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NO. 67646-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
KIRK L. WILLIAMS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MARY YU, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. Under the invited error doctrine, a defendant may not request a jury instruction in the trial court and then complain on appeal that the requested instruction was given. Williams proposed a jury instruction that placed the burden of proof on him, by a preponderance of the evidence, to establish that the sexual intercourse that served as the basis of the charge of second degree rape was consensual. Did Williams invite any error, and should this Court accordingly decline to address his claim that this instruction impermissibly shifted the burden of proof on that charge?

2. The Court of Appeals is bound to follow Supreme Court precedent. The Washington Supreme Court has repeatedly 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 Williams in this forcible rape case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Kirk Williams was charged by information and amended information with a number of crimes, all involving domestic violence, including: Felony Violation of a Court Order (Count I); Assault in the Third Degree (Count II); Burglary in the First Degree (Count III); Rape in the Second Degree (Count IV); Assault in the Second Degree (Count VII); and Misdemeanor Violation of a Court Order (Counts V, VI and VIII). Counts II, III, IV and VII included special allegations that the crime was part of an ongoing pattern of abuse, and that the crime was committed within sight or sound of the defendant's or victim's minor-age child. The named victim on all of the counts except those involving violations of a court order was Felicia Gates. The time period stretched from November 28, 2009 to June 12, 2010. CP 1-6, 73-78.

A jury found Williams guilty as charged on all counts except Count VII (Assault in the Second Degree); as to that count, the jury found Williams guilty of the lesser-degree crime of Assault in the Fourth Degree. CP 151-67.

The trial court sentenced Williams to an exceptional sentence of 240 months. CP 207-23; 14RP 36¹.

2. SUBSTANTIVE FACTS.

Felicia Gates met Kirk Williams in May of 2007. 5RP 13, 16. They were together for about three years, and they have a child in common, two-year-old T.G. 5RP 13-14. Gates also has two teen-aged daughters, T.G. and S.G. 5RP 13. All three children live with Gates. 5RP 13-14.

After about a year, the relationship deteriorated, with Williams becoming physically and mentally abusive toward Gates. 5RP 18-49, 71-86.² On December 7, 2009, Williams showed up at Gates's front door. 5RP 51-52; 7RP 10-15. Gates told him that he shouldn't be there, and that he had to leave.³ 5RP 52-53.

¹ The verbatim report of proceedings at trial consists of 14 volumes, which will be referred to in this brief as follows: 1RP (2-15-11, 3-16-11, 3-24-11); 2RP (5-12-11); 3RP (5-13-11); 4RP (5-16-11); 5RP (5-18-11); 6RP (5-19-11); 7RP (5-23-11); 8RP (5-24-11); 9RP (5-26-11); 10RP (5-31-11); 11RP (6-1-11); 12RP (6-2-11); 13RP (7-8-11); and 14RP (8-12-11).

² The events described in the cited pages were the basis of some of the other charges against Williams. Because only the rape incident is relevant to the issue on appeal, only the events that occurred on December 7, 2009 will be discussed in any detail in this brief.

³ Williams was prohibited from coming within 500 feet of the residence under a court order listing Gates's daughter S.G. as the protected party. 6RP 97-100.

Williams did not leave. After starting an argument with Gates, Williams wanted to have sex with her. 5RP 54-56. She refused, but he overpowered her, forcing her down on the bed and getting on top of her.⁴ 5RP 56-57. Williams then forced Gates to have intercourse with him.⁵ 5RP 57-58. Baby T.G. lay on the bed while Williams raped Gates. 5RP 57.

Gates reported the rape to police immediately. 5RP 60; 6RP 128-31. A detective took Gates to Harborview Medical Center for a sexual assault examination. 5RP 60-62; 6RP 132; 7RP 35-40. A nurse practitioner collected Gates's clothing and took swabs from various parts of her body. 7RP 24-25, 35, 45-53. DNA analysis linked Williams to saliva from Gates's skin, as well as to sperm from her underpants. 9RP 18-30. The probability of selecting an unrelated individual with a matching profile at random from the population of the United States is 1 in 3.1 quadrillion. 9RP 30.

Police failed to locate Williams in the aftermath of the rape. 6RP 145; 7RP 114. Williams left for Baltimore on December 10, 2009, and did not return to the Seattle area until June 1, 2010. 10RP 29-30.

⁴ Williams is 6 feet 2 inches tall, and weighs 325 pounds. CP 6.

⁵ Additional details about the rape came in through the testimony of medical personnel. 7RP 15-17, 41-45.

King County Sheriff's Detective Cynthia Sampson interviewed Williams about the rape allegation on June 18, 2010, in the King County Jail.⁶ 7RP 134-35. Williams unequivocally denied having intercourse with Gates on December 7, 2009. CP 310. He denied even seeing or talking with Gates after he was released from jail in late November.⁷ CP 309. Williams insisted that he had left for Baltimore by December 7th; he said that he specifically recalled celebrating his birthday on December 3rd in Baltimore. CP 310-11, 321.

By the time he testified at trial, Williams had modified his story. He no longer denied having intercourse with Gates on December 7th; rather, he now claimed that he and Gates had consensual sexual intercourse on the morning of the alleged rape. 10RP 7-25.

⁶ Williams had been arrested on June 12, 2010, in connection with an assault on Gates. 6RP 177-81; 8RP 6-8, 19-22, 31-38; 9RP 60-70, 79-87. This assault is the basis for the charge of Assault in the Second Degree (Count VII).

⁷ Williams had been arrested on November 28, 2009, for assaulting Gates. 5RP 36-49; 6RP 13-19, 59-69, 110-16, 166-71; 7RP 94-100, 170-73, 180-83. This assault is the basis for the charge of Assault in the Third Degree (Count II).

C. ARGUMENT

1. WILLIAMS INVITED ANY ERROR BY PROPOSING THE JURY INSTRUCTION OF WHICH HE NOW COMPLAINS.

Williams challenges the trial court's instruction placing the burden of proof on him to show by a preponderance of the evidence that the sexual intercourse on which the rape charge was based was consensual. This claim must fail. Williams proposed the very instruction of which he now complains, and thus invited any error.

a. Relevant Facts.

At the end of a trial day, while still in the midst of the State's case, defense counsel informed the court that he would likely be proposing a jury instruction "on the affirmative defense of consent." 8RP 61. When testimony was completed, the court asked the parties whether they had any exceptions to the court's instructions. Defense counsel confirmed that he did not, but added, "I did propose the consent defense which I think based on Mr. Williams' testimony is supported." 10RP 185.

The trial court instructed the jury that, to convict Williams of rape in the second degree, the State had to prove beyond a

reasonable doubt that “the sexual intercourse occurred by forcible compulsion.” CP 110. In accordance with defense counsel's proposal, the court further instructed the jury on the affirmative defense of consent:

A person is not guilty of rape in the second degree if the sexual intercourse is consensual. 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.

The defendant has the burden of proving that the sexual intercourse was consensual 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 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 on the charge of rape in the second degree in Count IV.

CP 111; WPIC 18.25.

In his closing argument, defense counsel discussed consent, referring to Williams's testimony. 11RP 50. Counsel acknowledged that Williams bore the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence, and he emphasized that this was a lower standard of proof than the State's burden to prove the elements of the crime beyond a reasonable doubt. 11RP 50-51. Counsel told the jury

that, “[i]f you don’t believe they proved the rape allegation in the first place beyond a reasonable doubt, you don’t even have to get to consent.” 11RP 51.

b. Williams Invited Any Error.

The law in Washington has long been settled: a criminal defendant will not be allowed to request an instruction at trial and then, on appeal, seek reversal on the basis of claimed error in that same instruction. State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). The doctrine will be applied to preclude appellate review even where the error in the instruction is of constitutional magnitude. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (applying invited error doctrine to jury instruction that misstated the law of self-defense).

Here, Williams is predicating his claim of error on an instruction that he proposed at trial. The invited error doctrine precludes review.

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

Williams quarrels with the jury instruction's allocation of the burden of proof with respect to his claim that Gates consented to have sexual intercourse with him on December 7, 2009. 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. He contends that the Washington Supreme Court misinterpreted relevant precedent in State v. Camara,⁸ and he 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. In addition to Camara, which has never been overruled, the Washington Supreme Court more recently adhered to the holding of that case in State v. Gregory.⁹ This Court should refuse Williams's invitation to ignore this binding precedent.

An appellate court reviews a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole.

⁸ 113 Wn.2d 631, 781 P.2d 483 (1989).

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

State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Instructions are sufficient if they clearly state the applicable law, are not misleading, and allow the parties to argue their respective theories of the case. Havens v. C&D Plastics, 124 Wn.2d 158, 165, 876 P.2d 435 (1994). Jurors are presumed to follow all of the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

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 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,¹⁰ manslaughter,¹¹ and assault,¹² and the absence of a good-faith claim of title in a prosecution for robbery.¹³ 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 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

¹⁰ State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983).

¹¹ State v. Hanton, 94 Wn.2d 129, 614 P.2d 1280 (1980).

¹² State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984).

¹³ State v. Hicks, 102 Wn.2d 182, 683 P.2d 186 (1984).

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).

Williams acknowledges in a footnote that, “[g]iven an opportunity to overrule *Camara*, the Washington Supreme Court refused to do so based upon its reading of *Martin*” (citing State v. Gregory, 158 Wn.2d 759, 801, 147 P.3d 1201 (2006)). Brief of Appellant at 13 n.4. But Williams ignores Gregory in his discussion of Washington Supreme Court cases subsequent to Camara. See Brief of Appellant at 16-18.

Unlike the cases Williams cites, Gregory is directly on point. In Gregory, the Washington Supreme Court again faced a claim that requiring a defendant charged with forcible rape who claims 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 jury instructions given in this case adhered to this requirement. The jurors were told that, to find Williams guilty of rape in the second degree, the State had to prove beyond a reasonable doubt that “the sexual intercourse occurred by forcible compulsion.” CP 91, 110. They were told that if, after weighing “all the evidence,” they had a reasonable doubt as to “any one of these elements,” it was their “duty” to return a verdict of not guilty. CP 110. Jurors were also told that “[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses . . . , and that, “[i]n order to decide whether any proposition has been proved, you must consider all of the evidence . . . that relates to the proposition.” CP 86, 87. The burden of proof thus remained on the State to prove beyond a reasonable doubt that Williams raped Gates, and Williams’s testimony that the sexual intercourse was consensual was a part of the evidence that the jury had to consider in deciding that issue.

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 Williams's conviction for Rape in the Second Degree.

DATED this 2nd day of August, 2012.

Respectfully submitted,

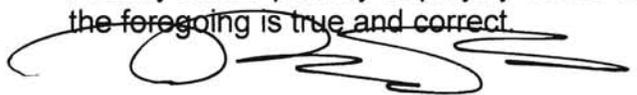
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Thomas M. Kummerow**, 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. KIRK L. WILLIAMS**, Cause No. **67646-6-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.



Name
Done in Seattle, Washington

08/02/12
Date