Supreme Court No. 93370-7
COA No. 33021-4-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent

v.

CHRIS LITO,

Defendant/Petitioner.

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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STATUTES

I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the Respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Defendant has filed a petition for review. Respondent seeks denial of Defendant's petition for review of the unpublished opinion issued by the Court of Appeals on June 2, 2016, *State v. Lito*, No. 33021-4-III, 2016 WL 3166825.

III. ISSUE PRESENTED

When the State charges the defendant with rape by mental incapacity or physical helplessness, does due process forbid requiring a defendant to prove as an affirmative defense that he "had a reasonable belief that the victim was capable of consent"?

IV. STATEMENT OF THE CASE

Defendant was charged in Spokane County Superior Court with one count of second degree rape in April 2014. CP 1. The State alleged that the victim was incapable of providing consent by reason of mental incapacity or physical helplessness. CP 1.

On April 2, 2014, victim H.H. met friends in Spokane County, Washington to have a fun evening. 1RP 49-50. She drank approximately six shots of rum, two cans of beer, five rum and cokes, and she smoked at

least three bowls of marijuana that evening. RP 51-53, 57-58, 80, 84. Around eleven o'clock, H.H. called her sister for a ride and told her that she would wait for her at one of the local bars. RP 58-59. H.H. did not remember any of the evening's events occurring after she called her sister. RP 59.

The next morning, H.H. awoke in a stranger's apartment, without her pants on and with bruises on her neck.[1] RP 59-60. She knew that she had been raped because, due to a medical issue, sexual intercourse is extremely painful for her afterwards, and she felt that particular pain the morning of April 3, 2014. RP 61. She testified, "there was no way I should have had sex that night." RP 60. Further, she testified that on the evening in question, she neither gave consent to anyone to have sexual relations with her, nor allowed anyone to bruise or bite her neck or breast. RP 75-76.

She called 911 and made her way to nearby Deaconness hospital. RP 60. Law enforcement located a video recording showing the defendant and H.H. walk into the apartment building at 11:41 p.m. RP 180-182. Additionally, Defendant's DNA sample matched the DNA sample taken from the victim's rape kit. RP 123.

At trial, defendant argued both that H.H. was not *actually* physically helpless or mentally incapacitated and that *even if* H.H. was physically

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[1] At least one bruise was described as a bite mark. H.H. also had a bite mark on one of her breasts. 2RP 215.

helpless or mentally incapacitated, the defendant had a reasonable belief, "based on what he knew, what he could see" that she was not incapacitated. RP 252-253. The defense argued that Mr. Lito saw that H.H. was able to walk unaided, talk, climb stairs, sit on a table, talk to another individual in the apartment, dial a telephone,[2] and participate in the act of sexual intercourse, and that "doing all of these things ... would indicate to him that she was able to consent." RP 252-253. However the defendant did not testify. RP 227.

The jury found the Defendant guilty as charged on September 19, 2013. CP 26. On November 17, 2014, Defendant moved the court for a new trial based on the Supreme Court's decision in *State v. W.R.*,[3] a decision filed by this Court on October 30, 2014. CP 27-31. The defendant alleged that *W.R.* extends to rape by incapacity cases and therefore the instruction[4]

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2 Evidence was elicited at trial that could support defense arguments in closing that H.H. was able to walk, talk, and use her telephone.

3 181 Wn.2d 757, 336 P.3d 1134 (2014).

4 The jury was instructed with Washington Patter Jury Instruction (WPIC) 19.03:

> It is a defense to the charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [H.H.] was not mentally incapacitated or physically helpless.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more

requiring him to prove the affirmative defense of "reasonable belief that the victim was capable of giving consent" by a preponderance of the evidence improperly shifted the burden of proof away from the State. RP 275. The trial court denied the motion, finding that *W.R.* was distinguishable from Mr. Lito's case because *W.R.*'s holding applied to rape by forcible compulsion cases, not rape by incapacity cases. CP 50.

The court sentenced the Defendant to a standard range sentence of 96 months to life under the indeterminate sentencing provisions of RCW 9.94A.507. CP 59, 62. The Court of Appeals affirmed the Defendant's conviction, also finding his case distinguishable from *W.R.*, and finding persuasive the opinion in *State v. Lozano*, 189 Wn. App. 124, 356 P.3d 219 (2015), *review denied*, 184 Wn.2d 1032 (2016). The defendant has now petitioned this Court for review.

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probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 20; 2RP 238.

Neither party objected to the use of this instruction. RP 203-208, 228-229.

V. ARGUMENT

THE COURT OF APPEALS PROPERLY HELD THE AFFIRMATIVE DEFENSE THAT THE DEFENDANT "HAD A REASONABLE BELIEF THAT THE VICTIM WAS CAPABLE OF CONSENT" DOES NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF IN RAPE BY REASON OF INCAPACITY PROSECUTIONS.

A party seeking discretionary review of a Court of Appeals decision must demonstrate one or more of the criteria required by RAP 13.4(b) for this Court to accept review. RAP 13.4(b); RAP 13.4(c)(7). Those criteria preclude review unless (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) if the case involves a significant question of law under the Constitution of the State of Washington or the United States; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)-(4). The defendant has petitioned for review based on the first three criteria. Pet. for Rev. at 2. However, the defendant's petition fails to demonstrate how the decision of the court of appeals meets any of those criteria.

The due process clause of the Fourteenth Amendment[5] requires the State to prove every element of a charged crime beyond a reasonable doubt.

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[5] The Defendant also indicates that the due process guarantee of Article 1, Section 3 of the Washington State Constitution is implicated by the situation presented here. Br. of Pet'r at 8. The federal and state due process guarantees are coextensive, and therefore, no

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is well-established that the State cannot require the defendant to disprove any fact that constitutes an element of the crime charged. *W.R.*, 181 Wn.2d at 762. However, it is also a long-standing rule that due process does not require the State to disprove every possible fact that would *mitigate* or *excuse* a defendant's culpability. *See Smith v. United States*, ___ U.S.___, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013) (defendant bears burden of proving withdrawal from conspiracy); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (defendant bears burden of proving the affirmative defense that his act of murder was committed while he was under extreme emotional distress); *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996) (entrapment is an affirmative defense that must be proved by the defendant); *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994) (duress must be proved by the defendant by a preponderance of the evidence); *State v. Monaghan*, 166 Wn. App. 521, 270 P.3d 616 (2012) (defendant claiming defense of insanity carries the burden of proving by a preponderance of the evidence his or her insanity at the time of the offense), *review denied*, 174 Wn.2d 1014 (2012). Whether due process prevents the legislature from allocating the burden of proving an affirmative defense to

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analysis of independent state grounds is necessary. *See In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014).

the defendant depends on the relationship between the elements of the crime and the elements of the defense. *W.R.*, 181 Wn.2d at 762.

A defendant is properly assigned the burden of proving true affirmative defenses because true affirmative defenses *admit* the defendant committed a criminal act but plead an excuse for doing so; such defenses do not negate any element of the charged crime. *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). Put differently, a defense that merely *excuses conduct that would otherwise be punishable* is a true affirmative defense, and the burden of proving that defense is properly allocated to the defendant. *W.R.*, 181 Wn.2d at 762.

However, where a defense *necessarily* negates an element of the crime charged, the legislature may not allocate the burden of proof to the defendant. *Id.* In such a case, of course, "the legislature can only require the defendant to present sufficient evidence to create a reasonable doubt as to his or her guilt." *Riker*, 123 Wn.2d at 367-378 (alibi defense negates an element of the crime because it denies the defendant committed the crime and as such, a defendant must only prove the defense such that it creates reasonable doubt; however, a duress defense *admits* that the defendant committed the unlawful act, but pleads an excuse for doing so and the burden of proof for such a defense may be allocated to the defendant).

The legislature has designated "reasonable belief" as an affirmative defense in cases where lack of consent is based solely upon the victim's mental incapacity or physical helplessness, and has required that a defendant provide proof by a preponderance of the evidence in support. RCW 9A.44.030. This Court has recently stated that this defense *is* an affirmative defense that must be proved by the defendant at trial. *State v. Coristine*, 177 Wn.2d 370, 300 P.3d 400 (2013) (the decision to offer the affirmative defense of "reasonable belief" cannot be forced upon an unwilling defendant who strategically would rather argue that the State failed to prove its case, rather than assume the burden of putting on any proof of the affirmative defense).

The question, therefore, is whether this statutory affirmative defense and the completed crime of rape by reason of incapacity or helplessness can co-exist, or whether it violates due process to allocate the burden of proving this affirmative defense to the defendant. *W.R.*, 181 Wn.2d at 765. "The key to whether a defense necessarily negates an element [of an offense] is whether the completed crime and the defense can co-exist." *Id.* In *W.R.* this Court held that in forcible compulsion cases, the burden of proving the defense of "consent" cannot be allocated to the defendant. "There can be no forcible compulsion when the victim consents, as there is no resistance

to overcome. Nor is there actual fear of death, physical injury or kidnapping when the victim consents." *Id.*

This Court expressly declined to address whether the crime of rape by incapacity or helplessness and the affirmative defense of "reasonable belief" could co-exist without improperly shifting the burden of proof to the defendant in *Coristine*. 177 Wn.2d at 381. However, Division Two analyzed this very issue in *State v. Lozano*, 189 Wn. App. 117, 356 P.3d 219 (2015), and this Court denied review of that decision six months before Division Three issued its opinion in *State v. Lito*. 184 Wn.2d 1032, 364 P.2d 120 (January 6, 2016).

In *Lozano*, the defendant was charged with second degree rape with the allegation that the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. *Id.* In that case, like the instant case, the victim had consumed a significant amount of alcohol. *Id.* A witness found the defendant having sexual intercourse with the victim while she appeared to be asleep. *Id.* At trial, the defense theory was that the victim had initiated sexual intercourse with the defendant, and that even if she was incapable of consent, he reasonably believed she could consent. *Id.*

Lozano argued on appeal that the decision in *W.R.* should also apply to rape cases charged under RCW 9A.44.050(1)(b) – rape offenses by mental incapacity or physical helplessness. *Id.* at 222. In deciding that *W.R*

only applies to rape by forcible compulsion cases, and not rape by incapacity cases, the *Lozano* court stated:

> *W.R.* does not support Lozano's position. The instruction in *W.R.* violated due process because it allocated to the defendant the burden to prove consent, which negated the forcible compulsion element of the charged crime. Lozano's burden to prove his "reasonable belief" that the victim was not mentally incapacitated and physically helpless did not negate an element of the charged crime.
>
> ...
>
> The reasonable belief defense may co-exist with the charged crime because the elements of the crime are based on the inability of the person to consent, whereas the defense is concerned with the reasonableness of the defendant's belief that the person was able to consent. The "reasonable belief" defense is merely an excuse for conduct that would otherwise be punishable. Therefore, the trial court's instruction did not violate due process.

Lozano, 189 Wn. App. at 124.

Division Two's decision in *Lozano* is logically sound in light of this Court's decision in *W.R.* and its other jurisprudence, as well as the jurisprudence of the Supreme Court on affirmative defenses and their relationship to a defendant's due process rights.

As addressed in *W.R.*, "forcible compulsion" and "consent" are conceptual opposites that necessarily negate each other. *W.R.*, 181 Wn.2d at 768. "Forcible compulsion" is defined, in part, as physical force which overcomes resistance and places a person in fear of death or injury. RCW 9A.44.010(6). As defined, there can be no forcible compulsion when

the victim consents as there is no resistance to overcome. *W.R.*, 181 Wn.2d at 765. Thus, the two cannot co-exist and *necessarily* negate each other.

The "conceptual opposite" of incapacity to consent, however, is *actual* or *objective* capacity to consent. In *Lozano*, as here, the defendant was not required to prove that the victim had *actual* capacity to consent. His burden was merely to prove that he *reasonably believed* that she had capacity to consent. The focus of this defense is on the reasonableness of the defendant's *subjective* belief, not on the victim's *objective* or actual ability to consent to sexual contact. The two are not conceptual opposites as alleged by defendant in his petition. The two may co-exist because a victim may objectively be incapable of giving consent, but a defendant may still have a reasonable belief that the victim was capable of consenting.

This Court has previously recognized the significant difference between the affirmative defense of "reasonable belief" and the defense that the State had failed to prove the victim was actually incapacitated and therefore was incapable of giving consent (i.e., that the State did not prove all elements of rape by reason of incapacity beyond a reasonable doubt):

> Coristine maintains he elected to forego an affirmative defense as a matter of strategy; his sole defense was that the State failed to prove its case. The State disputes this, arguing that Coristine raised the affirmative defense by testifying that L.F. did not 'appear' drunk. But Coristine's testimony served to cast doubt on the State's case, consistent that L.F. was capable of consent. *There is no basis to conclude*

> *Coristine offered this testimony in support of the unargued defense that he reasonably believed that L.F. was not mentally incapacitated or physically helpless. Rather it supported his argument that she was not in fact incapacitated or helpless.*

Coristine, 177 Wn.2d at 379 (emphasis added).

In this case, Mr. Lito was charged with rape in the second degree with the allegation that the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 1. He argued in closing both that the victim was capable of consent and that even if she was not capable of giving consent, he reasonably believed that she could consent.

As to the first argument, the defendant needed only create a reasonable doubt because that defense does negate an element of the crime of rape by reason of the victim's incapacity. *See Riker*, 123 Wn.2d at 367.

As to his second argument, however, the defendant properly bore the burden of proving his own subjective belief, as his subjective belief is a fact that "lies peculiarly" within his own knowledge, and merely provides an excuse for his conduct. *Smith*, 133 U.S. at 720; *State v. Deer*, 175 Wn.2d 725, 735, 287 P.3d 539 (2012), *cert. denied*, 133 S.Ct. 991, 184 L.Ed.2d 770 (2013). And, just as in *Lozano*, the State retained its burden to prove beyond a reasonable doubt that the defendant had sexual

intercourse with H.H. when she could not consent by reason of being physically helpless or mentally incapacitated.

The challenged instruction in Mr. Lito's case did not negate any element of the criminal offense, as it did not require the defendant to prove that H.H. *actually* consented, nor did it require the defendant to prove that the victim was objectively *capable* of giving consent. It merely placed the burden on him to prove that he *reasonably believed* that she *was capable* of giving consent. The former "defense" is concerned with the victim's actual ability to consent, whereas the latter defense is concerned with the defendant's subjective belief as to the victim's ability to consent, as an excuse for what would otherwise be criminal conduct.

The defendant's petition does not establish any of the criteria required for this Court to accept review of his case. His bare allegations that the decision below conflicts with *W.R.* are without merit, as they are predicated on a conflation of the victim's actual capacity to consent with the defendant's subjective and reasonable belief as to her ability to consent. Pet. at 5-6. This argument should be rejected based on this Court's decision in *W.R.*, *Coristine*, and its other well-established precedent on the law of affirmative defenses in criminal cases. Thus, the defendant's petition does not satisfy RAP 13.4(b)(1). Furthermore, the decision below is wholly consistent with the well-reasoned decision in *Lozano*. Therefore, the

defendant's petition fails to establish a conflict with other Court of Appeals decisions. RAP 13.4(b). Lastly, the defendant's petition fails to establish that the decision below involves a significant question of law under the State or Federal Constitution (RAP 13.4(c)) because this Court and the Supreme Court have repeatedly affirmed that in true affirmative defense cases, such as this, the burden of proof is properly allocated to the defendant. Because the defendant fails to establish any of the RAP 13.4 criteria, this Court should decline review of his case.

VI. CONCLUSION

For the reasons stated above, Respondent requests the Court deny the petitioner's request for review.

Respectfully submitted this 26 day of July 2016.

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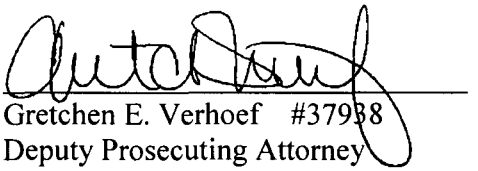
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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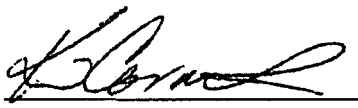
7/26/2016 (Date) Spokane, WA (Place)  (Signature)

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