

FILED

OCT 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29016-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUAN CARLOS CORTEZ BARAJAS, APPELLANT

BRIEF OF RESPONDENT

Karen Horowitz
Attorney for Respondent, State of Washington
WSBA # 40513
Grant County Prosecuting Attorney's Office
P.O. Box 37
Ephrata, WA 98823-0037
(509) 754-2011

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A. ASSIGNMENTS OF ERROR

The Respondent, State of Washington, asserts that no error occurred in the trial and conviction of the Appellant and respectfully requests that his conviction be affirmed.

B. STATEMENT OF THE CASE

The Appellant, Juan Carlos Cortez Barajas, was found guilty at an adjudicatory hearing of Rape of a Child in the Second Degree under RCW 9A.44.076. (CP 140)

Mr. Cortez Barajas and J.S. were together at a residence located at 612 L Street SW in Quincy, Washington on June 6, 2009. (CP 158) At some point during the late hours of June 6, 2009 or the early morning of June 7, 2009 Mr. Cortez Barajas and J.S. had sexual intercourse. (CP 159) This act occurred on a bed in a bedroom located at the L Street residence belonging to Mr. Cortez Barajas's brother. (CP 159)

On the morning of June 7, 2009 family members discovered Mr. Cortez Barajas and J.S. in bed together. (CP 159) The Quincy police department was called out to the residence and later that day Mr. Cortez Barajas was interviewed by Officer Trujillo and Detective Snyder at the Quincy Police Department. (CP 159)

During the interview Mr. Cortez Barajas admitted to having sexual intercourse with J.S. (CP 159) Mr. Cortez Barajas told Detective Snyder that J.S. was thirteen years old and at no time during the interview did Mr. Cortez Barajas inform the officers that he believed J.S. to be older than thirteen years of age. (CP 159)

J.S. was born on June 8, 1995; she was thirteen years old at the time of sexual intercourse. (CP 159) Mr. Cortez Barajas was born on March 16, 1992; he was seventeen years old at the time of sexual intercourse and was at least thirty-six months older than J.S. (CP 159) J.S. and Mr. Cortez Barajas were never married. (CP 159)

C. STATEMENT OF THE ISSUES

1. Did the trial court err when it found that Mr. Cortez Barajas did not prove by a preponderance of the evidence his affirmative defense that, based on declarations made by J.S, he reasonably believed J.S. was fourteen years of age or older or less than thirty-six months younger than he was at the time of sexual intercourse?

D. ARGUMENT

1. The State of Washington must prove each element of the crime beyond a reasonable doubt; the accused, if asserting an affirmative defense, must prove the defense by a preponderance of the evidence.

The trial court did not err when it entered Conclusion of Law 3.1 stating, “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) Further, the trial court did not err when it entered Conclusion of Law 3.3 stating, “The Respondent did not prove by a preponderance of the evidence that he reasonably believed J.S. was 14 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) RCW 9A.44.030 recognizes an affirmative defense to the crime of Rape of a Child in the Second Degree that the accused reasonably believed, based on declarations by the victim, that the victim was at least fourteen or was less than thirty-six months younger than the accused. RCW 9A.44.030(2), (3)(b). The accused must prove this defense by a preponderance of the evidence. RCW 9A.44.030(2).

Mr. Cortez Barajas misstates the law when he asserts that “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.” (Brief of Appellant 13) Instead, the State must prove each element of the crime beyond a reasonable doubt, and the accused, if asserting an

affirmative defense, is required to prove the defense by a preponderance of the evidence. *See, e.g., State v. Riker*, 123 Wn.2d 351, 366-67, 869 P.2d 43 (1994).

2. There was sufficient evidence for the trial court to find that the State of Washington proved the elements of Rape of a Child in the Second Degree beyond a reasonable doubt.

There was sufficient evidence to convict Mr. Cortez Barajas of Rape of a Child in the Second Degree under RCW 9A.44.076. When reviewing a sufficiency of the evidence challenge, the court considers whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. *State v. Hepton*, 113 Wn. App. 673, 681, 54 P.3d 233 (2002); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The essential elements necessary to convict Mr. Cortez Barajas of Rape of a Child in the Second Degree are (i) on or about June 6, 2009 Mr. Cortez Barajas had sexual intercourse with J.S., (ii) J.S. was at least twelve years old but less than fourteen years old, (iii) J.S. was not married to Mr. Cortez Barajas, (iv) Mr. Cortez Barajas was at least thirty-six months older than J.S., and (v) this act occurred in the State of Washington. *See* RCW 9A.44.076.

Mr. Cortez Barajas acknowledged that he had engaged in sexual intercourse with J.S. at a residence in Quincy, Washington. (RP 667)

During the taped interview Mr. Cortez Barajas stated that J.S. was thirteen years old. (RP 320, Exh. 5) Maria Barajas testified that Mr. Cortez Barajas was born on March 16, 1992. (RP 264) J.S. testified that she was born on June 8, 1995 (RP 97) and that she and Mr. Cortez Barajas had never been married. (RP 98-99) As a result, the trier of fact was able to conclude that the State of Washington proved the elements of Rape of a Child in the Second Degree beyond a reasonable doubt.

3. The trial court did not err by concluding that Mr. Cortez Barajas did not prove his affirmative defense by a preponderance of the evidence.

The trial court did not err when it determined that Mr. Cortez Barajas did not prove by a preponderance of the evidence his affirmative defense that he reasonably believed J.S. was fourteen years old or older based on declarations made by J.S. The trial court, as finder of fact, is free to weigh the evidence and make credibility determinations, and the reviewing court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002).

The standard of review for sufficiency of the evidence when a defendant is required to prove an affirmative defense by a preponderance of the evidence 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), citing *Wilson v. State*, 257 Ga. 444, 359 S.E.2d 891 (1987) (challenge of a conviction based on the affirmative defense of insanity), *State v. Roy*, 395 So. 2d 664 (La. 1981) (insanity defense), *State v. Bell*, 647 So. 2d 498, 500 (La. App. 1994) (the defense of reasonable discipline of a child).

A number of witnesses testified that J.S. said she was at least fourteen years old either directly to, or in the presence of, Mr. Cortez Barajas. (RP 455, 481, 497, 511, 536, 545, 608) J.S., however, testified that she never told Mr. Cortez Barajas or any of his family members that she was older than thirteen years old. (RP 134) In fact, she testified that she had discussed with Stefanny Rowell the fact that she was thirteen years old. (RP 181) Further, on cross-examination J.S. denied stating that she was too old for Andrew Rowell (RP 163), denied having a conversation about holding a joint quincenera with Stefanny Rowell (RP 165), denied having told Hernan Cortez that she was only two years younger than seventeen year-old Ashley (RP 166), and denied having lied to other people about her age (RP 176). The trial court is not required to adopt the testimony of the defense witnesses. As the finder of fact, the trial court was permitted to conclude based on this record that Mr. Cortez

Barajas did not prove his affirmative defense by a preponderance of the evidence.

E. CONCLUSION

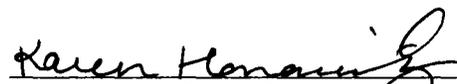
For the reasons set out above, the State respectfully requests that the Court affirm the conviction of Mr. Cortez Barajas and the disposition imposed by the trial court.

DATED: October 7, 2010

Respectfully submitted:

D. ANGUS LEE,

Prosecuting Attorney



Karen Horowitz, WSBA #40613

Deputy Prosecuting Attorney

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v.)	
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JUAN CARLOS CORTEZ BARAJAS,)	DECLARATION OF MAILING
)	
Appellant.)	
_____)	

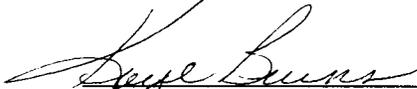
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and his attorney containing a copy of the Brief of Respondent in the above-entitled matter.

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PO Box 28459
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Dated: October 7, 2010.



Kaye Burns

Declaration of Mailing.