

FILED

SEP 24 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No. 290166

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent

v.

JUAN CARLOS CORTEZ BARAJAS, Appellant

---

APPEAL FROM THE SUPERIOR COURT, JUVENILE DIVISION

OF GRANT COUNTY

THE HONORABLE EVAN E. SPERLINE

---

BRIEF OF APPELLANT

---

Marie Trombley  
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WSBA 41410

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## SUMMARY

Juan Carlos Cortez Barajas, a juvenile, appeals his conviction for Rape of a Child in the Second Degree. He contends he reasonably believed the complaining witness to be at least fourteen- years- old based on her declarations about her age. The State failed to disprove this affirmative defense beyond a reasonable doubt. For this reason, the conviction must be reversed and dismissed with prejudice for insufficient evidence.

### I. Assignments of Error

- A. The court erred in making Finding of Fact (FF) 2.9: “At no time during the interview did the Respondent inform the officers that he thought J.S. was older than 13.” (CP 159).
- B. The court erred in making FF 2.14: “J.S. did not make declarations to the Respondent that she was at least fourteen- years- old or that she was less than thirty-six months younger than Respondent.” (CP 159).
- C. The court erred in entering Conclusion of Law (CL) 3.1: “The evidence is sufficient beyond a reasonable doubt that the Respondent is guilty of Count 1, Rape of a Child in the Second Degree.” (CP 160).

D. The court erred in entering CL 3.3: “The Respondent did not prove by a preponderance of the evidence that he reasonably believed J.S. was fourteen- years- old or older or less than thirty-six months younger than he was at the time of sexual intercourse based on declarations made by J.S.” (CP 160).

*ISSUES PERTAINING TO ASSIGNMENTS OF ERROR*

1. Did the trial court err when it found J.S. did not make declarations about her age and then concluded that Juan Carlos Cortez Barajas did not prove by a preponderance of the evidence that at the time of the offense he reasonably believed J.S. to be age fourteen or older based upon her declarations as to her age? (Assignments of Error A, B,D).
2. Did the trial court err when it concluded the State proved beyond a reasonable doubt that Juan Carlos Cortez Barajas was guilty of Rape of a Child in the Second Degree? (Assignment of Error C).

II. Statement of Facts

Juan Carlos Cortez Barajas, (Cortez) a seventeen-year-old juvenile, was charged by amended information with three counts of rape of a child in the second degree based on allegations made by J.S. (CP 48-49). He was found guilty of one count, based on an

event that occurred on June 6-7, 2009 with J.S. J.S. turned fourteen-years- old on June 8, 2009.

J.S. became a friend of Cortez's niece, Steffany Rowell in April 2009. They attended the same school and were in the same grade. (RP 100). On May 17, 2009, J.S. celebrated Steffany's fifteenth birthday with her at a family party. (RP 212). Family members who attended the party testified they heard J.S. affirmatively state, in the presence of Cortez, she was either fifteen years old or very shortly going to turn fifteen. (RP 213, 248, 249, 461, 481, 608). J.S. denied discussing her age with Cortez or his family. (RP 134).

On June 6, 2009, around 10 p.m., J.S. telephoned Cortez and asked him to give her and her cousin, a ride home from a local McDonald's restaurant. (RP 108, 202). Cortez agreed and drove with his nephew, fourteen year old Andrew Rowell, to get the girls. (RP 238). Cortez drove the cousin directly home.

J.S. did not want to go to her own home because she had had an altercation with her mother and was angry with her. (RP 119, 224 ). Instead, she went to Cortez's family's home with him. When Cortez's mother and other family members arrived home later, J.S. ran into a closet in the bedroom where Cortez was to sleep that

night. (RP 121). Later that night or early the next morning, she and Cortez had sexual intercourse. (RP 128).

On the morning of June 7, 2009, J.S.'s mother arrived at the home around 7 a.m. (RP 128). J.S. testified her mother was crying and yelled that J.S. "was only thirteen". (RP 143). J.S. stated, "She told me that – I guess I'm not having a fifteen no more 'cause of this, that all my dreams are gone. And she was just crying." (RP 129). The "fifteen" J.S. referred to was the traditional Quinceanera party for "a young lady to become a woman". (RP 129).

At trial, Cortez acknowledged he had engaged in sexual relations with J.S. (RP 667). He made an affirmative defense that he had reason to believe she was fifteen years old. This was based on her declarations and a MySpace page he viewed, where J.S listed her age as fifteen years old. (RP 662, 664, 666, 673). Cortez testified he first learned of J.S.'s true age of thirteen, on the morning of June 7, 2009, when her mother told him. (RP 674).

Quincy police officers interviewed Cortez twice on June 7, 2009, the day he was taken into custody. (RP 80-81). They did not record the first interview. A second interview, which was recorded, immediately followed the first one. After a 3.5 hearing, the court

admitted the taped statement. (RP 89). It was played at trial and the transcript admitted as State's Exhibit 5. (RP 315, 317).

During the taped interview, in answer to the question, "How old is J.S.?" Cortez stated J.S. was thirteen- years-old. (RP 320, Exh. 5). Officers testified they did not ask, in either interview, when or how Juan Carlos learned that J.S. was still thirteen years old on June 7, 2009. (RP 325, 330, 338). When asked, "How old does she look to you?" He answered, "Like fifteen, fourteen." (Exh. 5). When asked, "And how did you describe her at (sic) tall and big when we talked earlier?" He answered, "Like a normal girl that I would you know, that I would- looks like about my age." (Exh. 5). Officers asked if J.S. was about Cortez's height, to which he answered, "Yes". (Exh. 5).

In a colloquy at the end of the trial the court commented that if Cortez had sexual intercourse with J.S. on June 7, not addressing his defense, it was a Class A felony. However, if they had sexual intercourse on June 8, 2009, when she turned fourteen, there was no criminal liability. (RP 806). The court found Cortez guilty of one count of rape of a child in the second degree. He was given a

standard range disposition for the offense of 15-36 weeks. (CP 160). This appeal follows. (CP 153).

### III. Argument

A. The Trial Court Erred When It Concluded Cortez Did Not Prove By A Preponderance Of The Evidence That At The Time Of The Offense He Reasonably Believed J.S. To Be Age 14 Or Older Based Upon Her Declarations As To Her Age.

Both J.S. and Cortez testified they had sexual intercourse on June 7, 2009. The crucial issue presented for adjudication was whether Cortez proved by a preponderance of the evidence he reasonably believed J.S. to be at least fourteen years old, based on her declarations about her age. A trial court's conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

It is an effective defense to the charge of Rape of a Child in the Second Degree, if at the time of the offense, the defendant reasonably believed the complaining witness was aged fourteen or older, or less than thirty-six months younger than he, based upon declarations as to age by the complaining witness. RCW 9A.44.030 (2),(3)(b); *State v. Knutson*, 121 Wn.2d 766, 770, 854

P.2d 617 (1993). As a rule, the defendant must establish an affirmative defense, which excuses criminal conduct, by a preponderance of the evidence. *State v. Riker*, 123 Wn.2d 351, 366-69, 869 P.2d 43 (1994).

The standard of review for sufficiency of the evidence when a defendant is required to prove an affirmative defense is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

1. The Court's Findings of Fact Are Not Supported By Substantial Evidence.

A trial court's findings of fact are reviewed for substantial evidence. Generally, findings of fact are viewed as verities, provided there is substantial evidence to support the findings. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person that the finding is true. *State v. Graffius*, 74 Wn.App. 23, 29, 871 P.2d 1115 (1994). The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial

evidence. *Grein v. Cavano*, 61 Wn.2d 498, 507, 379 P.2d 209 (1963).

Here, the court erred in finding that during the interview Cortez did not inform officers he thought J.S. was older than thirteen. (CP 159). In *State v. Burke*, Burke had sexual relations with a minor and was charged with rape of a child in the third degree. *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008). At trial, he asserted that he reasonably believed the complaining witness to be sixteen years of age based on her declarations.

In an effort to undermine his affirmative defense, the State there argued that when given an opportunity to tell his side of the story during a pre-arrest interview, Burke did not mention that the complaining witness told him she was sixteen. The primary issue in *Burke*, the right to remain silent without inference of guilt, does not pertain to this case. However, the Court did comment that at the time of the interview, "Burke may not have appreciated the significance of the [victim's] age. He may not have known that if she was 16 or 17, rather than 15, it was a defense to the crime." *Burke*, 163 Wn.2d at 219.

Here, the transcript of the recorded interview documented the questions investigating officers asked Cortez about the events

of the evening. They asked him, "How old is J.S.?" He replied "Thirteen". As he later testified, he learned of her age the morning of June 7, 2009. His knowledge of her age, on the evening of June 7, 2009, did not reflect his knowledge or belief prior to that morning.

And like Burke, Cortez may not have appreciated the significance of her age during the recorded portion of the interview. Cortez testified he told officers during the *unrecorded* interview, "I just found out that she was thirteen, but – 'I know that she's thirteen now.' And then we did the tape recording thing." (RP 680).

Officers further questioned Cortez as to how old she appeared, her height, size, and the size of her "butt" and breasts. (Exh. 5). He said she looked fourteen or fifteen, was his height, had an average size "butt". In fact, Cortez stated she looked "like a normal girl... looks like about my age." (Exh. 5). Cortez's answers clearly indicated he believed she was older than thirteen.

The court also erred in finding J.S. did not make declarations to Cortez that she was at least fourteen years old. (CP 159). For the statutory defense to apply, there must have been some type of explicit assertion of age by the complaining witness. *State v. Bennett*, 36 Wn.App. 176, 182, 672 P.2d 772 (1983).

Besides Cortez, five witnesses testified J.S. said she was at least fourteen years old either directly to, or in the presence of, Cortez. (RP 455, 481, 497,499, 511, 536, 576, 608). While the testimony of each witness differed in small details, the essence was the same, that is, J.S. said she was fifteen or soon to be fifteen years old. Simply put, there was in fact, substantial evidence that J.S. *had* made declarations she was at least fourteen years old. The court's finding was not supported by substantial evidence.

The record does not contain a sufficient quantity of evidence to persuade a fair-minded, rational person that the finding made by the court is true. Possibility, speculation, conjecture, suspicion, or even a scintilla of evidence does not meet the standard necessary to qualify as substantial evidence, nor does it meet the minimum requirements of due process. *State v. Moore*,, 7 Wn. App. 1, 499 P.2d 16 (1972).

**2. The Court Erred In Concluding Cortez Did Not Prove By A Preponderance Of The Evidence That He Reasonably Believed J.S. Was Fourteen Years Old.**

A court's conclusions of law are reviewed de novo and must be supported by the findings of fact. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

Here, the court entered Conclusion of Law 3.3:

“The Respondent did not prove by a preponderance of the evidence that he reasonably believed J.S. was fourteen years old or older or less than thirty-six months younger than he was at the time of sexual intercourse based on declarations made by J.S.”

Cortez argues that not only did J.S. make explicit declarations regarding her age, but that he proved by a preponderance of the evidence that he reasonably believed those declarations. A preponderance of the evidence standard does not mean beyond a doubt, or even beyond a reasonable doubt. Rather, the term merely means the greater weight of evidence. *State v. Harris*, 74 Wash.60, 64, 132 P.735 (1913).

A reasonable belief must be supported by “declarations as to age” made by the complaining witness. *State v. Shuck*, 34 Wn.App. 456, 461, 661 P.2d 1020 (1983). Cortez’s older brother, Hernan, testified J.S. told him, in the presence of Cortez, that she was fifteen. (RP 455). Cortez and other witnesses testified J.S. told them she was fifteen during a discussion about Steffany Rowell’s Quinceanera. (RP 248, 249, 531, 536, 576, 608, 662).

Additionally, Cortez was aware J.S. was in the same grade as his fifteen-year-old niece, Steffany Rowell, supporting a reasonable belief that J.S. was fourteen or older.

An inference of age arising from the complaining witness's general behavior, appearance, and demeanor are insufficient to support an affirmative defense under RCW 9A.44.030. *Bennett*, 36 Wn.App. 181-82. However, the combination of explicit assertions of age, school grade, physical appearance, and the demeanor of the complaining witness can support a reasonable belief in the declaration of age. Even in a light most favorable to the State, a rational trier of fact could not have found Cortez failed to prove by a preponderance of the evidence that he reasonably believed J.S. to be at least fourteen years old.

**B. The Trial Court Erred When It Concluded The State Proved Beyond A Reasonable Doubt That Juan Carlos Cortez Barajas Was Guilty Of Rape Of A Child In The Second Degree.**

The court concluded Cortez was guilty of rape of a child in the second degree. Under due process, guaranteed under the United States Constitution, Fourteenth Amendment and the Washington Constitution, Article 1 § 3, the state must prove every element of a

crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Here, there was an admission that seventeen-year-old Cortez had sexual intercourse with thirteen-year-old J.S., and they were not married.

The introduction of the affirmative defense required the state to prove beyond a reasonable doubt that Cortez did not prove by a preponderance of the evidence that at the time of the offense he reasonably believed J.S. to be at least fourteen years old based upon declarations she made about her age. Cortez demonstrated he and others heard J.S. say she was fifteen and, he reasonably believed her. He met the necessary requirements of the affirmative defense.

The verdict here is contrary to the evidence. For this reason, the conviction must be reversed and dismissed with prejudice for insufficient evidence.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, appellant Cortez respectfully urges this court to reverse his conviction for rape of a child in the second degree and dismiss the charge with prejudice.

Dated this 24<sup>th</sup> day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Juan Carlos Cortez Barajas, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid or emailed on September 24, 2010, to Jessica Cafferty, c/o khorowitz@co.grant.wa.us; and Juan Carlos Cortez Barajas, 21003 Rd 11 NW, Quincy, WA 98848.

  
Marie Trombley

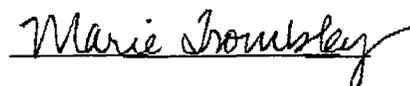
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MARIE TROMBLEY  
DIVISION III  
STATE OF WASHINGTON

## SECOND AMENDED CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Juan Carlos Cortez Barajas, COA No. 290166, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on September 24, 2010, to Juan Carlos Cortez Barajas, 21003 Rd 11 NW, Quincy, WA 98848 and Jessica Cafferty, Prosecuting Attorney's Office, PO Box 37, Ephrata, WA 98823.



Marie Trombley