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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28273-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH SAM,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

3. The trial court erred by failing to instruct the jury on the statutory defense of "reasonable belief."

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

3. The court's instructions to the jury are the critical vehicle for conveying the prosecution's elements to the jury, and they must be accurate. Did the court err, and is reversal required, where the trial court failed to give the statutory reasonable belief defense to the jury, as requested by defense counsel in the defendant's proposed instructions?

C. STATEMENT OF THE CASE

Joseph Sam was convicted of one count of rape in the second degree, following what he believed to be a consensual encounter involving oral sex with a female friend during the great snowstorm of December 2009. He was also convicted of one count of theft of a motor vehicle, for leaving home in a car which belonged to his cousin.

At trial, Mr. Sam testified that he had believed the complainant had consented, since she had initiated the encounter

in his home, and he stated that he believed she had been sufficiently alert to consent.

Defense counsel's arguments during the trial were consistent with this defense, and defense counsel included the WPIC in his proposed instructions. CP 29-37. The trial court, however, failed to instruct the jury on the reasonable belief defense. 2RP 398-412; CP 38-61. The trial court's failure to properly instruct the jury on the statutory defense deprived defense counsel of the ability to argue its theory of the case. Moreover, it deprived the jury of the tools it needed to understand a critical component of the defense, essentially nullifying the consent defense.

D. ARGUMENT

THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY ON THE STATUTORY DEFENSE OF REASONABLE BELIEF.

a. A trial court must give instructions that permit the defense to argue its side of the case. A trial court's refusal to give a proposed instruction is reviewed for abuse of discretion. State v. Castle, 86 Wn. App. 48, 62, 935 P.2d 656 (1997). Jury instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury, and if they permit each party to argue its theory of the case. Id. (citing State v. LeFaber, 128 Wn.2d 896,

903, 913 P.2d 369 (1996)). The court's instructions to the jury are the critical vehicle for conveying the prosecution's elements to the jury, and they must be accurate. State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007). "[A] trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt." Id.

b. Mr. Sam was entitled to his requested instruction on "reasonable belief." The State argues that Mr. Sam's defense counsel specifically requested the jury instruction on reasonable belief in the defendant's proposed jury instructions. State's Resp. Brief at 2; CP 29-37.¹ Specifically, trial counsel requested that the instruction read as follows:

It is a defense to a charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [complainant] was not mentally defective or mentally incapacitated 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 the evidence in the case, that it is more probably

¹ Mr. Sam has also argued that his defense counsel was ineffective for failing to ensure that his proposed reasonable belief instruction was presented to the jury in the Court's Instructions. The State has responded that defense counsel was effective.

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 (WPIC 19.03).

CP 35.

Mr. Sam's entire defense rested on the theory that he reasonably believed that the complainant had consented to sexual relations with him. Yet, the trial court denied the request to charge the jury on the statutory defense, despite the fact that defense counsel had requested it in writing. CP 35.

A defendant in a criminal case has the right to the correct statement of the law and to have the jury instructed on a defense that is supported by substantial evidence. State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987); State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009) (reversing for failure to give reasonable belief instruction, albeit for attorney error); In re Hubert, 138 Wn. App. 924, 926, 158 P.3d 1282 (2007) (same).

The court's refusal to give the instruction clearly deprived Mr. Sam of his opportunity to argue his theory of the case, and was thus an abuse of discretion.

c. Since this instructional error was not harmless beyond a reasonable doubt, reversal is required. When a jury

instruction is deficient, a reviewing court must reverse the conviction unless the State can show that the instructional error was harmless beyond a reasonable doubt. State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006) (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

The failure of the trial court to instruct the jury in such a way that defense counsel could effectively argue his theory of the case was an abuse of discretion, and as such, must be reversed. An abuse of discretion is discretion exercised on untenable grounds for untenable reasons. State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision

and the comparative weight of the reasons for and against the decision one way or the other. Ex rel Carroll, 79 Wn.2d at 26. Here, the court exercised its discretion on untenable grounds and for untenable reasons.

The conviction here rested on the evidence that the complainant was too intoxicated to consent to sexual relations. The trial court's refusal to give the instruction on the statutory defense of reasonable belief deprived defense counsel of the opportunity to argue his theory of the case. The trial court's refusal to give the specified instruction requested by counsel deprived the jury of an adequate explanation of the law, and ultimately deprived Mr. Sam of a fair trial.

E. CONCLUSION

Mr. Sam's conviction must be reversed because the jury was not instructed on the statutory defense of reasonable belief.

DATED this 4th day of November, 2010.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28273-2-III
v.)	
)	
JOSEPH SAM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY, DPA	(X)	U.S. MAIL
SPOKANE COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
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SPOKANE, WA 99260-0270		
[X] JOSEPH SAM	(X)	U.S. MAIL
C/O ATTN: CORDLE, CEDAR HALL	()	HAND DELIVERY
DAYTON AIRPORT ROAD	()	_____
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SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF NOVEMBER, 2010.

X _____ 

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