

67340-8

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NO. 67340-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WINFRED ROBERSON, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA, JUDGE

BRIEF OF RESPONDENT

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COURT OF APPEALS
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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT PROPERLY PLACED THE BURDEN OF PROOF WITH RESPECT TO CONSENT ON ROBERSON BY A PREPONDERANCE OF THE EVIDENCE.....	6
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

In re Winship, 397 U.S. 358,
90 S. Ct. 1068, 25 L. Ed.2d 368 (1970) 8

Martin v. Ohio, 480 U.S. 228,
107 S. Ct. 1098, 94 L. Ed.2d 267 (1987) 10, 11, 12, 13

United States v. Deleveaux, 205 F.3d 1292
(11th Cir. 2000) 13

United States v. Prather, 69 M.J. 338
(C.A.A.F. 2011) 13

Washington State:

State v. Acosta, 101 Wn.2d 612,
683 P.2d 1069 (1984)..... 9

State v. Camara, 113 Wn.2d 631,
781 P.2d 483 (1989)..... 7, 8, 9, 10, 11, 12

State v. Gregory, 158 Wn.2d 759,
147 P.3d 1201 (2006)..... 7, 11, 12

State v. Hanton, 94 Wn.2d 129,
614 P.2d 1280 (1980)..... 9

State v. Hicks, 102 Wn.2d 182,
683 P.2d 186 (1984)..... 9

State v. McCullum, 98 Wn.2d 484,
656 P.2d 1064 (1983)..... 7, 8, 9

State v. Watkins, 136 Wn. App. 240,
148 P.3d 1112 (2006), review denied,
161 Wn.2d 1028 (2007)..... 14

Other Jurisdictions:

State v. Drej, 233 P.3d 476
(Utah 2010) 12, 13

State v. Urena, 899 A.2d 1281
(R.I. 2006) 12

Constitutional Provisions

Federal:

U.S. Const. amend. XIV 10

Statutes

Washington State:

RCW 9.79.010 (1974) 8

RCW 9A.44.050 9

A. ISSUE

1. The Court of Appeals is bound to follow Supreme Court precedent. The Washington Supreme Court has held that, where a defendant is charged with rape by forcible compulsion, the defendant bears the burden of proving by a preponderance of the evidence any claim that the intercourse was consensual. Did the trial court properly place that burden on Roberson in this forcible rape case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Juvenile respondent Winfred Roberson, Jr. was charged by information with rape in the second degree by forcible compulsion. The State alleged that, on the night of January 1-2, 2011, Roberson forced 12-year-old J.F. to have sexual intercourse with him.

CP 1-3.

Both J.F. and Roberson testified at the bench trial. Roberson claimed that the intercourse was consensual. CP 49-50. Finding that the State had proved the elements of the crime beyond a reasonable doubt, and that Roberson had not proved consent by a preponderance of the evidence, the court found him guilty as charged. CP 35, 50.

2. SUBSTANTIVE FACTS.

J.F. was 12 years old in January of 2011. 1RP¹ 27; 2RP 6; CP 1, 2. She was spending New Year's weekend at the home of her aunt Chalene. 1RP 29, 38-40; 2RP 7, 19-21. Also living in Aunt Chalene's home were Chalene's long-time boyfriend, Winfred Roberson, Sr.; his 15-year-old daughter, Lakeisha ("Keisha"); his 14-year-old son, Winfred Roberson, Jr. (also known as "Man-Man"); and the couple's three-year-old daughter, Rachelle. 1RP 28-30; 2RP 8-9; 4RP 56.

On New Year's Day, the family went out to dinner. 2RP 20-21. After getting back to the house around 9:30 or 10:00 p.m., J.F. and Keisha changed into their pajamas. 2RP 21. Keisha went upstairs to watch television. 2RP 21. J.F. went back and forth a few times between the upstairs, where the television was, and the downstairs, where Keisha and Roberson, Jr. ("Roberson") had their bedrooms. 2RP 21, 23, 27; 4RP 60.

As J.F. left Keisha's bedroom after retrieving her phone, Roberson, who was sitting at a computer desk downstairs, grabbed her by the arm, threw her to the floor and pulled her shorts down.

¹ The State will refer to the verbatim report of proceedings as follows: 1RP (6-14-11); 2RP (6-15-11 (morning session)); 3RP (6-15-11 (afternoon session)); 4RP (6-16-11); 5RP (6-17-11, 6-21-11, 6-29-11).

2RP 27-33. Holding her down, he put his penis in her vagina.

2RP 35-36. After a few minutes of "going back and forth," he got up and let her go. 2RP 37-38. J.F. ran to the bathroom, where she discovered that she was bleeding; she also noticed a stinging sensation upon urinating. 2RP 38. She went back upstairs, but did not tell Keisha what had just happened. 2RP 39-42.

The next morning, J.F. took a shower. 2RP 44. She and Keisha watched television until J.F.'s mother, Carmella, picked her up at about 2:45 p.m. 1RP 42; 2RP 44. Carmella noticed that J.F. seemed really quiet, and she asked her daughter what was wrong. 1RP 43. Carmella thought J.F. seemed stressed and nervous. 1RP 44. After they got home, J.F. told her mother that she had been raped. 1RP 45-46.

J.F.'s father called Chalene (his sister) and told her what J.F. had said. 1RP 47. After calling the police, J.F.'s parents took her to Harborview Hospital. 1RP 47. A nurse practitioner and a physician examined J.F. together. 3RP 51-52; 4RP 15. They observed petechiae (little red dots that mark small areas of bleeding under the skin) around the urethra, as well as a small laceration in the area leading into the vagina. 3RP 53; 4RP 16-17. Both injuries were consistent with vaginal trauma. 3RP 54-58;

4RP 16-18. Based upon the physical exam alone, it was impossible to say whether the injuries were the result of consensual or nonconsensual sexual intercourse. 3RP 72; 4RP 18.

At trial, J.F. recounted an earlier incident of sexual assault by Roberson, also in the downstairs area of her aunt's house. 2RP 12. On that occasion, Roberson took down J.F.'s clothes. 2RP 13. J.F. was facing away from Roberson, in a position "like a cat." 2RP 14. He put his penis in her vagina. 2RP 15. She "tried to get up but [she] couldn't move because his hand was around [her]." ² 2RP 15. She didn't tell anyone that time. ³ 2RP 15-16.

Police collected the clothing that Roberson had been wearing on the night in question. ⁴ 4RP 121-22. Forensic testing revealed Roberson's sperm on his boxer shorts and pants. 3RP 15-18, 20-25. The sexual assault kit from J.F. yielded positive results for a protein found in semen from her endocervical, vaginal and anal areas. 3RP 14, 26-27.

² In light of this testimony, Roberson's assertion that this incident was "[b]y all accounts . . . consensual" is not accurate. Brief of Appellant at 1.

³ J.F. disclosed this incident for the first time on the day before she testified. 2RP 16. She had previously denied any prior sexual contact with Roberson. 4RP 110.

⁴ The clothing that J.F. had been wearing had already been washed, and thus was not retained for testing purposes. 4RP 123-24.

When questioned by police, Roberson repeatedly and categorically denied having sexual intercourse with J.F. 5RP 27; Ex. 21 at 9, 14, 15, 17, 18, 21, 22, 23, 26, 27, 31, 33, 38, 39, 42, 46. He said that J.F. had been bothering him while he was on the computer, and he described in graphic detail how he had kicked J.F. on the thigh, and slammed her to the ground. 5RP 27; Ex. 21 at 8, 18, 37, 44-45. He implied that this roughhousing might have been the source of her vaginal injuries. Ex. 21 at 14, 22, 44. He rejected the suggestion that J.F. might have been flirting with him. Ex. 21 at 35-36.

By the time of trial, Roberson had changed his defense to consent, claiming that J.F. had willingly had sexual intercourse with him. Roberson said that, while the two of them were alone downstairs on the evening of January 1, J.F. began touching his arm; she put her hands on the back of his neck and they started kissing. 4RP 148-49, 154-55. They slid to the floor. 4RP 155-56. J.F. turned around and assumed a position "what you call cat stand or whatever," and Roberson pulled down her pants. 4RP 156. After grabbing a condom, Roberson put his penis into J.F.'s vagina. 4RP 157, 162. After about a minute, J.F. said "stop," and Roberson "pulled out." 4RP 162. The two of them put their clothes back on,

and J.F. spent the rest of the evening upstairs with Keisha.

4RP 162-64.

After hearing the testimony, and the closing arguments of the parties, the trial court announced its findings and decision. 5RP 110-24; CP 43-51. The court pointed out that “the key issue . . . is credibility.” 5RP 110. After discussing the testimony and the parties’ theories of the case at some length, the court concluded that J.F. was credible, and Roberson was not. 5RP 116-24; CP 48-49. The court found beyond a reasonable doubt that Roberson was guilty of second-degree rape. 5RP 124; CP 50. The court also found that Roberson had not proved by a preponderance of the evidence that the sexual intercourse was consensual. CP 50.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY PLACED THE BURDEN OF PROOF WITH RESPECT TO CONSENT ON ROBERSON BY A PREPONDERANCE OF THE EVIDENCE.

Roberson quarrels with the trial court’s allocation of the burden of proof with respect to his claim that J.F. consented to sexual intercourse. He argues that, rather than requiring him to prove consent by a preponderance of the evidence, the trial court should have required the State to *disprove* consent beyond a

reasonable doubt.⁵ He contends that the Washington Supreme Court misinterpreted relevant precedent in State v. Camara.⁶ Dismissing Camara as an “anomalous opinion,” Roberson urges this Court to ignore Camara’s holding placing the burden of proof to show consent in a forcible rape case on the defendant by a preponderance of the evidence.

This Court should reject this argument. Far from being anomalous, Camara has more recently been cited and followed by the Washington Supreme Court in State v. Gregory.⁷ This Court should refuse Roberson’s invitation to ignore this binding precedent.

In determining the burden of proof with respect to a criminal defense, courts look to both statutory and constitutional law. State v. Camara, 113 Wn.2d 631, 638, 781 P.2d 483 (1989). The statutory aspect is determined by legislative intent. Id. The constitutional dimension is based on the due process requirement

⁵ Roberson did not raise this claim in the trial court. Nevertheless, the State will not argue waiver here, because this Court would likely find that shifting the burden of proof in the manner that Roberson alleges would be manifest constitutional error, and thus reviewable in this appeal. See State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983) (finding that similar claim of burden-shifting could be raised for the first time in a petition for review).

⁶ 113 Wn.2d 631, 781 P.2d 483 (1989).

⁷ 158 Wn.2d 759, 147 P.3d 1201 (2006).

that the State prove every element of a crime beyond a reasonable doubt. Id. (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)).

Washington courts traditionally applied the following two-part test in determining where the burden of proof should lie:

There are two ways to determine if the absence of a defense is an ingredient of the offense: (1) the statute may reflect a legislative intent to treat absence of a defense as one “of the elements included in the definition of the offense of which the defendant is charged”, or (2) one or more elements of the defense may “negate” one or more elements of the offense which the prosecution must prove beyond a reasonable doubt.

Camara, 113 Wn.2d at 638 (quoting State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983) (citations omitted)). When either part of this test was satisfied, the State was required to prove the *absence* of the defense at issue. Camara, at 638.

Legislative history sheds some light on the statutory aspect of this test. Under the 1909 criminal code, rape was defined as “sexual intercourse . . . committed against the person’s will and without the person’s consent.” Id. at 636; RCW 9.79.010 (1974). Under this statute, the State bore the burden of proving an alleged rape victim’s lack of consent. Id. at 636. When the criminal law was recodified in 1975, the concept of nonconsent was replaced

with forcible compulsion. Id.; RCW 9A.44.050(1)(a) (“A person is guilty of rape in the second degree when . . . the person engages in sexual intercourse with another person . . . [b]y forcible compulsion . . .”). The court in Camara concluded that the removal of the express reference to nonconsent indicated legislative intent to shift the burden of proof on that issue to the defendant. Camara, at 638.

The constitutional aspect of the test traditionally looked to whether the defense “negates” an element of the offense. Prior to Camara, the Washington Supreme Court had applied the “negates” analysis to find that the State bore the burden to prove the absence of self-defense in prosecutions for murder,⁸ manslaughter,⁹ and assault,¹⁰ and the absence of a good-faith claim of title in a prosecution for robbery.¹¹ The court in Camara, however, expressed “substantial doubt” about the correctness of the “negates” analysis, declining to apply it to a claim of consent in a forcible rape case, based on the United States Supreme Court’s

⁸ State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983).

⁹ State v. Hanton, 94 Wn.2d 129, 614 P.2d 1280 (1980).

¹⁰ State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984).

¹¹ State v. Hicks, 102 Wn.2d 182, 683 P.2d 186 (1984).

opinion in Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed.2d 267 (1987).

In Martin, the Court addressed the question “whether the Due Process Clause of the Fourteenth Amendment forbids placing the burden of proving self-defense on the defendant when she is charged . . . with committing the crime of aggravated murder.” 480 U.S. at 230. Acknowledging the overlap between self-defense and the elements of aggravated murder in Ohio (“purposely, and with prior calculation and design, caus[ing] the death of another”), the Court nevertheless found that Ohio’s requirement that the defendant prove self-defense did not violate the Constitution. Id. at 230, 234, 235.

The Washington Supreme Court followed the reasoning of Martin in Camara, and held that the burden of proof as to consent properly lies with the defendant in a forcible rape case:

Following *Martin*, it appears that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense “negates” an element of a crime. Thus, while there is a conceptual overlap between the consent defense to rape and the rape crime’s element of forcible compulsion, we cannot hold that for that reason alone the burden of proof on consent must rest with the State. *Rather, we*

now hold that that burden lies, as we understand the Legislature to have intended, with the defendant.

Camara, 113 Wn.2d at 640 (italics added).

Roberson incorrectly dismisses Camara as “at best . . . an anomalous opinion.” Brief of Appellant at 5. In doing so, Roberson ignores the more recent decision of the Washington Supreme Court in State v. Gregory, 158 Wn.2d 759, 801, 147 P.3d 1201 (2006). In that case, the court again faced a claim that requiring a defendant charged with forcible rape and claiming consent to prove the defense by a preponderance of the evidence violated due process. Recognizing that Camara precluded this argument, Gregory argued that Camara should be overruled. Id. at 802.

The Washington Supreme Court declined to overrule its own precedent. Id. at 803-04. Citing Martin, the court noted that, “while evidence offered to support a defense may also tend to negate an element of the crime, that does not necessarily shift to the defendant the burden of disproving any element of the State’s case.” Id. at 802 (citing Martin, 480 U.S. at 234). Rejecting Gregory’s claim that the Camara court incorrectly analyzed Martin, the court observed that “the *Martin* analysis clearly supports the

Camara court's conclusion." Id. at 803. The Gregory court reasoned:

The jury in a first degree rape case must be convinced that none of the evidence presented raises a reasonable doubt that sexual intercourse occurred as the result of forcible compulsion. Therefore, as long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the consent defense and the forcible compulsion element does not relieve the State of its burden to prove forcible compulsion beyond a reasonable doubt.

Id.

The cases on which Roberson relies do not undermine the reasoning of Camara and Gregory. In holding that the burden is on the State to "negate" a claim of self-defense beyond a reasonable doubt, the court in State v. Urena noted that this requirement stems from the protections of the Due Process Clause; the court made no mention of Martin, however, relying instead on a pre-Martin state case. 899 A.2d 1281, 1288 (R.I. 2006). In State v. Drej, the court mentioned the "negates" analysis, but relied on the "Utah rule," a statutorily codified common law rule that explicitly required the State to disprove *all* properly raised affirmative defenses beyond a

reasonable doubt; again, there was no mention of Martin. 233 P.3d 476, 481-82 (Utah 2010).

The court in United States v. Deleveaux cited the “negates” analysis in holding that justification was an affirmative defense to a charge of felon in possession of a firearm, and thus the burden was properly placed on the defendant to prove justification by a preponderance of the evidence; however, the court relied only on pre-Martin case law as to the “negates” analysis. 205 F.3d 1292, 1298-99 (11th Cir. 2000). Finally, in United States v. Prather, the court found a due process violation where the trial court had placed the burden on the defendant to prove consent against a charge of aggravated sexual assault. 69 M.J. 338, 339-43 (C.A.A.F. 2011). But Prather was charged with engaging in a sexual act with a person who was “substantially incapacitated” or “substantially incapable” of appraising the nature of the act, declining participation in the act, or communicating unwillingness to engage in the act. Id. at 341. The court found only that, “[u]nder the facts of this case,” the defendant could not prove consent without first proving a *capacity* to consent, and thus directly *disproving* an element of the offense, i.e., that the victim was substantially incapacitated. Id. at 343.

In sum, the Washington Supreme Court has given strong indication that it intends to adhere to its holding that, where a defendant is charged with rape by forcible compulsion, the defendant bears the burden of proving consent by a preponderance of the evidence. This Court should follow this binding precedent. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006), review denied, 161 Wn.2d 1028 (2007) (Court of Appeals is bound to follow Supreme Court precedent).

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the adjudication of guilt in this case.

DATED this 19th day of July, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Gregory C. Link**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. WINFRED ROBERSON, JR.**, Cause No. **67340-8-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

7/19/12
Date