

FILED

Jun 05, 2013

Court of Appeals

Division III

State of Washington

30638-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-APPELLANT

v.

KURT D. BONSER, APPELLANT/CROSS-RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF

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A. STATEMENT OF THE CASE

The court instructed the jury:

It is *not* a defense to the charge of rape of a child in the third degree that at the time of the acts the defendant did not know the age of RMJ or that the defendant believed her to be older.

It is, however, a defense to the charge of rape of a child in the third degree that at the time of the acts the defendant reasonably believed that RMJ was at least sixteen years of age based upon declarations as to age by RMJ.

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 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 the charge of rape of a child in the third degree.

(CP 8)

It is undisputed that the alleged victim told the jury that she had repeatedly assured Mr. Bonser that she was at least sixteen years old.

(RP 291, 294, 317; Cross-App Br at 4)

B. ARGUMENT

The defendant's state of mind, including reasonable belief, may be inferred from circumstantial evidence. *See State v. Bryant*, 89 Wn. App. 857, 870-71, 950 P.2d 1004 (1998). "RCW 9A.08.010 permits a jury to find that a defendant has subjective knowledge if the jury

finds that an ordinary person would have had knowledge under the circumstances.” *State v. Hepton*, 113 Wn. App. 673, 683, 54 P.3d 233 (2002) citing *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).

Evidence the alleged victim told the defendant she was sixteen years old is sufficient to support the inference that the defendant reasonably believed that she was sixteen.

C. CONCLUSION

This court should affirm the trial court’s giving the affirmative defense jury instruction under these circumstances.

Dated this 6th day of June, 2013.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489

Attorney for Appellant/Cross-Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Appellant/Cross-Respondent,)	No. 30638-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
KURT D. BONSER,)	
)	
Respondent/Cross-Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on June 5, 2013, I served a copy of the Appellant/Cross-Respondent's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
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I certify under penalty of perjury under the laws of the State of Washington that on June 5, 2013, I mailed a copy of the Appellant/Cross-Respondent's Reply Brief in this matter to:

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Signed at Spokane, Washington on June 5, 2013.


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