

86145-5
NO. 28868-4-III

FILED
OCT 13 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON SCOTT CORISTINE,

Appellant.

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

The Honorable Michael P. Price, Judge

APPELLANT'S OPENING BRIEF

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT	1
II. ASSIGNMENTS OF ERROR.....	2
1. The trial court erred in giving, over defense objection, Court’s Instruction No. 13, an affirmative defense instruction, in violation of Coristine’s state and federal constitutional right to control his own defense.....	2
2. The Court’s Instruction 13, under the circumstances of the case, unconstitutionally shifted the burden of proof in violation of Coristine’s state and federal constitutional rights to due process of law.....	2
3. Because there was insufficient evidence to support the giving of Court’s Instruction No. 13, the instruction constituted a comment on the evidence in violation of the state constitution.	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
1. Did the trial court deny Coristine his state and federal constitutional right to control his own defense by giving an affirmative defense instruction over his objection?	2
2. Did the trial court err in giving the affirmative defense instruction where there was no evidence to support it?	3
3. Did the trial court’s affirmative defense instruction, under the facts of the case, constitute a shifting of the burden of proof and violate Coristine’s state and federal constitutional rights to due process of law?.....	3
4. Did the trial court’s affirmative defense instruction, given that there was insufficient evidence to support it, constitute a comment on the evidence in violation of the Washington State Constitution?	3

IV. STATEMENT OF THE CASE.....	3
a. The party.....	3
b. Jury instructions.	8
c. The verdict.....	11
d. The sentence.....	11
V. ARGUMENT.....	11
THE TRIAL COURT ERRED IN SUBMITTING, OVER DEFENSE OBJECTION, AN AFFIRMATIVE DEFENSE INSTRUCTION.	11
a. It was Coristine’s constitutional right to determine his defense at trial.	12
b. There was insufficient evidence to justify giving the affirmative defense instruction.	13
c. The instruction shifted the burden of proof.	15
d. Court’s Instruction 13 was a comment on the evidence.....	17
e. Summary.	19
VI. CONCLUSION.....	20
CERTIFICATE OF MAILING.....	20

TABLE OF AUTHORITIES

Page

Cases

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 15

Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975) 12

Heitfield v. Benevolent & Protective Order of Keglers, 36 Wn. App. 685, 200 P.2d 655 (1950)..... 17

In re Winship, 397 U.S. 358, 25 L. Ed 2d 368, 90 S. Ct. 1068 (1970)..... 15

Neder v. United States, 527 U.S. 1, 44 L. Ed. 2d 35, 119 S.Ct. 1827 (1999)..... 15

North Carolina v. Alford, 400 U.S. 25, 47 L.Ed.2d 162, 91 S.Ct. 160 (1970)..... 12, 13

State v. Cronin, 142 Wn.2d 568, 14 P.2d 752 (2000)..... 15

State v. Galesa, 63 Wn. App. 833, 822 P.2d 303 (1992) 13

State v. Hansen, 46 Wn. App. 272, 730 P.2d 706 (1986) 18

State v. Jackson, 87 Wn. App. 801, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999)..... 15

State v. Jacobsen, 78 Wn.2d 491, 447 P.2d 884 (1970)..... 18

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) 13

State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983) 12

State v. Lampshire, 74 Wn.2d 888, 447 P.2d 727 (1968)..... 18

State v. McSorley, 128 Wn. App. 598, 116 P.3d 431 (2005) 12

<u>State v. Painter</u> , 27 Wn. App. 708, 620 P.2d 1001 (1980), <u>review denied</u> , 95 Wn.2d 1008 (1981)	18
<u>State v. Speece</u> , 115 Wn.2d 360, 798 P.2d 294 (1990).....	14
<u>Tremblay v. Overholser</u> , 199 F.Supp 569 (D.D.C. 1961).....	13
<u>United States v. Laura</u> , 607 F.2d 52, 56 (3 rd Cir. 1979).....	12

Statutes

RCW 9.94A.507.....	1, 11
RCW 9A.44.030(1).....	9

Other Authorities

Washington State Constitution Article 4, § 16	17
WPIC 19.03.....	9

I. SUMMARY OF ARGUMENT

Brandon Coristine, on trial for second degree rape and facing the prospect of life imprisonment under RCW 9.94A.507, was stripped by the court and the prosecutor of his constitutional right to defend his case as he saw fit. The prosecutor alleged that Coristine had sex with Laura Fjelstad when she could not consent because she was so intoxicated as to be physically helpless or mentally incapacitated. While Coristine agreed that he had sex with Fjelstad, he presented evidence that Fjelstad was anything but helpless or incapacitated and was, very much, the sexual aggressor.

Coristine's chosen defense was "Prosecutor, prove your case." But the prosecutor believed that Coristine should have to prove his innocence instead. Over Coristine's objection, the court gave an affirmative defense instruction requiring Coristine to prove by a preponderance of the evidence that he reasonably believed Fjelstad was not helpless or incapacitated during the sex act that he testified she aggressively initiated.

By telling the jury in its instructions that it was Coristine's burden to essentially disprove that Fjelstad was incapacitated or helpless, the court did two things. First, it undermined Coristine's chosen defense by placing the burden on him to prove that although Fjelstad was incapacitated or helpless, he reasonably believed that she was capable of consenting to sex. That was not how Coristine chose to defend the case.

It was unfair for the prosecutor and the court to dictate to Coristine what his defense actually was after all of the evidence was presented and just before closing argument. Second, it told the jury that it was the court's opinion that Fjelstad's incapacitation or helplessness had been proven. This was an impermissible comment on the evidence.

Coristine is entitled to a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in giving, over defense objection, Court's Instruction No. 13, an affirmative defense instruction, in violation of Coristine's state and federal constitutional right to control his own defense.

2. The Court's Instruction 13, under the circumstances of the case, unconstitutionally shifted the burden of proof in violation of Coristine's state and federal constitutional rights to due process of law.

3. Because there was insufficient evidence to support the giving of Court's Instruction No. 13, the instruction constituted a comment on the evidence in violation of the state constitution.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court deny Coristine his state and federal constitutional right to control his own defense by giving an affirmative defense instruction over his objection?

2. Did the trial court err in giving the affirmative defense instruction where there was no evidence to support it?

3. Did the trial court's affirmative defense instruction, under the facts of the case, constitute a shifting of the burden of proof and violate Coristine's state and federal constitutional rights to due process of law?

4. Did the trial court's affirmative defense instruction, given that there was insufficient evidence to support it, constitute a comment on the evidence in violation of the Washington State Constitution?

IV. STATEMENT OF THE CASE

a. The party.

Brandon Coristine shared a Spokane home with his fiancée Ashley, Ashley's sister Trisha VanDusen, Ashley's best friend, Kayla Ericson, Coristine's sister Brianna Zimmerman, and Kevin Gelines, a friend of Coristine's mother. 1RP at 37; 2RP at 249-50; 3RP¹ at 304-05. A new roommate, Laura Fjelstad, was also joining the house. 2RP at 78-79. She knew Kevin through her ex-boyfriend. 2RP at 78.

Fjelstad's first night at the home, December 6, 2008, coincided with a bachelorette party for Coristine and Ashley who were planning to get married in a few days. 2RP at 78-82, 252. The party attendees were

¹ 1RP - January 11 and 12, 2010
2RP - January 13, 2010
3RP - January 14 and 19, March 3, 2010

the people who lived at the home and other friends. 3RP at 306. In all, about 12 or 13 people were there. 2RP at 253; 3RP at 306. Everybody was drinking except Kayla and Trisha. 2RP at 254; 3RP at 307.

Coristine testified that during the party, Fjelstad was “extremely flirting” with him and saying things like, “Oh, come on, Brandon, your wife will never know.” 3RP at 350. She attempted to grab his groin area and his leg and tried to kiss him once. 3RP at 350. She wanted him to come upstairs to her bedroom and have sex with her after the party. 3RP at 352. She told him if he did not do that, she would tell his wife that he raped her and cheated on her. 3RP at 352.

Coristine noticed Fjelstad moving around the house. She was moving just fine. 3RP at 352. She did not stumble or lose her balance. Id. She did not slur her words. 3RP at 353. She did not seem to be overly intoxicated. 3RP at 353.

Fjelstad behavior did not go unnoticed by Ashley. Fjelstad was flirting with Coristine and hanging on him. 3RP at 308. She saw Fjelstad rub Coristine’s inner thigh. 3RP at 309. She decided to overlook the behavior because she did not think she had anything to worry about. 3RP at 310. She did not notice Fjelstad slurring her words. 3RP at 308.

Trisha also noticed Fjelstad’s flirtatious behavior toward Coristine. 2RP at 256. She thought Fjelstad kind of acted like she was intoxicated

but she did not feel like Fjelstad was extremely intoxicated. 2RP at 256-57.

Fjelstad went to bed early. 2RP at 92. As she was going to bed she said, "I'm passing out, good night." 1RP at 45. Kevin Gelines took that to mean that she was literally going to bed to pass out from drinking too much. 1RP at 45. During her testimony, Fjelstad could not recall how much she had had to drink. 1RP at 91. When she went to bed, she felt like she was getting drunk and had the "spins." 1RP at 92. After she had gone to bed, she remembered Coristine opening her door and asking her if she needed a trash can. 2RP at 95. Coristine did this as a precautionary measure, not because he thought she was intoxicated, but because she said she was not feeling well earlier. 3RP at 354. Fjelstad denied being attracted to Coristine or doing anything to suggest that she was interested in him. 2RP at 96.

After the visitors left, Coristine made a tour of the home to make sure all of the windows and door were locked. 3RP at 353. The house was not in the best neighborhood so he made it a practice to make sure the house was secured before going to bed each night. Id. He tucked his head into Fjelstad's room and she said that she was alright. 3RP at 354. He shut the door and left. 3RP at 354.

As he was falling asleep, he heard a loud noise upstairs above his room. 3RP at 354. He went upstairs and checked on Brianna, Kayla, and Tricia. They all seemed fine. 3RP at 355. He turned and noticed that Fjelstad's door was open. 3RP at 355. All of a sudden, Fjelstad grabbed him, he lost his balance, and fell into her room. 3RP at 355. She shoved her hands down his pants and invited Coristine to have sex with her. 3RP at 355. He told her "no" but ultimately gave in. 3RP at 355-56. Id. She put his penis in her mouth to help him get an erection. 3RP at 356. She asked him which sexual position he preferred. 3RP at 356. They had sex "doggie style." 3RP at 356. Coristine relented and agreed to the sex. Id. Fjelstad was very participatory. 3RP at 357. When they were done, he went back downstairs.

At some point after that, Fjelstad went across the hall and talked to Trisha. 2RP at 259. Fjelstad said that she had a dream about sleeping with someone but she did not go into detail. 2RP at 260. Fjelstad was not upset. 2RP at 260. She just wanted to talk about her dream because she could not get back to sleep. Id. The three girls went downstairs and tried to wake up Kevin but he was asleep. 2RP at 262. Fjelstad said the Branson was cute and it was too bad he was marrying Ashley. 2RP at 262-63. Fjelstad said something derogatory about Ashley and Tricia told her that was uncalled for. 2RP at 263-64. Fjelstad said that she thought

the guy in her dream was Coristine. 2RP at 264. Trisha told Fjelstad that if she had had sex with Coristine, Ashley was going to be mad and would kick her out. 2RP at 264. Fjelstad started to cry and said the Coristine raped her. 2RP at 264. Trisha told her if she had been raped, she should go to the hospital and get a DNA swap. 2RP at 264.

Fjelstad described the sex differently. During her testimony, she claimed little memory of anything. 2RP at 99. She “just remembered coming to and realizing my pajamas were around my knees and realizing something wasn’t right.” 2RP at 98. She went across the hall to the girls’ room and woke them up and told them that she thought someone was in her room. Id. The girls told her to go back to sleep. Id. She slept on the girls’ floor. 2RP at 99. In talking to the girls, they led her to believe it was Kevin. 2RP at 100. She felt really violated. 2RP at 101. She went downstairs to try and wake up Kevin but he was too drunk. 2RP at 104. She called her best friend and ended up going to the hospital to get a rape kit done. 2RP at 102.

She later told a police officer that she was lying on her stomach, she felt somebody pull her pajama bottoms down, she felt a pain in her vagina and the weight of a person on top of her. She was in and out of consciousness. She heard the door slam and that jarred her awake. 2RP at 182.

She testified that Coristine called while she was at the hospital and told her, "I think it was me." 2RP at 108. He also said that he was really drunk and thought she wanted it and asked that she not tell his wife. 2RP at 108.

She later returned to the house with her father and moved her things out. 2RP at 109. That she and Coristine had sex was confirmed by DNA results. 2RP at 111, 195-208.

Ashley and Coristine married a few days later. 3RP at 305.

Coristine was embarrassed that he had relented and had sex with Fjelstad. 3RP at 358. He felt terrible for having cheated on Ashley. Id. He acknowledged being pretty drunk that night. 3RP at 358, 360. He had hoped that the incident would remain a secret. 3RP at 358. When Spokane Detective Anderson spoke with him, he initially said he did not have sex with Fjelstad. 2RP at 235. The second time he talked to Anderson, Coristine said that he was intoxicated and did not remember having sex with Fjelstad and that he did not mean to if he did.

b. Jury instructions.

Before the trial began, defense counsel told the court that Coristine's defense was that the State could not prove that Fjelstad was mentally incapacitated or physically helpless. 1RP at 27-27. That defense

was born out by Coristine's testimony that Fjelstad was the sexual aggressor. 3RP 355-56.

During the post trial discussion about jury instructions, Coristine did not object to the State's proposed Jury Instruction. 3RP at 397. (See Supplemental Designation of Clerk's Papers (Plaintiff's Proposed Instructions to the Jury, sub nom. 25). However, the court proposed giving WPIC 19.03, the affirmative defense to second degree rape. 3RP at 394-95. That instruction reads,

It is a defense to the charge of rape in the second degree that at the time of the acts the defendant reasonably believed that Laura Fjelstad was not mentally handicapped 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 of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established the defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 20 (Court's Instruction 13); See RCW 9A.44.030(1).

The prosecutor sided with the court and asked that the affirmative defense instruction be given. 3RP at 395-98. Coristine objected:

MR. COMPTON: First of all, an element of the crime as it's been charged is that Ms. Fjelstad was incapacitated. Therefore, the State must prove beyond a reasonable doubt that Ms. Fjelstad was incapacitated. It's been our defense that in fact she was no incapacitated. The mere fact that she may have had some alcohol does not necessarily make you incapacitated. That instruction I think would be more applicable where you had a fact pattern where, in fact, we concede, yes, Ms. Fjelstad was incapacitated,

however, it was reasonable for Mr. Coristine to have believed that, in fact, she was not. But from our point of view, she was, although drinking, still capable of realizing what was going on and engaging in that behavior that may have affected her judgment, but that does not mean she's incapacitated and that's why we took such pains to talk about her behavior at the party, about why she slurred words, that sort of stuff. So I think we have to be careful about shifting the burden of proof because that's what that instruction does. So from our point of view she was not incapacitated therefore and, of course, they engaged in sexual relations. It was consensual but, of course, if it wasn't consensual we would be talking about rape of another form but I think that's how the consent fact fits into this fact pattern.

3RP 397-98.

Despite Coristine's objection, the court instructed the jury on the affirmative defense. 3RP at 399.

The jury was also given Court Instruction 9 that lists the elements for second degree rape.

To convict the defendant of the crime of rape in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on December 7, 2008, the defendant engaged in sexual intercourse with Laura Fjelstad;
- (2) That the sexual intercourse occurred when Laura Fjelstad was incapable of consent by reason of being physically helpless or mentally incapacitated;
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 16.

c. The verdict

The jury deliberated “for at least two full days,” before finding Coristine guilty. 3RP at 460; CP 24.

d. The sentence.

Coristine, whose only previous crime had been malicious mischief as a juvenile, was sentenced to a minimum of 78 months and a maximum term of life.² CP 27, 29.

Coristine filed a timely notice of appeal. CP at 39-40.

V. ARGUMENT

THE TRIAL COURT ERRED IN SUBMITTING, OVER DEFENSE OBJECTION, AN AFFIRMATIVE DEFENSE INSTRUCTION.

The trial court erred in submitting, over defense objection, an affirmative defense instruction. It was Coristine’s state and federal constitutional prerogative to determine his defense at trial. Moreover, there was insufficient evidence to support giving the affirmative defense instruction.

² See RCW 9.94A.507

Because there was insufficient evidence to support the affirmative defense, under the facts of the case, the instruction unconstitutionally shifted the burden of proof to Coristine to prove his innocence by a preponderance of the evidence and constituted a judicial comment on the evidence.

a. It was Coristine's constitutional right to determine his defense at trial.

In State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983), the Supreme Court held that a trial court may not, as a general rule, enter a plea of not guilty by reason of insanity over the defendant's objection. Accord, State v. McSorley, 128 Wn. App. 598, 605, 116 P.3d 431 (2005). The decision in Jones rested not only on the defendant's right to determine what plea to enter, but, in large part, on the constitutional right to control his own defense as set forth in Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), and North Carolina v. Alford, 400 U.S. 25, 47 L.Ed.2d 162, 91 S.Ct. 160 (1970). Faretta is based on "the conviction that a defendant has the right to decide within limits the type of defense he wishes to mount." United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979).

“[C]ourts should not ‘force any defense on a defendant in a criminal case,’ particularly when advancement of the defense might ‘end in disorder.’” North Carolina v. Alford, 400 U.S. at 33 (quoting Tremblay v. Overholser, 199 F.Supp 569, 570 (D.D.C. 1961)).

The court’s giving of an affirmative defense instruction over Coristine’s objection violated his state and federal constitutional right to control his case and decide what defense he wanted to mount at trial. For this reason alone, Coristine’s conviction should be reversed and his case remanded for retrial.

b. There was insufficient evidence to justify giving the affirmative defense instruction.

Defense instructions are proper only where there is sufficient evidence from which the jury could find the defense proven. See, e.g., State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (“to raise a claim of self-defense before the jury, the defendant must produce some evidence that his or her actions occurred in circumstances amounting to self-defense”); State v. Galesa, 63 Wn. App. 833, 822 P.2d 303 (1992) (an entrapment defense should be given only where there is evidence to support the necessary finding that the defendant was not a willing participant in the crime).

Here, the defense never asserted in argument, nor was there any evidence introduced at trial, that Coristine, while having sex with Fjelstad,

reasonably believed that Fjelstad was not mentally incapacitated and/or physically helpless. Coristine and his witnesses testified that although Fjelstad drank alcohol that evening, she was fine. No mental incapacity. No physical helplessness. To the contrary, Fjelstad acted quite purposefully in her pursuit of Coristine's affections that evening. Once she ensnared Coristine in her bedroom, she even demanded of Coristine a particular sexual position.

Conversely, if one were to believe Fjelstad's testimony, she was essentially comatose when Coristine took advantage of her. Given her description of herself, Coristine could not have reasonably believed anything but that Fjelsad was mentally incapacitated and/or physically helpless during the sex act.

Because there was insufficient evidence to support the giving of the instruction, even if Coristine had requested it, the trial court erred in giving the affirmative defense instruction over his objection. It is not enough to justify giving an affirmative defense instruction because the jury might have disbelieved the state's evidence. State v. Speece, 115 Wn.2d 360, 362, 798 P.2d 294 (1990) (improper to give lesser included offense instruction solely on the grounds that the jury might disbelieve some of the state's evidence; there must be affirmative evidence that the lesser include offense was committed).

The court's error in giving the affirmative defense instruction requires reversal of Coristine's conviction.

c. The instruction shifted the burden of proof.

As a matter of due process of law, the State bears the burden of proving every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 25 L. Ed 2d 368, 90 S. Ct. 1068 (1970). An instruction which relieves the state of the burden of proof is constitutional error. See e.g., State v. Cronin, 142 Wn.2d 568, 14 P.2d 752 (2000); State v. Jackson, 87 Wn. App. 801, 804, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999). As constitutional error, it is harmless only if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder v. United States, 527 U.S. 1, 18, 44 L. Ed. 2d 35, 119 S.Ct. 1827 (1999) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Under Neder and Chapman, the error could not be harmless in this case.

Here, *if* Coristine had some reason to believe that Fjelstad was mentally incapacitated or physically helpless but still reasonably believed that she was capable of consenting to sex, the affirmative defense instruction would have permitted the jury to acquit him if they found his testimony convincing.

Coristine, however, testified that Fjelstad was the sexual aggressor and that he had no reason whatsoever to believe that she was mentally incapacitated or physically helpless. Under these circumstances, the jurors must have interpreted the affirmative defense instruction as requiring Coristine to establish by a preponderance of the evidence that Fjelstad was apparently mentally incapacitated or physically helpless but that he nonetheless reasonably believed that she was capable of consenting to sex. This is what the instruction directed him to do:

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 Laura Fjelstad was not 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 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 this charge.

CP 20.

Since there was no evidence for the jury to consider whether Coristine *reasonably believed* that Fjelstad was mentally incapacitated or physically helpless when they had sex, the instruction entirely shifted the burden to Coristine to establish the innocence of his actions by a preponderance of the evidence. Given the marked difference between Fjestad's self-described essentially comatose state and Coristine's

description of Fjelstad as the sexual aggressor, the jurors might well have had a reasonable doubt even if they did not conclude that Coristine had proved his innocence by a preponderance of the evidence. The jury obviously struggled to return a verdict because they deliberated “for at least two full days.” 3RP at 460.

Since it cannot be said that the erroneous instruction did not contribute to the verdict, Coristine’s conviction should be reversed.

d. Court’s Instruction 13 was a comment on the evidence.

Washington State Constitution Article 4, § 16 prohibits the court from commenting on the evidence at trial:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The purpose of Article 4, §16 is to keep separate the respective functions of the judge and the jury:

[T]he object of this constitutional provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted. The jury is the sole judge of the credibility and weight of the evidence, and the courts should be extremely careful of any comments made in the presence of the jury, because such comments may have great influence upon the final determination of the issues.

Heitfield v. Benevolent & Protective Order of Keglers, 36 Wn. App. 685, 689, 200 P.2d 655 (1950).

Because a comment on the evidence is constitutional error, it may be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968); State v. Hansen, 46 Wn. App. 272, 300, 730 P.2d 706 (1986). Whether or not the statement by the court was intended as a comment is irrelevant. Lampshire, 74 Wn.2d at 892.

A statement or instruction by the judge is a comment on the evidence “if it conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial.” State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981). A comment is constitutional error where it expresses “the court’s attitude toward the merits of the case or the court’s evaluation relative to a disputed issue is inferable from the statement.” Hansen, 46 Wn. App. at 300 (emphasis in original).

Comments by the court must be reviewed in light of the facts and circumstances of the case. Painter, 27 Wn. App. at 715; State v. Jacobsen, 78 Wn.2d 491, 495, 447 P.2d 884 (1970).

Here, the judge’s affirmative defense instruction conveyed to the jury that the trial court’s opinion was that the evidence established that Fjelstad was mentally incapacitated or physical helpless and that Coristine had a burden to prove that he reasonably believed Fjelstad had the mental

or physical ability to consent to sex. The instruction only made sense if the judge believed that Fjelstad was incapacitated or helpless. The only evidence of that was Fjelstad's testimony. Thus, the affirmative defense instruction conveyed to the jury that the judge believed Fjelstad. If Coristine failed to meet his burden that he reasonably believed Fjelstad had the mental or physical ability to consent to sex, he was guilty of the crime charged. It is hard to imagine a more unfairly prejudicial comment on the evidence. The giving of the instruction therefore should require reversal of Coristine's conviction.

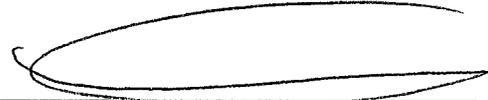
e. Summary.

The court's giving of an affirmative defense instruction in this case, over defense objection that he was not raising that defense, allowed an extraordinary intrusion into the right of a criminal defendant to control his own defense. This instruction was even more remarkable given that it was unsupported by the evidence at trial. The giving of the instruction represented not only a violation of Coristine's rights to present a defense, it shifted the burden of proof to him to establish his lack of intent to commit the crime and it constituted an improper comment on the evidence by the trial court. The improper instruction requires reversal of Coristine's conviction.

VI. CONCLUSION

Coristine's conviction should be reversed. He is entitled to a new trial.

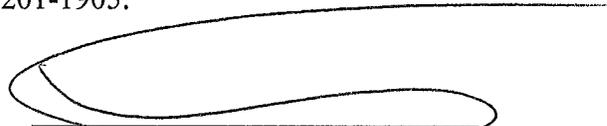
Respectfully submitted this 9th day of October 2010.



LISA E. TABBUT/WSBA #21344
Attorney for Brandon Scott Coristine

CERTIFICATE OF MAILING

I certify that on October 9, 2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Mark Lindsey, Spokane County Prosecutor's Office, 1100 W. Mallon Ave., Spokane, WA, 99260-2043; (2) Brandon S. Coristine/DOC#337530, Washington State Penitentiary, 1313 13th Ave. Walla Walla, WA 99362, and (3) the original and one copy of this documents to Renee S. Townsley, Clerk, Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201-1905.



LISA E. TABBUT, WSBA #21344