

67646-6

67646-6

No. 67646-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KIRK L. WILLIAMS,

Appellant.

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

The Honorable Mary I. Yu

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 3

COURT'S INSTRUCTION 23 IMPERMISSIBLY
SHIFTED THE BURDEN TO THE DEFENDANT OF
DISPROVING AN ELEMENT OF THE CHARGED
OFFENSE THUS VIOLATING MR. WILLIAMS'
RIGHT TO DUE PROCESS 3

1. The State bears the burden of proving each
element of the crime charged beyond a reasonable
doubt..... 4

2. Forcible compulsion is an essential element of
second degree rape, and the burden of persuasion on
consent may not be placed on the defendant. 5

3. Consent is not an affirmative defense to second
degree rape. 7

4. The meaning of the Supreme Court's decision in
State v. Camara should be clarified to prohibit
requiring a defendant to prove consent by a
preponderance of the evidence. 11

5. The trial court's instructional error was not
harmless..... 18

E. CONCLUSION 20

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 1, 4

FEDERAL CASES

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d
705 (1967) 19

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970) 5

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

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508
(1975) 5

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d
281 (1979) passim

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 29
(1979) 5

WASHINGTON CASES

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) 4, 16, 17

State v. Box, 109 Wn.2d 320, 745 P.2d 23 (1987) 7, 8, 16

State v. Bright, 77 Wn.App. 304, 890 P.2d 487 (1995) 6

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 19

State v. Brown, 45 Wn.App. 572, 726 P.2d 60 (1986) 18

State v. Camara, 113 Wn.2d 631, 781 P.2d 483
(1989) 6, 11, 13, 17

State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005) 18

<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	13
<i>State v. Hanton</i> , 94 Wn.2d 129, 614 P.2d 1280, <i>cert. denied</i> , 449 U.S. 1035 (1980)	18
<i>State v. Hicks</i> , 102 Wn.2d 182, 683 P.2d 186 (1984)	17
<i>State v. Kester</i> , 38 Wn.App. 590, 686 P.2d 1081 (1984)	6, 8
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	4, 5, 16, 17
<i>State v. McNight</i> , 54 Wn.App. 521, 774 P.2d 532 (1989).....	6
<i>State v. Moses</i> , 79 Wn.2d 104, 483 P.2d 832 (1971), <i>cert. denied</i> , 406 U.S. 910 (1972)	7
<i>State v. Pistona</i> , 127 Wash. 171, 219 P. 859 (1923)	8
<i>State v. Riker</i> , 123 Wn.2d 351, 869 P.2d 43 (1994).....	passim
<i>State v. Roberts</i> , 88 Wn.2d 337, 562 P.2d 1259 (1979).....	4
STATUTES	
RCW 9A.44.010	5, 6
RCW 9A.44.050	5

A. ASSIGNMENT OF ERROR

The trial court violated Mr. Williams' Fourteenth Amendment right to due process when it instructed the jury on consent in Court's Instruction 23.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Fourteenth Amendment Due Process Clause requires the State to bear the burden of proving each element of the charged offense beyond a reasonable doubt. Here, the trial court placed the burden of proving consent by a preponderance of the evidence on the defendant. Did the trial court violate due process by shifting to the defense the burden of disproving an element of the crime charged, forcible compulsion, when it required Mr. Williams prove consent by a preponderance of the evidence?

2. Does the "forcible compulsion" element of second degree rape necessarily include lack of consent, such that proof of consent negates forcible compulsion?

C. STATEMENT OF THE CASE

Felicia Gates and Kirk Williams were involved in a stormy three year romantic relationship. 10/18/2011RP 16. The two broke up for approximately a month in November 2009 following an altercation. 10/18/2011RP 48-50. On December 7, 2009,

according to Ms. Gates, Mr. Williams came to her home wishing to see his son.¹ 10/18/2011RP 50-52. Because there was a no-contact order in effect barring Mr. Williams from being at or near Ms. Gates residence, she told Mr. Williams to leave. *Id.* At some point, according to Ms. Gates, Mr. Williams stated he wanted to have sex with her. *Id.* at 56. Ms. Gates claimed she did not desire to have sex. *Id.*

Again, according to Ms. Gates, Mr. Williams forced her onto the bed and got on top of her. *Id.* Ms. Gates claimed Mr. Williams took off her clothing, covered her mouth and engaged in intercourse. 10/18/2011RP 57. Once finished, Mr. Williams left Ms. Gates' home. *Id.* Ms. Gates claimed that her and Mr. Williams' infant son was on the bed during the incident. 10/18/2011RP 57.

Mr. Williams admitted having sexual intercourse with Ms. Gates while their son was on the bed. 5/31/2011RP 15. Mr. Williams denied that Ms. Gates told him she did not want to have intercourse and testified that she did not resist. *Id.* at 18-21.

¹ Mr. Williams and Ms. Gates had a child together, T.G. born in 2008.

Mr. Williams was charged with second degree rape for the December 2009 incident.² Following a jury trial, he was convicted as charged. CP 158.

D. ARGUMENT

COURT'S INSTRUCTION 23 IMPERMISSIBLY
SHIFTED THE BURDEN TO THE DEFENDANT OF
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RIGHT TO DUE PROCESS

The trial court instructed the jury in Instruction 22, the “to convict” instruction, that among other things, the State bore the burden of proving forcible compulsion in order to find Mr. Williams guilty of second degree rape. CP 110. In addition, the trial court also instructed the jury in Instruction 23 that Mr. Williams bore the burden of proving the sexual intercourse was consensual. CP 111. Mr. Williams contended this instruction impermissibly shifted the burden of proof to him and relieved the State of proving forcible compulsion beyond a reasonable doubt.

² Mr. Williams was also charged with one count of felony violation of a court order, one count of third degree assault, one count of first degree burglary, one count of second degree assault, and two counts of misdemeanor violation of no contact orders. CP 73-78. He was convicted as charged except on the second degree assault count, as to which the jury found him guilty of the lesser degree of fourth degree assault. CP 152-67.

1. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *Martin v. Ohio*, 480 U.S. 228, 230, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 29 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

It is well established under the Due Process Clause that the burden of disproving an element of a crime may never be shifted to the defendant. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Roberts*, 88 Wn.2d 337, 340, 562 P.2d 1259 (1979). 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; *Acosta*, 101 Wn.2d at 614 (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. Thus, the burden on a defense which “negates” an element of the crime charged, must remain with the State. *Patterson v. New York*, 432 U.S. 197, 206-07, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1979); *McCullum*, 98 Wn.2d at 486.

2. Forcible compulsion is an essential element of second degree rape, and the burden of persuasion on consent may not be placed on the defendant. Mr. Williams was charged with second degree rape pursuant to RCW 9A.44.050(1)(a). This offense required the State to prove, beyond a reasonable doubt, that the defendant had sexual intercourse with another person by “forcible compulsion.” *Id.* The “forcible compulsion” element is 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 or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6) (emphasis added). On the other hand,

“consent” is defined as follows:

“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.

RCW 9A.44.010(7) (emphasis added).

The defendant must use force which “overcome[s] resistance,” a phrase which necessarily encompasses a lack of consent, as the victim must be somehow rendered unable to resist. *State v. McNight*, 54 Wn.App. 521, 536, 774 P.2d 532 (1989) (Some type of resistance from victim must be shown. Issue of resistance is a fact question to be determined on a case-by-case basis). Further, forcible compulsion could be achieved through threat, which implicitly renders any resistance impossible. At the same time, to have consent, the victim must agree “freely” to the intercourse. RCW 9A.44.010(7); *State v. Bright*, 77 Wn.App. 304, 311, 890 P.2d 487 (1995).

Under these definitions, the victim *cannot* consent where “forcible compulsion” is present, 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) (forcible compulsion is conceptual opposite of consent); *State v. Kester*, 38 Wn.App. 590, 594, 686 P.2d 1081 (1984) (forcible compulsion is antonym of consent). *See also Bright*, 77 Wn.App. at 311 (third

degree rape, which requires intercourse “without consent” is lesser included offense of second degree rape, since “without consent” element is established where forcible compulsion is shown). By requiring Mr. Williams to prove consent by a preponderance of the evidence, the trial court required him to disprove the element of forcible compulsion. But due process prohibits the court from requiring Mr. Williams to do anything more than raise reasonable doubt as to his guilt. The trial court improperly shifted the burden of proof on an element of the crime, thereby depriving Mr. Williams of his due process rights.

3. Consent is not an affirmative defense to second degree rape. The State's ultimate burden of disproving consent follows from the fact consent is not an “affirmative defense.” The State may permissibly require the defendant to bear the burden of proving an “affirmative defense,” which does not negate an element of the crime charged. See *Patterson*, 432 U.S. at 202, 210; *Martin*, 480 U.S. at 235; *State v. Riker*, 123 Wn.2d 351, 366, 869 P.2d 43 (1994) (duress defense); *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971) (treaty exemption defense to violation of fishing laws), *cert. denied*, 406 U.S. 910 (1972); *State v. Box*, 109 Wn.2d 320, 323, 745 P.2d 23 (1987) (insanity defense). This is so in part

because an affirmative defense admits all the elements of the crime charged, but advances an excuse or justification for the defendant's conduct, and asks that punishment be mitigated because the defense reduces the defendant's culpability. *Riker*, 123 Wn.2d at 367-68. Further, an affirmative defense is generally uniquely within the defendant's knowledge and ability to establish. *Id.*

Here, unlike duress or insanity, an assertion that the alleged victim consented to intercourse does not admit the defendant committed the crime of rape, nor does it ask the court to condone or excuse the defendant's otherwise criminal conduct. *Contrast Riker*, 123 Wn.2d at 367-68 (duress admits the defendant committed the unlawful act, but pleads an excuse for doing so) and *Box*, 109 Wn.2d at 326-27 (insanity defense asks the court to excuse unlawful conduct) *with State v. Pistona*, 127 Wash. 171, 219 P. 859 (1923) (alibi defense denies defendant was present at the scene of the crime or that he could have committed offense) *and Acosta* (as defined in Washington, self-defense disputes whether defendant killed with appropriate *mens rea* and therefore, denies that defendant committed murder). An assertion of consent is merely another way of saying no forcible compulsion was used. *Kester*, 38 Wn.App. at 594 (unnecessary to instruct the jury on the

definition of consent as the instruction describing forcible compulsion adequately allowed the defendant to argue his theory that the victim consented to intercourse with the defendant). Further, unlike these affirmative defenses, whether the alleged victim consented is not a fact that is uniquely within the defendant's knowledge or ability to establish. *Riker*, 123 Wn.2d at 367 (burden of persuasion for affirmative defenses placed on defendants because generally, affirmative defenses are uniquely within the defendant's knowledge and ability to establish). Therefore, a rape defendant may only be required to raise sufficient evidence of consent to raise a reasonable doubt as to the element of forcible compulsion.

To contrast this case with *Martin v. Ohio, supra*, is instructive. In *Martin*, Ohio law defined murder as "purposely causing the death of another with prior calculation or design." *Martin*, 480 U.S. at 228. The Ohio statute placed the burden on the defendant of proving self defense by a preponderance of the evidence by showing: (1) the defendant was not at fault for creating the self-defense situation; (2) the defendant had an honest belief he was in imminent danger of death or great bodily harm and that the only means of escape from such danger was the use of such force;

and (3) the defendant did not violate any duty to retreat or avoid danger. *Martin*, 480 U.S. at 230. Noting that traditionally, affirmative defenses, including self-defense, were matters for the defendant to prove, the Supreme Court held that requiring the defendant to prove self-defense by a preponderance of the evidence did not violate due process because the State was still required to prove the elements of prior calculation and design beyond a reasonable doubt. *Martin*, 480 U.S. at 233, *citing Patterson*, 432 U.S. at 202. In *dicta*, the Court noted that while there may be some evidentiary overlap between proof of self defense and proof of the required mental state for murder, the ultimate burden of proving the individual elements of the crime remained with the State. *Martin*, 480 U.S. at 233. The Court also emphasized that the jury was entitled to use evidence presented by the defendant regarding self-defense to find the elements of murder had not been established beyond a reasonable doubt. *Id.*

In contrast to *Martin*, the Washington legislature and courts have defined “forcible compulsion” and “consent” to be mutually exclusive terms. As outlined above, proof of forcible compulsion disproves consent. There is much more than mere evidentiary “overlap” between the two concepts. Burdening the defendant with

proving consent by a preponderance of the evidence necessarily requires the defendant to convince the jury that forcible compulsion was not used. Therefore, due process requires the defendant to present evidence of consent only to the extent necessary to create a reasonable doubt he committed second degree rape.

4. The meaning of the Supreme Court's decision in *State v. Camara* should be clarified to prohibit requiring a defendant to prove consent by a preponderance of the evidence. *Camara, supra*, can be read as permitting courts to place the burden on defendants to prove consent by a preponderance of the evidence, as it questions the validity of the "negates" analysis.

Mr. Williams instead asks this Court to interpret *Camara* consistent with the due process principles outlined above, and forbid shifting the burden of persuasion on consent to the defense. Alternatively, Mr. Williams argues that *Camara* represents a flawed reading of United States Supreme Court precedent. See *Martin, supra; Patterson, supra*. In the expectation of further review in the state and federal system, Mr. Williams wishes to preserve the issue by raising it here in order to better urge reconsideration of *Camara*.

The *Camara* decision relied, in large part, upon *Martin, supra*, in reaching its conclusion regarding the burden of proof on

consent. In *dicta*, the *Martin* Court acknowledged that evidence regarding an affirmative defense may also be relevant to whether the underlying elements of the crime charged have been established. The Court observed that the defendant's evidence that she acted in self-defense could lead to a finding she did not act purposefully or with prior calculation and design. 480 U.S. at 233. The Court concluded, however, that this did not mean that requiring the defendant bear the burden of proving self defense violated due process, as the ultimate burden of proving the required mental state lie with the state, since the jury was instructed that all evidence must be examined in determining whether the state had met its burden of proving every element. *Martin*, 480 U.S. at 234.³

³ In that regard, the Supreme Court stated:

We are thus not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former. It may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case.

Martin, 480 U.S. at 234.

The *Camara* court cited to this portion of *Martin* and found that the “negates analysis” no longer applied to due process analysis, stating:

In light of [*Martin v. Ohio*], we have substantial doubt about the correctness of [the] “negates” analysis and thus decline to apply it in this 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 the 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 must lie with the State.

Camara, 113 Wn.2d at 639-40.⁴ This portion of *Camara* effectively opened the door to permit the State to shift the burden of proving an element of an offense to the defendant under the guise of creating a “defense.”

Camara misread *Martin* as a rejection of the “negates” analysis. First, precedent relied upon and embraced by the *Martin* Court endorsed the “negates” analysis. *Martin* relied primarily upon *Patterson, supra*, which upheld a state statute shifting the burden of proving an affirmative defense to the accused. New York law required the prosecutor to prove all of the statutorily-defined

⁴ Given an opportunity to overrule *Camara*, the Washington Supreme Court refused to do so based upon its reading of *Martin*. *State v. Gregory*, 158 Wn.2d 759, 802-04, 147 P.3d 1201 (2006).

elements of murder beyond a reasonable doubt, but permitted a defendant to reduce the charge to manslaughter by showing he acted while suffering an extreme emotional disturbance. The Supreme Court found this burden-shifting did not violate due process, largely because the affirmative defense did “not serve to negate any facts of the crime which the State is [required] to prove in order to convict of murder.” *Patterson*, 432 U.S. at 207. The clear implication of this ruling is that when a defense does negate an element of the crime, the State may not shift the burden. *Martin*, 480 U.S. at 237 (Powell, J., dissenting); *White v. Arn*, 788 F.2d 338, 344–45 (6th Cir. 1986).

The *Martin* Court analogized the facts before it to those present in *Patterson*, and found, as in *Patterson*, that the defendant's due process rights had not been violated because the State was still required to prove each element of the crime beyond a reasonable doubt. *Martin*, 480 U.S. at 233. The Court relied on *Patterson* as the framework to guide its decision, and, at one point, explicitly refused to depart from *Patterson's* reasoning in any way.⁵

⁵ Justice Powell wrote a dissenting opinion in *Martin*, asserting the majority had abandoned the central tenets of *Patterson* regarding defenses which negate an element of the crime. *Martin*, 480 U.S. at 237, 239 (Powell, J. dissenting). The majority responded to Justice Powell by stating, “[w]e do not

By endorsing that case as a whole, the *Martin* Court endorsed *Patterson's* “negates” analysis. Therefore, contrary to *Camara's* conclusion, the “negates” analysis must still be applied to examine whether something designated a “defense” is actually a euphemism for the opposite of an essential element of the crime. This is essential to ensure that the burden of proving each element of the crime charged remains with the state.

A more consistent reading of *Martin* is that it represents an effort to distinguish situations where a defense may, through overlapping evidence, tend to cast doubt on the existence of an underlying element of the crime, from cases where the “defense” in question actually and legally represents the absence of an essential element of the crime. While the same evidence may be relevant to determine whether one kills with premeditation, and whether he acts in self-defense, there remains an ultimate legal difference between the two. An Ohio defendant asserting self-defense is saying he committed murder *because* of his urge to act in self-defense. In contrast, arguing consent is merely another way of arguing lack of forcible compulsion, as the two terms have been

depart from *Patterson v. New York* [citation omitted], in this respect or in any other.” *Martin*, 480 U.S. at 234-35 fn.

defined in this state. Legally, the two terms encompass one another. Thus, by designating consent as a defense, and placing the burden of proving it on the defendant, the trial court shifted to the defendant the burden of disproving forcible compulsion, and due process was violated.

Further, Washington Supreme Court cases decided after both *Martin* and *Camara* appear to have embraced *Patterson's* "negates" analysis. In *State v. Box, supra*, a post-*Martin* decision, the Supreme Court rejected the defendant's argument that insanity in a murder case must be disproved by the State. The Court concluded the defense did not negate an element of the crime of murder as the defendant's sanity was not an element of that crime. *Box*, 109 Wn.2d at 328-29. The Court then held that a defendant must prove the affirmative defense of insanity by a preponderance of the evidence. *Id* at 330, citing *McCullum, supra*, and *Acosta, supra*.

Likewise, in *Riker, supra*, the Supreme Court again applied the "negates" analysis to the statutory defense of duress. The Court ruled that a defendant must prove duress by a preponderance of the evidence. However, despite the earlier

holding in *Camara*, the Supreme Court distinguished duress from other “defenses” such self defense and alibi, stating:

[t]he duress defense, unlike self-defense or alibi, does not *negate* an element of the offense, but pardons the conduct even though it violates the literal language of the law. . . . Generally an affirmative defense that does not negate an element of the crime charged, but which only excuses the conduct, should be proved by a preponderance of the evidence.

Riker, 123 Wn.2d 368.

Thus, it appears the Washington Supreme Court has subsequently refused to read *Martin* as broadly as it did in *Camara*, and has continued to apply the “negates” analysis. The majority of post-*Martin* cases that have applied the “negates analysis” represent a better reading of United States Supreme Court precedent. Rejecting the “negates analysis” at this time would mean abandoning well-established precedent in this state which has prevented the State from shifting to the defendant the burden of disproving an element of the crime with which he or she is charged. See *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (prosecution must disprove the defense of good faith claim of title in robbery case because the defense negates intent element of robbery); *Acosta*, 101 Wn.2d at 616-19; *McCullum*, 98 Wn.2d at 494-96; *State v. Hanton*, 94 Wn.2d 129, 133, 614 P.2d 1280, *cert.*

denied, 449 U.S. 1035 (1980). Mr. Williams asks this Court to follow the established precedent of this state, and give *Martin* its intended reading, by applying the “negates analysis” to this case. Under this analysis, the trial court violated due process by instructing the jury that Mr. Williams was required to prove consent by a preponderance of the evidence.

5. The trial court's instructional error was not harmless. An instruction error is harmless only if it is “trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Brown*, 45 Wn.App. 572, 576, 726 P.2d 60 (1986). Where the error is of constitutional magnitude, it is presumed prejudicial unless the State can prove beyond a reasonable doubt the jury would have reached the same result absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). “An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) (alteration in original), *quoting State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889

(2002). Whether a flawed jury instruction is harmless error depends on the facts of a particular case. *Id.*

Here, the State cannot prove the outcome of the trial would have been the same absent the trial court's erroneous instruction. As in most rape cases, Mr. Williams's guilt or innocence hinged primarily upon the swearing match between him and Ms. Gates, regarding whether she consented to sexual intercourse or whether he forced her to have sex. Ms. Gates denied consenting to the sexual congress, while on the other hand, Mr. Williams contended Ms. Gates actively participated in the act of sexual intercourse and there was no forcible compulsion. Had the jury merely been instructed it had to find the State proved forcible compulsion beyond a reasonable doubt, and not instructed on consent, this could have altered the outcome of the trial. The error in instructing the jury that Mr. Williams was required to prove consent was not harmless.

E. CONCLUSION

For the reasons stated, Mr. Williams requests this Court reverse his rape conviction and remand for a new trial.

DATED this 30th day of March 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 67646-6-I
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KIRK WILLIAMS)	
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Appellant.)	

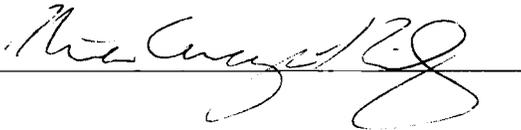
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I, NINA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED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

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