

No. 45242-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Marcos Lozano,

Appellant.

Thurston County Superior Court

Cause No. 09-1-00446-7

The Honorable Judge Christine Schaller

Appellant's Supplemental Brief

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SUPPLEMENTAL ISSUE AND ASSIGNMENT OF ERROR

The trial court erred by instructing jurors on the “reasonable belief” affirmative defense.

ISSUE: The prosecution must disprove any defense that negates an element of a charged crime. Here, Mr. Lozano presented a defense of consent. Did the trial court violate Mr. Lozano’s Fourteenth Amendment right to due process by instructing jurors that he bore the burden of proving he reasonably believed the alleged victim capable of consent?

SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS

At his trial for second-degree rape, Marcos Lozano presented evidence that the alleged victim consented to intercourse. RP (7/24/13) 238-254, 316-353; RP (7/25/13) 365-379, 423-439. He also presented expert testimony on confabulation, which occurs when a person with partial amnesia fills in memory gaps with socially positive conclusions or overheard information. RP (7/24/13) 267-270.

The prosecutor proposed an instruction on the affirmative defense contained in RCW 9A.44.030(1). The trial court adopted the proposed instruction and told jurors that Mr. Lozano bore the burden of proving by a preponderance that he reasonably believed the alleged victim was neither mentally incapacitated nor physically helpless. CP 111.

After conviction and sentencing, Mr. Lozano appealed. CP 174-187, 156-170.

ARGUMENT

A. Standard of Review

Constitutional issues are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). Legal errors in jury instructions are also reviewed *de novo*. *State v. Condon*, No. 88854-0, 2015 WL 114156, at *3 (Wash. Jan. 8, 2015). Instructions must

make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

The Court of Appeals will review an issue raised for the first time on appeal if it presents a manifest error affecting a constitutional right. RAP 2.5(a)(3). The court may also review other issues that do not meet this standard. *See State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

B. The trial court’s “reasonable belief” instruction impermissibly shifted the burden of proof.

In a criminal case, the prosecution “cannot require the defendant to disprove any fact that constitutes the crime charged.” *State v. W.R., Jr.*, 336 P.3d 1134, 1136 (Wash. 2014). A defense that negates an element “is *not* a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense.” *Id.*, at 1137. Where a defense negates an element, “the legislature can only require the defendant to present sufficient evidence to create a reasonable doubt.” *Id.*

In *W.R.*, the Supreme Court differentiated between defenses that cannot “coexist” with the charged crime and those that merely excuse the charged crime. *Id.*, at 1138. Where a defense cannot coexist with the crime, it necessarily negates an element, and the state must disprove the

defense. *Id.* Applying this reasoning, the court invalidated an instruction burdening the defendant with proving consent in a rape case. *Id.*

Here, the state alleged that Mr. Lozano “did engage in sexual intercourse with A.E.B., when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.” CP 3. He defended against the charge by presenting evidence and arguing actual consent. He did not suggest that he reasonably believed her capable of consent; rather, he insisted that she actually consented. RP (7/23/13) 53-184; RP (7/24/13) 189-353; RP (7/25/13) 365-447.

Under these circumstances, Instruction No. 9 impermissibly shifted the burden of proof. Mr. Lozano’s defense—that A.E.B. initiated and *actually consented* to intercourse—cannot coexist with the completed crime, which requires proof that she was *incapable* of consent. A defense of actual consent negates the “incapable of consent” element. *Id.*

Mr. Lozano’s defense did not rest on a “reasonable belief” regarding her capacity. Nonetheless, the prosecutor proposed the reasonable belief instruction and relied on it at trial to argue that the jury couldn’t acquit under Mr. Lozano’s theory of the case unless he proved a reasonable belief in her capacity by a preponderance. RP (7/25/13) 417, 421, 446-447.

In a proper case, the instruction would not violate due process. However, this is not such a case. Here, Mr. Lozano's defense of actual consent could not coexist with the completed crime, and he had no burden. The court's instructions did not make this manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.

Constitutional error requires reversal unless the prosecution can prove harmlessness beyond a reasonable doubt. *Id.*, at 1140. The state cannot make that showing here. Absent the improper "reasonable belief" instruction, jurors might well have concluded that the prosecution failed to prove the absence of consent beyond a reasonable doubt. *Id.*

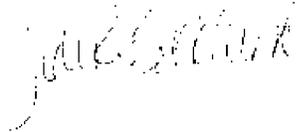
Mr. Lozano's conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

CONCLUSION

For the foregoing reasons, the court should overturn Mr. Lozano's conviction and remand the case for a new trial.

Respectfully submitted on January 20, 2015.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

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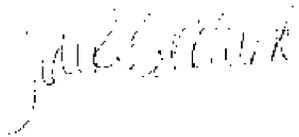
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 20, 2015.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

January 20, 2015 - 8:03 AM

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