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No. 71013-3-I
Snohomish County Superior Court No. 11-8-01268-9, 12-1-00138-8

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

AMOS GYAU,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael Downes and Richard T. Okrent, Judges

APPELLANT'S OPENING BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

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2. The trial court erred in finding that Pereira's suicide attempt and psychological problems corroborate her claim of traumatic rape and that she appeared to suffer from post-traumatic stress disorder as a result of being raped by the defendant. Bench Trial Findings of Fact Nos. 49 & 50.

3. The trial court erred in finding that Gyau was more sophisticated and mature than his peers. Decline Finding of Fact 1.14.

4. The trial court erred in finding that the adult system offered better treatment and supervision than the juvenile system. Decline Finding of Fact 1.16.

5. At the decline hearing, the trial court erred in failing to consider Gyau's immigration status.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. In a prosecution for second degree rape where the defendant argues that the alleged victim consented, the State must prove lack of

consent beyond a reasonable doubt. Must Gyau's conviction be reversed because the trial judge never made any finding on this element?

2. Did the trial court err in finding that the alleged victim's post-incident suicide attempt and psychological problems made her claim of rape more credible?

3. Because this case was a "credibility contest," can the State show that these two errors are harmless beyond a reasonable doubt?

4. Should the trial court's decision to decline jurisdiction be reversed where Gyau was not particularly mature and where the trial court misunderstood the consequences of an adult sentence?

III.
STATEMENT OF THE CASE

Amos Gyau was charged with one count of second degree rape. He was 17 on September 21, 2011, when the alleged rape took place. Thus, he was initially charged in Snohomish County Juvenile Court.

A. DECLINE HEARING

On September 29, 2011, he appeared for arraignment. 9/29/11 RP 2.[1] His mother hired private counsel. *Id.* The State asked to increase bail

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[1] The transcripts in the juvenile case are not sequentially paginated, so they are referred to as "DATE RP PAGE." The transcripts in the adult case are sequentially paginated, so they are referred to as "RP PAGE."

because the victim "is asking the Court to impose an even higher amount than is being requested by the State." 9/29/11 RP 4. The prosecutor said:

> She feels that the defendant, if released, would pose a threat to her safety, and she does not believe that the charges that have currently been filed correctly reflect the full extent of the defendant's criminal conduct towards her.

9/29/11 RP 4. The State cited to one comment by Gyau that she "might" send him back to Ghana if he continued to "get in trouble." 9/29/11 RP 5. The juvenile court judge increased the bail to $100,000. 9/29/11 RP 7.

On October 3, 2011, Gyau appeared with new counsel. At that time, Gyau waived his right to a speedy decline hearing. 10/3/11 RP 2-4.

On October 19, 2011, Gyau appeared with his counsel who asked the decline hearing be reset for November 9, 2011. His counsel said that he could not "go forward and have me representing him fairly if I have not really talked to him." 10/19/11 RP 2. The State objected because it had Detective Arnett present and ready to testify. 10/19/11 RP 3. But she also stated that

> Defense counsel has informed me that he and his client would stipulate to the admissibility of the police reports...

Id. The judge then specifically asked if counsel so stipulated and counsel said "yes." 10/19/13 RP 3. No interpreter was present.

The trial judge noted that, in her decline report, the juvenile probation officer had incorrectly stated that Gyau might be eligible for a SOSSA sentence. The judge stated that it was not. 10/19/11 RP 5.

On November 9, 2011, the defense asked for another continuance. The State also noted that the victim "within the last week has been hospitalized for a suicide attempt." 11/9/11 RP 2.

On December 14, 2011, the defense again asked for a continuance because defense counsel was very ill. 12/14/11 RP 3.

On January 4, 2012, the case was continued again. No interpreter was present. But the parties explained that a plea offer had been extended because the victim had just "made a claim that there's been another sexual assault by a different individual." 1/4/12 RP 2.

The decline hearing was held on January 18, 2012. The parties submitted the issue on the police reports, the expert evaluation and the juvenile court probation officer's report.

Dr. Brent O'Neal reported that Gyau was born in Ghana. Juvenile Court Exhibit 3. His mother left for the United States in 2000 when he was 7 and left him with his maternal grandmother. His father moved to the United States in 2004 when he was 11. When his father moved, Gyau was placed in a boarding/military school.

O'Neal reported that

> Gyau indicated that his has a history of strained relationships with his biological parents due to a longstanding resentment toward them for leaving him and one of his brothers in Ghana.

In Ghana, Gyau was beaten by an older male cousin with a can but his parents refused to believe him. At the boarding school, Gyau joined a "crew" to keep from being beaten by other boys. According to O'Neal:

> Amos said that he and his brother were sent to the military school because their grandmother was very busy with her family and wanted both boys to get a solid education. He also said that his family was trying to "break us down because they thought we were too crazy."

Id.

School personnel reported to O'Neal that Amos could be violent and aggressive. However

> [A]ll three academic personnel that I interviewed as part of this assessments state that they strongly believed that Amos should participate in intensive clinical services for anger management problems and that overall, they believed Amos could be successful at addressing said problems. All three academic personnel reported fond sentiments about Amos and said that he was typically very respectful toward them.

When he arrived in the United States he would intentionally stay away from the family home in order to avoid his parents. He said that his parents called him and his brother "bad-luck kids." If he misbehaved, his parents would call him names and lock him in his room. *Id.*

O'Neal pointed out that in the juvenile justice system Gyau would have the benefit of Aggression Replacement Therapy, Integrated Treatment and the Functional Family Parole program.

The juvenile court judge concluded that Gyau was more sophisticated and mature than other juveniles his age. CP 98. Moreover, the Court found that

> [T]he adult system offers the possibility of a lifetime of community supervision upon conviction, as well as a longer prior of incarceration during which the respondent could receive treatment if he were amenable. The Court finds that it is not likely that the respondent would be rehabilitated if kept in the juvenile system. In order to adequately protect the public from the respondent, the juvenile court must decline jurisdiction and the respondent should be treated as an adult.

CP 99.

On February 22, 2012, the parties appeared for a presentation of the findings of fact and conclusions of law. At that time, defense counsel stated that, because he had been in trial, "I did not see the Court's version of the findings and conclusions." 2/22/12 RP 2. The Court said:

> My patience is kind of low. You've missed several hearings. We went to the trouble of redrafting these and sending them to you and you haven't even looked at them.

Id.

B. SUPERIOR COURT TRIAL

After several more continuances, the case proceeded to trial in Snohomish County Superior Court. The defendant, upon advice of counsel, waived his right to a jury trial. CP 88.

As both parties acknowledged, there was no question that sexual contact had taken place. A forensic scientist testified that male DNA was found on the vaginal swab from Pereira and was consistent with Gyau's DNA. RP 301. The only question was whether that contact was consensual.

Yansy Pereira testified that she was raised in Hong Kong. RP 53. She said that she had been an investment manager for a bank in Hong Kong. RP 146. She came to the U.S. on September 10, 2011, to finish her degree. RP 54. She enrolled in Edmonds Community College (ECC) and lived with a "home stay" family. RP 57. She began working out at the ECC gym. RP 59-61. ECC has a gym and she went there on September 20, 21, 22 and 23, 2011. RP 60. She said that she met Gyau at the gym on September 21, 2011. RP 63. He gave her his number but she said she threw it away. RP 64.

She saw Gyau again at the gym on September 23. Pereira told Gyau she wanted to get two books, a driver's education book and a

history book. Gyau told her that he had copies of the books and she agreed to accompany him to get the book. RP 67.

Pereira and Gyau took the bus to his cousin's house. RP 73. Gyau and his cousin invited her in and Gyau began talking with his family while she waited. *Id.* She told Gyau she was hungry and he got her food. She said she watched Gyau eat some food first because "maybe have some drugs in it [sic]." RP 75. Gyau was engaged in an argument with his cousin and then went upstairs. RP 77.

Gyau called Pereira upstairs to a room. When he opened the door, he was in his bathrobe. RP 78. There was a bed and TV in the room. RP 79.

According to Pereira, Gyau the forced her inside the room and threw her down on the bed. RP 81. She told him stop. RP 81. According to her, she yelled "help" and "someone help me." RP 83. But Gyau turned up the volume on the TV. RP 83. She said that Gyau was bigger and stronger than she was. RP 85. She described a struggle during which Gyau put his penis in her vagina. RP 88-97. Pereira then stated that she "acted like I was passed out." RP 100. According to her Gyau tried CPR and slapped her. He also ran to get medication. RP 100-101. She said she told him she was having a heart attack and asked him to call 911. RP 101. Gyau called 911 and when the police and medics arrived Pereira told

them that she had been raped. RP 104. While the two waited for the police to arrive, Gyau didn't do anything other than sit near Pereira. She did not ask for an interpreter during the incident. RP 105.

Three days later, Pereira met with Sheryl Copeland, the interim Director of Psychological Services at ECC. RP 149. She met with her again on September 27th. RP 150. Pereira told Copeland she was concerned that people would not believe she was raped because Gyau had been the one to call 911. RP 150. Copeland set two more appointments with Pereira that Pereira missed. RP 151.

On November 3, 2011, Pereira tried to commit suicide. RP 151. She was in the hospital for almost 10 days and Copeland came to visit her. RP 151. At that time Pereira told Copeland that she had been raped by someone else after this incident with Gyau.

On December 2nd, Pereira was interviewed by Detective Arnett. RP 153. By the time of trial, however, Pereira did not remember the statement she gave to Detective Arnett. RP 157. Apparently, she told Arnett that in October, a man accosted her on her street and used a towel to cover her mouth. He called her by name, but she couldn't see who it was because it was night time. It appears that she also said this happened every day for three days. RP 158. Pereira went on to state that she was going to tell the school, but on the third day the man took a knife out. RP

158. At that point, the Court and the parties agreed to have Pereira read her statement to the police officer, confirm it, and then have it admitted as an exhibit. RP 161. The transcript of the interview was admitted as Defendant's Exhibit 57. RP 162.

Pereira clarified that when Gyau raped her, he pulled her underwear aside. RP 164. Pereira stated that she kept a diary, but she refused to give it to the defense or the prosecution because it was "too personal." RP 165. On redirect-examination, Pereira stated that her mother had a mental health history and was bipolar, and suffered from depression and anxiety. RP 171. She also said that her mother had "personality issues." RP 171. Pereira testified that she suffered from Post-traumatic Stress Disorder (PTSD). RP 174.

In the end, Pereira testified that she was not sure that the other rapes had happened. RP 185.

Sexual Assault Nurse Lori Moore testified that she examined Pereira at the hospital. She used an interpreter to speak with the victim. RP 314-319. Moore stated that the victim told her that Gyau raped her, and that he lied to the medical personnel and told them he was her boyfriend. RP 318. The nurse also took pictures of various bruises and collected swabs for a forensic kit. RP 321-322.

Dr. Angelina Zappia testified about the victim's hospitalization after her suicide attempt. RP 345-356. Pereira had taken an overdose of several medications. RP 347. There was some concern that she had used opiates. RP 349.

Dr. Christopher Wilson, a psychiatrist, testified that he did an inpatient psychiatric review of the victim. RP 358. But he never had a chance to complete "our formal psychiatric diagnostic history and physical interview because she left against medical advice before we completed that workup." RP 359. He did say that some of her symptoms were the "hallmark" of PTSD. RP 361. He said that there was no way of really knowing what trauma triggered the PTSD without knowing the patient's complete clinical history. RP 364.

Sheryl Copeland, the counseling director at ECC, testified that she met with Pereira beginning on September 26, 2011. RP 376. During one of those meetings Pereira told her that she had been raped three more times on October 12, 14 and 17, 2011. She said her attacker had followed her home on the bus and that the rapes occurred in a construction ditch that was very deep. RP 395. She also reported that another man took pictures of the rape and threatened to put them on the internet. RP 396, 574. She later told the police that on at least one occasion her October attacker used a knife. RP 569. She did not see her

attacker, but he called her by name. RP 570. And he covered her mouth with a towel that had something sweet smelling on it. RP 570. One of her attackers also took $1,400 from her. RP 573. She said that after the attacks she was unconscious for 8 to 10 hours. RP 575. She also talked about waking up with hundreds of photographs covering her body. RP 574.

The police were never able to verify Pereira's report of additional rapes. RP 448.

Pereira's schoolmate, Chung Mak, testified that the victim was not a very reliable person. RP 417.

Gyau testified that at the time of trial, he was 19-years-old. RP 587. He had given several conflicting statements, but he always denied raping Pereira. RP 638. He consistently told the first responders and the police that any sexual contact was consensual.

In 2011, Gyau was attending ECC and he frequently worked out in the gym. He met Pereira at that gym. RP 589. They chatted sometime before September 23rd at the gym. RP 590. They exchanged telephone numbers. RP 591. He and Pereira discussed a history book and a driver's education manual. RP 592. On the day of the incident, he and Pereira went to the Lynnwood Library because he had a CD to return. RP 597. The two went into the men's bathroom and had sex. RP 597. According

to Gyau, he ejaculated during that encounter. RP 598. This took no more than 10 minutes. RP 599. Their encounter was interrupted when another man came into the restroom. RP 600. He did not want his family to know that he had just had sex with a girl in the bathroom because they would be upset. RP 601.

After leaving the library, the two proceeded on to his cousin, Max's house. After the other occupants of the house left, Gyau and Pereira began "kissing, messing around with each other, and her hands in my pants and mine was in hers, touching each other." RP 613. Eventually, she told Gyau that she was hungry and he went down and got her some food. RP 614. Gyau went upstairs to look for a movie and Pereira followed. He did not let her enter the bedroom. RP 625. They began kissing again, and at that point, she said that she was perhaps allergic to something she ate. RP 630. At first he thought Pereira was just playing games. RP 631. Gyau eventually tried to do CPR on her. But he also decided to call 911. RP 636. He stated that at the house there was never any sexual touching except with fingers. RP 637.

At the close of trial, the judge found Gyau guilty. CP 1-6. Judgment and sentence were entered. RP 21-36. This timely appeal followed. RP 19-20.

IV.
ARGUMENT

A. GYAU'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT DID NOT ENTER ANY FINDING THAT THE STATE FAILED TO PROVE LACK OF CONSENT BEYOND A REASONABLE DOUBT

1. At the close of a bench trial, the trial court is required to enter comprehensive findings of fact and conclusions of law.

> In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated.

CrR 6.1(d). Findings and conclusions comprise a record that may be reviewed on appeal. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (citations omitted). Each element must be addressed separately, setting out the factual basis for each conclusion of law. *Id.* at 623, 964 P.2d 1187 (citations omitted). In addition, the findings must specifically state that an element has been met. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995); *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198, 1201 (2003).

2. In a prosecution for second degree rape, the State is required to prove lack of consent beyond a reasonable doubt.

Due process requires the State prove each element of the offense. In a criminal prosecution, the Fourteenth Amendment Due Process

Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

> *Mullaney* . . . held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct. 2319, 52 L.Ed.2d 281 (1977).

Therefore, the State may not designate a "defense" which actually represents an element of the crime charged, then require the defendant carry the burden of persuasion on the defense. *Mullaney v. Wilbur*, 421 U.S. 684, 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Acosta*, 101 Wn.2d 612, 614-15, 683 P.2d 1069 (1984) (self-defense to a charge of murder); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983) (self-defense to a charge of assault). Unlike the pure affirmative defenses, such a "defense" effectively denies the commission of the underlying crime.

Because consent negates the forcible compulsion element of second degree rape, the State must disprove consent beyond a reasonable doubt. The State charged Gyau with second degree rape. CP 1-3. To convict Gyau, the State was required to prove, beyond a reasonable doubt, that he had sexual intercourse with another person by "forcible compulsion." RCW 9A.44.050(1)(a). "Forcible compulsion" means:

> physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6) (emphasis added). RCW 9A.44.010(7) provides:

> "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

A person cannot consent where forcibly compelled to do something, because forcible compulsion must overcome any resistance, or make resistance impossible. Likewise, because any consent must be free, forcible compulsion cannot occur where there is consent. Therefore, consent negates the forcible compulsion element of second degree rape. *See State v. Camara*, 113 Wn.2d 631, 637, 781 P.2d 483 (1989). Under a straightforward application of *Mullaney*, the State must therefore disprove consent beyond a reasonable doubt. *Mullaney,* 421 U.S. at 686-87.

However, in what is at best an anomalous opinion, *Camara* declined to apply this negates analysis to consent. 113 Wn.2d at 640. *Camara* reasoned that the United States Supreme Court's decision in *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267, *reh'g denied*, 481 U.S. 1024, 107 S.Ct. 1913, 95 L.Ed.2d 519 (1987), eliminated the "negates" analysis. But *Martin* did not do so. Instead, *Martin* concluded that because under Ohio law self-defense did not negate any element of the offense, but merely created an evidentiary overlap, due process did not require the State to bear the burden of proof. 480 U.S. at 234-36.

Beyond simply misreading *Martin*, *Camara*'s conclusion is inconsistent with subsequent United States Supreme Court decisions reaffirming the fundamental point of *Winship* and *Mullaney*: that the government must beyond a reasonable doubt prove every fact necessary to punishment. *Apprendi*, 530 U.S. at 476-77. *Camara* recognized nonconsent remains a necessary component of rape. *Camara*, 113 Wn.2d at 636-37. Thus, nonconsent is a fact necessary to support a conviction of and punishment for second degree rape. As such, the Fourteenth Amendment requires the State bear the burden of proving that fact.

Aside from its constitutional infirmity, *Camara*'s refusal to apply the negates analysis to consent is an anomaly in the Court's

jurisprudence, as the Court has continued its adherence to the analysis for other facts. For example, even after *Camara* the Court employed the negates analysis to determine that the State does not bear the burden of disproving entrapment only because it does not negate an element of the offense. *State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996); *see also, State v. Riker*, 123 Wn.2d 351, 366, 869 P.2d 43 (1994) (determining duress does not negate an element of the offense and thus the burden may be placed on defendant). Additionally, the Court has never retreated from the requirement that the State bears the burden of disproving self-defense or good-faith claim of title. Thus, other than consent the Court has never doubted the correctness of the negates analysis.

Further, the correctness of the analysis has also been repeatedly recognized by several federal circuits and state supreme courts. *See, e.g., United States v. Prather*, 69 M.J. 338, 342-43 (C.A.A.F.), *reconsideration denied*, 70 M.J. 30 (2011) (concluding that because it negates element government must disprove consent in sexual assault trial); *United States v. Deleveaux*, 205 F.3d 1292, 1298 (11th Cir.), *cert. denied*, 530 U.S. 1264, 120 S.Ct. 2724, 147 L.Ed.2d 988 (2000) (government must disprove fact which negates an element); *State v. Urena*, 899 A.2d 1281, 1288 (R.I. 2006) (because it negates element due

process requires state to disprove self-defense); *State v. Drej*, 233 P.3d 476, 481 (Utah 2010) (same).

Because consent negates forcible compulsion, the State must disprove consent beyond a reasonable doubt. *Mullaney*, 421 U.S. at 686-87. The juvenile court deprived Gyau of due process by misapprehending the burdens in this case.

3. In this case, the trial court did not specifically address lack of consent in its findings of fact and conclusions of law.

As outlined in the Statement of Facts, Gyau testified that he and Pereira had consensual sex at the Lynnwood library. Pereira testified that Gyau raped her at his cousin's home. In Finding 49, the Court states that the "findings and observations of the medical personnel who responded …corroborate a non-consensual and physically violent rape and not consensual intercourse." But that is it. The trial court said nothing about the burden of proof in his findings.

B. THE TRIAL COURT ERRED IN FINDING THAT PEREIRA'S SUICIDE ATTEMPT AND PSYCHOLOGICAL PROBLEMS CORROBORATE HER CLAIM OF TRAUMATIC RAPE AND THAT SHE APPEARED TO SUFFER FROM POST-TRAUMATIC STRESS DISORDER AS A RESULT OF BEING RAPED BY THE DEFENDANT

1. This finding is contrary to the evidence presented at trial.

In Finding of Fact 48 the trial judge found that Pereira's suicide attempt and "psychological problems" did not "negatively impact" her credibility because she "appeared to suffer from post-traumatic stress disorder as a result of being raped by the defendant." CP 5.

There is no evidence to support this finding. In fact, the evidence was to the contrary. Dr. Wilson specifically testified that there was no way of really knowing if Pereira's psychological symptoms were even caused by the alleged rapes, let alone were "proof" that Pereira was credible.

2. Had the State offered evidence of Pereira's PTSD as "proof" that she was credible, such evidence would have been inadmissible.

It is important to note that the State was careful not to argue that Pereria's symptoms demonstrated that she had been raped. That caution was appropriate because our Supreme Court held that rape trauma syndrome has not been generally established as a scientifically reliable means of proving that a rape occurred in *State v. Black*, 109 Wn.2d 336,

342, 745 P.2d 12 (1987). The court concluded that it had not, noting that several authors had criticized the methodology of rape trauma syndrome studies, and that the literature established that there was no typical rape response. *Black*, 109 Wn.2d at 343. In fact, the symptoms associated with rape trauma syndrome included two "directly conflicting emotional manifestations which are referred to as 'styles,'" one outwardly emotional, and the other calm, composed, and subdued. *Black,* 109 Wn.2d at 344. The court concluded that because the syndrome's symptoms "embrace such a broad spectrum of human behavior, the syndrome provides a highly questionable means of identifying victims of rape." *Black*, 109 Wn.2d at 344.

C. AS A RESULT OF THESE TWO TRIAL ERRORS, THE CONVICTION MUST BE REVERSED

The Court's misapprehension of the burden of proof in this case requires reversal unless the State can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh'g denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967)). To meet that standard the State must establish that it in fact proved nonconsent beyond a reasonable doubt. This error is magnified

by the trial court's misunderstanding of the testimony regarding Pereira's PTSD and his conclusion that her PTSD established that her claim of rape was credible.

Given these two errors, the State cannot meet the burden of demonstrating non-consent beyond a reasonable doubt and this Court must reverse.

D. THE TRIAL COURT ERRED IN FINDING THAT DECLINE OF JUVENILE JURISDICTION WAS APPROPRIATE IN THIS CASE

The Washington Supreme Court first adopted the Kent factors in *State v. Williams*, 75 Wn.2d 604, 606-07, 453 P.2d 418 (1969). The eight Kent factors that juvenile courts should consider in deciding whether to transfer or retain jurisdiction are

> (1) the seriousness of the alleged offense and whether the protection of the community requires declination; (2) whether the offense was committed in an aggressive, violent, premeditated, or willful manner; (3) whether the offense was against persons or only property; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults; (6) the sophistication and maturity of the juvenile; (7) the juvenile's criminal history; and (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system.

State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993). All eight of these factors need not be proven to support a declination decision, but the

record must demonstrate that each of the factors was considered. *State v. Holland*, 30 Wn. App. 366, 374, 635 P.2d 142 (1981), *review granted*, 97 Wn.2d 1012 (1982), *aff'd*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The trial court's findings on two critical factors were an abuse of discretion. First, the trial court erred in finding that Gyau was more mature and sophisticated than his peers. But both O'Neal and the probation counselor noted that Gyau's mother and father moved to the United States in 2000 and 2004, respectively, but left Gyau behind in Ghana. He was placed in a "boarding school" where "might" prevailed. The parents did not bring Gyau to the United States until December 2008. Thus, he had been in the United States less than two years before the alleged offense.

Upon arrival, he was "resentful." In addition, his father "provides little guidance" and both of his parents worked two jobs. His mother reported working 80 hours a week. Thus, it appears that he lived somewhat independently, not because he was equipped to do so but because his parents had essentially abdicated from their responsibility when Gyau was 14.[2]

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[2] Gyau's immaturity is most evident by the fact that on the day that he testified he wore a shirt that depicted a "provocatively posed," bikini clad woman. RP 644-45.

Second, the juvenile probation officer gave the juvenile judge objectively incorrect information about the difference between the adult and juvenile consequences for Gyau. First, she completely misunderstood Gyau's adult sentencing consequences. As the ultimate judgment entered in this case makes clear, Gyau is currently sentenced to life in prison with a minimum term of 102 months. It is true that there is a "presumption" of release after 102 months, but there is a substantial possibility that Gyau will serve a far longer sentence, perhaps even life in prison. According to a report filed by the Indeterminate Sentencing Review Board, 65.5 % of sex offenders are not released at the first ISRB hearing. *See* Exhibit 1 to this brief. These hearings are held at the end of the offender's minimum term.

This is not an insignificant error. In *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the U.S. Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 2460. The Court based the ruling on the Eighth Amendment's "concept of proportionality," which is viewed "less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society." *Id.* at 2463

(citations and internal quotation marks omitted). The Court summarized its rationale as follows:

> [I]in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 2468.

The trial court should have been properly informed about the very real possibility that an adult sentence in this case would violate the spirit, if not the letter, of the United States Supreme Court's concerns about lengthy sentences in juvenile cases.

Second, she stated: "In both systems, ultimately a responsible offender may earn the ability for relief of registration by living a responsible life." CP 101-109. This is not true. Gyau's adult sentence

makes it clear that he is on community supervision for life and that he must register as a sex offender for life. CP 27.

Third, the CCO and the Court seems to think that, as an adult Gyau would be placed on community supervision and provided with treatment. But, an adult conviction, unlike a juvenile conviction will subject Gyau to deportation if he is ever released from prison. In fact, there is no discussion at all of the difference in treatment of juvenile and adult sentences for a non-citizen. The only time the issue was discussed was at the adult sentencing hearing during which Mr. Harrison told the judge that Gyau was not a citizen. CP 892.

V.
CONCLUSION

This Court should reverse Gyau's conviction and remand this case to the Snohomish County Juvenile court.

DATED this 22nd day of September, 2014.

Respectfully submitted,

Suzanne Lee Elliott, WSBA #12634
Attorney for Amos Gyau

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

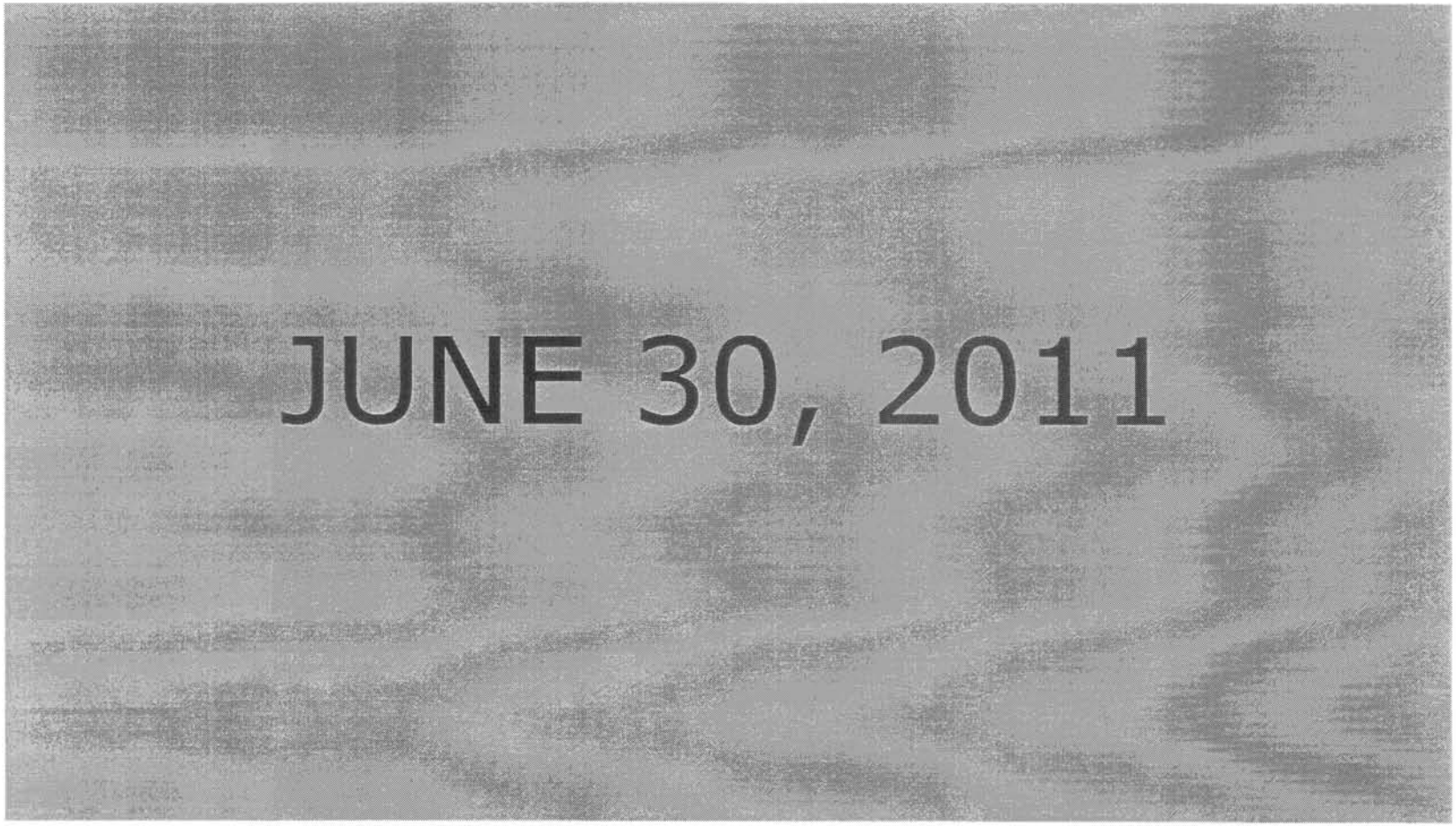
Snohomish County Prosecutor's Office
Appellate Division
3000 Rockefeller Avenue, M-S 504
Everett, WA 98201

Mr. Amos Gyau #368699
Washington Corrections Center
PO Box 900
Shelton, WA 98584

09/22/2014
Date

Peyush Soni

Determinate Plus/CCB Statistical Report



CCB Offenders

TABLE H-B
CCB HEARING DECISIONS BY THE ISRB
HEARING TYPE BY BOARD DECISION
AS OF JUNE 30, 2011

HEARING TYPE	TOTAL	DECISION			
		NOT - RELEASABLE		RELEASABLE	
		N	%	N	%
TOTAL	1075	639	59.4	436	40.6
1ST 420/CCB REL HRG	655	429	65.5	226	34.5
2ND 420/CCB REL HRG	293	136	46.4	157	53.6
3RD 420/CCB REL HRG	89	50	56.2	39	43.8
4TH 420/CCB REL HRG	30	18	60	12	40
5TH 420/CCB REL HRG	6	5	83.3	1	16.7
6TH 420/CCB REL HRG	2	1	50	1	50