

67340-8

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No. 67340-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Winfred R. Jr.,
(A minor child)
Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 30 PM 4:49

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The juvenile court relieved the State of its burden of proof when it required Winfred to disprove an element of the offense.

B. ISSUE PERTAINING TO ASSIGNMEN OF ERROR

The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Where a fact negates an element of an offense, due process requires the State disprove that fact defense beyond a reasonable doubt. Consent negates the “forcible compulsion” element of second degree rape. Did the juvenile court relieve the State of its burden of proof when it placed the burden of proving consent on Winfred?

C. STATEMENT OF THE CASE

In July 2010, 14-year-old Winfred and 12-year-old J.F. engaged in consensual sexual intercourse. 6/15/11 12. By all accounts this act was consensual. 6/16/11 RP 135-52.

On January 2, 2011, the two again engaged in sexual intercourse. 6/16/11 153-62. This time, however, J.F. contended she had not consented. Instead, J.F. testified that Winfred had pushed her to the ground, and restrained her while he engaged

in sexual intercourse with her. 6/11/11 RP 30-37. Winfred testified that as with the prior occasion, the January encounter was consensual as well. 6/16/11 153-62

The juvenile court found Winfred guilty of second degree rape, concluding Winfred had not proved consent by a preponderance of the evidence. CP 50.

D. ARGUMENT

The juvenile court relieved the State of its burden of proving each element of the offense

The juvenile court found the State had proved the elements of second degree rape. CP 50. The court concluded Winfred “did not prove, by a preponderance of the evidence, that the sexual intercourse was consensual.” Id. In doing so the court erroneously placed the burden of disproving an element of the offense on Winfred contrary to the Due Process Clause of the Fourteenth Amendment.

1. 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 [v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)] . . . 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, a 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, 421 U.S. at 684; 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.

2. Because consent negates the forcible compulsion element of second degree rape the State must disprove consent beyond a reasonable doubt. The State charged Winfred with second degree rape. CP 1-3. To convict Winfred, 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.

(emphasis added).

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 and 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 Ohio v. Martin, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (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. 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. 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. 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 Winfred of due process by placing the burden on him.

3. This court must reverse Winfred's conviction. The Court's impermissible shifting 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 (1967)).

To meet that standard the State must establish that it in fact proved nonconsent beyond a reasonable doubt. Because the State cannot meet that burden this Court must reverse the conviction.

E. CONCLUSION

This court must reverse Winfred’s convictions.

Respectfully submitted this 30th day of March, 2012.



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

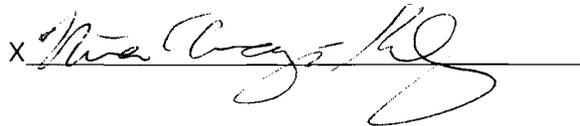
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67340-8-I
v.)	
)	
WINFRED R.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] WINFRED R. NASELLE YOUTH CAMP 11 YOUTH CAMP DR. NASELLE, WA 98638	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2012.

x 

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