

64335-5

64335-5

NO. 64335-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MOHAMED MOHAMED,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

---

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	10
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING PROPENSITY EVIDENCE. ....	10
2. BECAUSE THE DEFENDANT DID NOT EXERCISE HIS RIGHT TO REMAIN SILENT AFTER ARREST, THE STATE'S QUESTIONS ABOUT HIS STATEMENT TO POLICE WERE NOT COMMENTS ON HIS POST-ARREST SILENCE. ....	14
3. THE COURT'S INSTRUCTIONS TO THE JURY DID NOT VIOLATE DUE PROCESS .....	17
D. <u>CONCLUSION</u> .....	21

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)..... 19

Washington State:

State v. Aguirre, 168 Wn.2d 350,  
229 P.3d 669 (2010)..... 10, 13

State v. Belgarde, 110 Wn.2d 504,  
755 P.2d 174 (1988)..... 15

State v. Brown, 147 Wn.2d 330,  
58 P.3d 889 (2002)..... 20

State v. Camara, 113 Wn.2d 631,  
781 P.2d 483 (1989)..... 18, 19

State v. Clark, 143 Wn.2d 731,  
24 P.3d 1006 (2001)..... 15

State v. Everybodytalksabout, 145 Wn.2d 456,  
39 P.3d 294 (2002)..... 11

State v. Gregory, 158 Wn.2d 759,  
147 P.3d 1201 (2006)..... 19, 20

State v. Jones, 168 Wn.2d 713,  
230 P.3d 576 (2010)..... 12

State v. Koslowski, 166 Wn.2d 409,  
209 P.3d 479 (2009)..... 16

State v. Riker, 123 Wn.2d 351,  
869 P.2d 43 (1994)..... 19

State v. Silva, 119 Wn. App. 422,  
81 P.3d 889 (2003)..... 15

State v. Tigano, 63 Wn. App. 336,  
818 P.2d 1369 (1991)..... 11

Other Jurisdictions:

State v. Jovanovic, 263 A.D.2d 812,  
700 N.Y.S.2d 156 (1999)..... 19

**Statutes**

Washington State:

RCW 9.79.090 (1974) ..... 18

RCW 9A.44.010 ..... 18

RCW 9A.44.040 ..... 17

RCW 9A.44.050 ..... 19

RCW 9A.44.060 ..... 19

**Rules and Regulations**

Washington State:

ER 404 ..... 1, 11, 12

**A. ISSUES PRESENTED**

1. Evidence of past acts to prove action in conformity therewith is inadmissible propensity evidence pursuant to ER 404(b). Evidence that the victim used drugs in the past was propensity evidence, which was not admissible to show that she used drugs on the night of the rape. Did the trial court properly exercise its discretion in excluding evidence of the victim's drug use on prior occasions?

2. Inferences of guilt may not be drawn from a defendant's post-arrest silence. Inferences of guilt may be drawn from assertions the defendant makes, or does not make, when he waives his right to remain silent and gives a statement to the police. Were the State's questions about the written statement that the defendant gave to the police proper?

3. Jury instructions that require the State to prove every element of the crime beyond a reasonable doubt do not violate due process, even if there is a conceptual overlap between an element of the crime and an affirmative defense. The instructions in this case required the State to prove forcible compulsion beyond a reasonable doubt. Did the instructions comport with due process?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The defendant, Mohamed Mohamed, was found guilty by jury trial of the crimes of rape in the first degree and robbery in the first degree. CP 125. He was sentenced to a determinate sentence of 75 months to run concurrently with an indeterminate sentence of 184 months to life. CP 129-30. This appeal follows.

**2. SUBSTANTIVE FACTS.**

On July 15, 2008, at 11:18 p.m., Tukwila Police officers conducted a traffic stop at International Boulevard and South 148<sup>th</sup> Street. RP 9/22/09 85-87, 111-12, 115. The officers arrested the driver of the vehicle, and the car was towed away. RP 9/22/09 87. The defendant, Mohamed Mohamed, was passed out in the back seat of the car. RP 9/22/09 87. When the officers woke him, the defendant was angry and very intoxicated. RP 9/22/09 97. He was allowed to leave the scene. RP 9/22/09 90.

A short time later, the victim, D.T., stopped at a convenience store on International Boulevard near South 150<sup>th</sup> Street. RP 9/23/09 6-9. As she waited at a stop sign to turn onto International Boulevard, the defendant, who was standing on the corner, entered

her car uninvited by reaching into the open window. RP 9/23/09 17-19. The defendant pulled her hair, put something sharp against her neck and told her to drive to the corner. RP 9/23/09 19. He then directed her to drive to a cul-de-sac adjacent to Crystal Springs Park. RP 9/22/09 46; 9/23/09 22-23. The defendant walked her into the park, near a picnic table, where he threw her on the ground, raped her vaginally and anally, and repeatedly hit her in the face. RP 9/23/09 25-31. The defendant then took her keys and drove away in her car. RP 9/23/09 45-46.

Patty Reed had noticed a white Honda parked outside her home, which sits adjacent to Crystal Springs Park. RP 9/22/09 46, 53. She saw a man and a woman walk into the park. RP 9/22/09 56. The woman was wearing a dress. RP 9/22/09 56. After approximately half an hour, in which she saw no one enter or exit the Honda, she noticed the white Honda had left. RP 9/22/09 62, 67, 70. Almost immediately, a woman, wearing a dress, with her face bloodied, walked up to the house crying, "Please, help me, I've been raped." RP 9/22/09 74-75. Ms. Reed called the police, and spoke to the woman at length. RP 9/22/09 75, 77, 79. The woman did not seem intoxicated or under the influence of any drugs. RP 9/22/09 82.

Tukwila police officers responded to the 911 call at 12:49 a.m., and found D.T. hysterical, with her face covered in blood and her dress disheveled. RP 9/22/09 92-94. She reported that she had been beaten and raped in the park and that the rapist had stolen her white Honda. RP 9/22/09 94-95.

Sergeant Chinnick of the King County Sheriff's Office heard the stolen car report and saw the defendant driving the victim's car at South 154<sup>th</sup> Street and International Boulevard at 1:50 a.m. RP 9/23/09 131. When Sergeant Chinnick activated his lights and siren, the defendant drove into the parking lot of a nearby apartment complex and ran from the car. RP 9/23/09 132-34.

Sergeant Chinnick chased the defendant, who was intercepted by Deputy Crawley of the King County Sheriff's Office. RP 9/23/09 135. Deputy Crawley placed the defendant under arrest and took him to his patrol car. RP 9/23/09 146-49. After advising the defendant of his right to remain silent, he asked the defendant how he obtained the car. RP 9/23/09 149. The defendant said a friend gave him the car at the Silver Dollar Casino and told him that it was stolen. RP 9/23/09 150-51.

Surveillance video from the Silver Dollar Casino showed the defendant driving up to the casino entrance in the victim's car at

12:54 a.m., entering the casino and then driving away in the victim's car at 1:19 a.m. RP 9/24/09 88-94. Another male was in the car with him. RP 9/24/09 91.

While D.T. was being transported to the hospital, she was taken to the scene of the defendant's arrest, where she positively identified him as her attacker. RP 9/23/09 53.

Dr. Kadege treated D.T. at Valley Medical Center. RP 9/24/09 6-9. D.T. had a fractured tooth, swelling and bruising around her right eye, an orbital fracture, abrasions on her elbows, knees, chest and back, and superficial scratches on her neck. RP 9/24/09 10-13, 71-72. A tampon had been forced into the victim's vaginal vault so far that it had to be retrieved with forceps. RP 9/24/09 17-19. The victim was alert with normal speech. RP 9/24/09 31.

Detective Corrigan of the Tukwila Police Department interviewed the defendant at 6:13 a.m. on July 16. RP 9/24/09 170-71. Detective Corrigan told the defendant he was under arrest for rape. RP 9/24/09 174. The defendant stated that he was with a friend whose car was towed earlier in the evening, and then had some beers at a grocery store. RP 9/24/09 176. After that, he took a bus to the Silver Dollar Casino and asked another friend for a ride

home. RP 9/24/09 176. The friend told him that he had a stolen car the defendant could take home. RP 9/24/09 176. The defendant took the stolen car and attempted to drive home when he was stopped by the police. RP 9/24/09 176. The defendant said he did not have a girl in the car, he did not rape anyone, and he did not have sex with anyone that night. RP 9/24/09 181.

DNA matching the victim's was found on the defendant's pants and shoes. RP 9/24/09 134-136. The probability of selecting an unrelated individual at random with a matching DNA profile was 1 in 13 trillion. RP 9/24/09 136. Sperm containing DNA matching the defendant's DNA was found on the defendant's underpants, indicating sexual activity. RP 9/24/09 150. The probability of selecting an unrelated individual at random with a matching DNA profile was 1 in 1.4 trillion. RP 9/24/09 150.

The defense presented three witnesses in addition to the defendant's testimony. Mustafa Abshir testified that he was with the defendant on the night of July 15, 2008, and was standing with him outside a store when a lady pulled up and asked him if he had "work", which means drugs. RP 9/28/09 80-81. The defendant told her he knew where she could get some drugs and the defendant got into her car. RP 9/28/09 82.

Ten days before Mustafa Abshir's testimony, the defendant called him from the jail, and their conversation was recorded with their knowledge pursuant to jail policy. RP 9/28/09 65, 68, 72. In the phone call, the defendant asked Abshir to find Jamal. RP 9/29/09 133. When Abshir informed the defendant that he had been unable to find Jamal, the defendant said he needed a witness who was there. RP 9/29/09 134. Abshir offered to come testify that he was there, and then the defendant coached Abshir as to the details of his defense after Abshir asked him what happened. RP 9/29/09 134. Both Abshir and the defendant claimed that the translation of the conversation, which was in Somali, was not accurate. RP 9/28/09 112; 9/29/09 81. However, the translator, who was certified and who grew up in Somalia himself, testified that the defendant and Abshir were speaking standard Somalian. RP 9/29/09 117-26.

Kulmiye Kulmiye testified for the defense that on July 15, 2008, he was waiting for a phone call at a pay phone near the corner grocery store and saw the defendant talking to a friend and then next saw him riding by in a white car. RP 9/28/09 14. His testimony was inconsistent with the other evidence in that he

did not see the defendant drinking and that the defendant did not seem drunk. RP 9/28/09 161, 168-69.

Jamal Mohamed testified that on July 15, 2008, he was with the defendant in the car that was stopped and towed by the police. RP 9/29/09 8. He later saw a white car driven by a woman with the defendant in the passenger seat. RP 9/29/09 9-13. His testimony was inconsistent with Mustafa Abshir's testimony, in that he said he did not see Abshir that night. RP 9/29/09 14. He admitted that the defendant had been drinking. RP 9/29/09 20.

The defendant testified and gave a different account than the written statement that he gave to the police on the morning of July 16, 2008. Mohamed testified that on July 15, 2008, he was a passenger in a car that was stopped by the police. RP 9/29/09 28. He walked to a nearby corner grocery store where he saw Mustafa and Jamal. RP 9/29/09 28. A woman drove up and said she was looking for drugs. RP 9/29/09 30. The defendant told her he knew someone with drugs and she asked him to help her. RP 9/29/09 31. He entered her car and directed her to Jamal's apartment complex. RP 9/29/09 38. He obtained crack cocaine for her at the apartment complex. RP 9/29/09 39. When he returned to the car, she said she had no money but that she had friends at a nearby

park that would pay him. RP 9/29/09 39. She drove to Crystal Springs Park where they waited for her friends, and then she offered the defendant sex in exchange for the drugs. RP 9/29/09 44. The defendant agreed and had sexual intercourse with the victim in the car. RP 9/29/09 45. He gave her the crack cocaine, which she smoked three times. RP 9/29/09 51. The defendant became upset when the victim disclosed that she had a disease, and the two fought. RP 9/29/09 45, 46. He punched her only once during the fight and then drove off in her car. RP 9/29/09 46, 50. He claimed all these events occurred in or near the white Honda. RP 9/29/09 71. He claimed that the victim's injuries must have occurred when she tried to stop the car from driving away. RP 9/29/09 66. He admitted driving to the casino after taking the victim's car. RP 9/29/09 57-59. He also admitted to being drunk and high at the time. RP 9/29/09 56. However, he denied running from the police, he denied making any statements to Deputy Crawley, and he testified that each of the defense witnesses' testimony was wrong to some degree. RP 9/29/09 62-63, 64, 77, 78, 88-89.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING PROPENSITY EVIDENCE.**

Mohamed contends that the trial court abused its discretion in not allowing defense counsel to question the victim about her illegal drug use in the past. This claim is without merit. The trial court properly exercised its discretion in excluding propensity evidence offered to infer that the victim used drugs on the night in question because she had used drugs in the past.

At trial, the defense sought to cross-examine the victim regarding prior illegal drug use. RP 9/16/09 7-16; 9/23/09 77-78. The court allowed the defense to ask the victim about drug use on the night in question, but precluded questions about prior drug use. RP 9/23/09 78-79.

Questions of relevancy are within the discretion of the trial court, and are reviewed for manifest abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). Evidence of a witness's drug use at the time of the event in question, or at the time of a witness's testimony, is admissible to impeach the witness.

State v. Tigano, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). In contrast, evidence of drug use on other occasions is generally not admissible. Id. at 344-45.

Such evidence falls within the purview of ER 404(b), which provides that evidence of prior acts is not admissible to prove the character of a person in order to show action in conformity therewith. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Evidence that a person has acted a certain way in the past is not relevant to proving that he acted that way on a particular occasion. Id. at 468. For example, in State v. Everybodystalksabout, evidence that the defendant appeared to be the leader in his relationship with the co-defendant on past occasions was not relevant to establish that he was the leader on the night of the crime. Id. Even if relevant, the state supreme court held that such evidence was not admissible pursuant to ER 404(b) because it is propensity evidence. Id.

In the present case, evidence that the victim used drugs on past occasions was not relevant to show that she used drugs on the night of July 15, 2008. The only relevance such evidence might have would be as propensity evidence: because the victim used drugs in the past, she was more likely to have used drugs on this

occasion. Such propensity evidence is barred by ER 404(b). The trial court properly exercised its discretion in excluding questions about the victim's prior drug use.

The defendant's reliance on State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), is misplaced. In that case, the court precluded the defense from presenting evidence of the victim's drug use *at the time of the offense*. Id. at 581. The state supreme court held that the rape shield statute did not bar the defendant from testifying that the alleged rape was actually consensual sex that occurred during an "all-night drug-induced sex party." Id. at 580. The court held that evidence of the victim's drug use at the time of the alleged rape was highly probative and could not be excluded. Id. at 582. In the present case, the defendant was allowed to ask the victim about drug use on the night of the rape. RP 9/23/09 64. The victim denied using cocaine that night. RP 9/23/09 64. The defendant testified that he saw her use crack cocaine three times. RP 9/23/09 64; RP 9/29/09 42, 47, 51. Unlike Jones, the defense was not precluded from presenting probative, albeit incredible, evidence regarding the victim's alleged drug use at the time of the crime. The trial court properly exercised its discretion in limiting the scope of cross-examination as to the victim's drug use.

Even if the trial court abused its discretion, the error was harmless. An erroneous ruling limiting the cross-examination of the victim requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of the trial.

Aguirre, 168 Wn.2d at 361. There is no reasonable possibility that testimony about the victim's prior drug use would have bolstered the defendant's story and changed the outcome of the trial.

Numerous people came into contact with the victim immediately after the rape: Ms. Reed, the police officers and the hospital staff. They all testified that the victim did not seem impaired or intoxicated. Their testimony thus refuted the defendant's claim that the victim had smoked crack cocaine at the time of the rape.

Moreover, evidence of prior drug use would not have affected the overwhelming physical evidence that a violent rape occurred, and the undisputed evidence that a robbery occurred.<sup>1</sup> There is no reasonable possibility that testimony that the victim had used illegal drugs in the past would have changed the outcome of the trial.

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<sup>1</sup> The evidence of robbery was undisputed because the defendant admitted to taking the victim's car against her will after he punched her.

**2. BECAUSE THE DEFENDANT DID NOT EXERCISE HIS RIGHT TO REMAIN SILENT AFTER ARREST, THE STATE'S QUESTIONS ABOUT HIS STATEMENT TO POLICE WERE NOT COMMENTS ON HIS POST-ARREST SILENCE.**

Mohamed contends that the State improperly commented on his "post-arrest silence" by asking a detective whether the victim or the defendant made any statements about her having used drugs on the night in question. His claim should be rejected because Mohamed was not silent after he was arrested. Mohamed waived his right to remain silent and gave a detailed written statement to the police. The State was allowed to ask questions about what Mohamed said and did not say in that statement.

The defendant's statements to the police were admitted at trial. CP 121; RP 9/23/09 149-51; RP 9/24/09 181-82. In his statement to Detective Corrigan, the defendant denied having any contact, sexual or otherwise, with the victim. RP 9/24/09 181. In cross-examination of the emergency room doctor and nurse, defense counsel inquired about the hospital's failure to test the victim's urine for the presence of drugs. RP 9/24/09 22, 51. In response to this line of questioning, the State questioned the crime scene investigation detective as to whether he ordered that the victim's urine be tested. RP 9/24/09 82-83. The detective testified

that he did not, and explained upon further questioning that nothing in the victim's statement to the police or in the defendant's statement to the police indicated that the victim had used drugs on the night of the rape. RP 9/24/09 83-84.

A criminal defendant's assertion of his constitutional right to remain silent is not evidence of guilt. State v. Silva, 119 Wn. App. 422, 428-29, 81 P.3d 889 (2003). The State may not invite the jury to infer guilt because the defendant exercised his right to remain silent. Id. Thus, the defendant may not be impeached at trial with the fact that he chose to remain silent following his arrest. Id.

However, "when a defendant does not remain silent and instead talks to the police, the state may comment on what he does *not* say." State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (emphasis in original). If the defendant waives the right to remain silent, the prosecutor may draw attention to the fact that facts testified to at trial were omitted from the statement given to police. Silva, 119 Wn. App. at 429. As the state supreme court has explained, "the State may question a defendant's failure to incorporate events related at trial into the statement given police or it may challenge inconsistent assertions." State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988).

In this case, Mohamed mischaracterizes the State's questions as a comment on his post-arrest silence. Mohamed did not remain silent after his arrest. He gave statements to both Deputy Crawley and Detective Corrigan. The statements that he gave to the police were markedly different than his testimony at trial. The State was allowed to question witnesses as to those statements, including what Mohamed did *not* say. The State was allowed to draw the jury's attention to the fact that Mohamed did not tell the police that the victim was allegedly using crack cocaine at the time of the rape. The State's questions cannot be characterized as an improper comment on Mohamed's post-arrest silence because Mohamed waived his right to remain silent.

Moreover, any error was harmless. Error in admitting evidence in violation of a constitutional right is subject to a constitutional harmless error test. State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479, 491 (2009). If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Id. In the present case, there was overwhelming evidence of the defendant's guilt. Any

error in allowing the State to question Detective Early about the contents of the defendant's written statement to police was harmless.

**3. THE COURT'S INSTRUCTIONS TO THE JURY DID NOT VIOLATE DUE PROCESS.**

Mohamed contends that the jury instructions violated due process because the jury was instructed that the burden of proving consent was on the defense. CP 100. However, the jury was instructed that the State was required to prove forcible compulsion beyond a reasonable doubt. CP 92, 98. The state supreme court has repeatedly held that the instructions given in this case comport with due process. Mohamed's claim must be rejected.

RCW 9A.44.040 defines the crime of rape in the first degree, in part, as "A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory: . . . kidnaps the victim; or inflicts serious physical injury." Forcible compulsion is statutorily defined as "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 of

another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6). Consent is statutorily defined as "at the time of the sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7).

Prior to 1975, the crime of rape was defined as "sexual intercourse . . . committed against the person's will and without the person's consent." RCW 9.79.090 (1974). The State bore the burden of proving lack of consent under the prior statute. State v. Camara, 113 Wn.2d 631, 636, 781 P.2d 483 (1989). When the criminal law was recodified in 1975, the crime of rape was redefined, separated into degrees, and lack of consent was removed from the definition of rape in the first degree. Id.

In State v. Camara, supra, at 636, the state supreme court held that consent remains a valid defense to the crime of rape in the first degree. However, the court held that the defense bears the burden of proving consent. Id. at 640. The court recognized that there was a conceptual overlap between the concepts of forcible

compulsion and consent, but declined to hold that this conceptual overlap required the State to prove lack of consent. Id. at 640.<sup>2</sup>

Mohamed contends that the state supreme court's holding in Camara violates due process, and should be rejected. However, this Court is bound by the holding of Camara. In State v. Riker, 123 Wn.2d 351, 366, 869 P.2d 43 (1994), the state supreme court cited the holding of Camara with approval.

More recently, the state supreme court explicitly declined to overrule Camara in State v. Gregory, 158 Wn.2d 759, 802, 147 P.3d 1201 (2006). In Gregory, the court acknowledged that due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. Id. at 801 (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)). The principles of due process are satisfied when the jury is instructed that it must find the elements of the crime beyond a reasonable doubt. Gregory, 158 Wn.2d at 802. The burden of

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<sup>2</sup> While there is, as the state supreme court has recognized, a conceptual overlap between consent and forcible compulsion they are not, as Mohamed argues, mutually exclusive. A person can consent to force, such as in consensual sadomasochism. See State v. Jovanovic, 263 A.D.2d 812, 700 N.Y.S.2d 156 (1999) (holding emails from victim regarding her interest in snuff films were admissible as to issue of consent). And sexual intercourse could occur without either consent or forcible compulsion, in which case the defendant would be guilty of rape in the second or third degree. RCW 9A.44.050, 9A.44.060.

disproving an element is not shifted to the defendant simply because evidence offered to support a defense tends to negate an element of the crime. Id. The instructions in Gregory provided that even if the defendant could not prove consent by a preponderance of the evidence, the jury was still required to acquit if it believed there was a reasonable doubt as to the elements of the crime. Id. The court held that as long as the instructions require the State to prove forcible compulsion beyond a reasonable doubt, the conceptual overlap between consent and forcible compulsion does not relieve the State of its burden and does not violate due process. Id. at 803-04. The instructions in the present case, like the instructions in Gregory, did not violate due process.

Finally, any error in giving the consent instruction was harmless in this case. A constitutional error is harmless if this Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Here, the defendant admitted to sexual intercourse with the victim, the evidence of a violent rape was overwhelming and the evidence of robbery was undisputed. The defendant's testimony could scarcely have been less credible. This Court can conclude beyond

a reasonable doubt that any reasonable jury would have convicted the defendant regardless of any error in the consent instruction.

**D. CONCLUSION**

The defendant's convictions for rape in the first degree and robbery in the first degree should be affirmed.

DATED this 6th day of ~~June~~<sup>July</sup>, 2010.

Respectfully submitted,

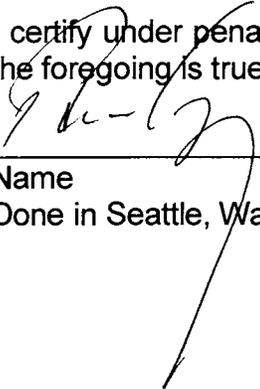
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MOHAMED, Cause No. 64335-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
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