the court's finding that good cause had been shown to continue the trial *beyond the speedy trial expiration date* where the State had not bothered to ascertain if its witnesses would be available or that a continuance beyond speedy trial was even necessary. See Br. App. at 1-3 (Assignments of Error 2 and 3, Issues 3 and 4). In the argument section of his brief, Powell argued that the trial court erred in finding good cause to grant the prosecutor's request.

The decision to grant a continuance under CrR 3.3 rests within the trial court's sound discretion. State v. Nguyen, 131 Wn. App. 815, 819, 129 P.3d 821 (2006). But a court abuses its discretion where its decision rests on untenable grounds or untenable reasons. Id. Here, the prosecutor did not show that a continuance was necessary to obtain a witness from the toxicology laboratory, but this was the basis for the trial court's good cause finding – even though the prosecutor had not even subpoenaed an expert from the toxicology lab. 1RP 5. See State v. Iniguez, 143 Wn. App. 845, 853-54, 180 P.3d 855 (2008) (prosecutor who subpoenaed a witness for the original trial date acted with diligence). Furthermore, the prosecutor did not even determine that her essential witnesses would be available on the new date, and

instead selected the date “at random”, as “we always do.” 2RP 5. Thus, far from conceding that the reason for the continuance was “valid,” as the State claims, Br. Resp. at 25, Powell challenged the legitimacy of the trial court’s finding.

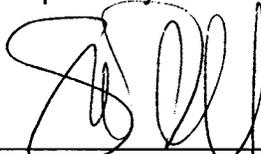
The State did not act with diligence and the trial court abused its discretion in finding the continuance beyond the speedy trial expiration date was necessary to obtain a witness from the toxicology laboratory. This Court should conclude that good cause for a continuance was not shown, and reverse and dismiss Powell’s conviction.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, this Court should conclude Powell was denied the effective assistance of counsel when his lawyer failed to propose instructions on the statutory defense to rape in the second degree contained in RCW 9A.44.050(1). This Court should also conclude the trial court abused its discretion in granting the State's motion for a continuance of the trial date.

DATED this 7th of November, 2008.

Respectfully submitted:



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DIVISION TWO**

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 Appellant.)

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2008, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF NOVEMBER, 2008.

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