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IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

NO. 87882-0

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY THOMAS LYNCH,

Petitioner.

STATE'S ANSWER TO AMICUS BRIEF

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ORIGINAL

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COUNTERSTATEMENT OF THE ISSUES

ISSUE ONE

Did *State v. Camara,* 113 Wn.2d 631, 781 P.2d 483 (1989), and *State v. Gregory,* 158 Wn.2d 759, 147 P.3d 1201 (2006), correctly grasp the significant distinction made by the Legislature when it rewrote the rape statutes in 1975?

ISSUE TWO

Was the confusion in the instant case caused by a systemic failure of pattern jury instructions, or was it in reality caused because the trial court attempted to address both sexual intercourse and sexual contact in the same instruction?

ISSUE THREE

When a defendant chooses to ignore precedent when presenting a defense, can it really be said that the defendant has authority to present a defense in any manner it believes appropriate?

STATEMENT OF THE CASE

The facts have been presented in previous briefings.

SUMMARY OF ARGUMENT

The defense continues to confuse and conflate two separate concepts. The decisions of the United States Supreme Court, the only entity with final authority about what the Due Process Clause means, has continually said that the clause only requires the state to prove the elements of the crime. Rape in the Second Degree has not contained a consent element since 1975. Therefore, the state is not required to prove a lack of consent.

The issue is not whether consent will disprove the state's burden. The issue is who has the burden to prove consent. It is not the state's burden because it does not address an element the state must prove and it is uniquely in the mind of the defendant. It is an affirmative defense.

ARGUMENT

ISSUE ONE

Did *State v. Camara,* 113 Wn.2d 631, 781 P.2d 483 (1989), and *State v. Gregory,* 158 Wn.2d 759, 147 P.3d 1201 (2006), correctly grasp the significant distinction made by the Legislature when it rewrote the rape statutes in 1975?

RESPONSE

From *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), through *Smith v. United States,* ___ U.S. ___, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013), the United States Supreme Court has continually said the same thing: The State's burden is to present evidence beyond a reasonable doubt to meet the elements of the crime as the state defines it.

In 1975, the legislature chose to rewrite Rape in the First and Second Degree as forcible compulsion, an inability to give informed consent, or rape coupled with a felony. The legislature also chose to couple lack of consent with Rape in the Third Degree, RCW 9A.44.060. The Legislature never intended that consent become a defense to rape in the first or second degree.

RCW 9A.44.040, Rape in the First Degree, created a crime in which forcible compulsion was accomplished by a felonious act. RCW 9A.44.050, Rape in the Second Degree, was accomplished through forcible compulsion – which is *not* lack of consent – or through abuse of a person unable to provide consent.

Amicus discusses briefly the rape statutes existing prior to 1975. The victim had to prove she or he did not consent. The victim had to show some small amount of resistance. From the beginning (report to the police) to the end (examination in court) the focus was on what the victim did or did not do. The Legislature reversed the process, creating two forms of rape that focused on the brutality of the rapist. The Legislature required the State to prove force. It no longer had to present corroboration. The victim's past sexual history was, for the most part, no longer relevant. The statutory scheme reversed the process so that the question the State must address is no longer related to consent, but whether the sexual encounter was completed by forcible compulsion. What the state *had* to prove before 1975 is no longer

what the state *has* to prove after 1975.

The legislative history for the rewritten statutes shows the changes to the rape statutes were significant, creating two counts of rape focused solely on the acts of the defendant and shielding rape victims from the pernicious cross examination victims faced if they reported a rape. For the first time in Washington State, the defendant was on trial for rape, rather than the victim. *State v. Camara,* 113 Wn.2d 631, 781 P.2d 483 (1989), recognized the state's burden was no longer to prove lack of consent, but instead to prove forcible compulsion. The court then, however, recognized a defense the Legislature had not created; it held that the common law defense of consent still existed. It then took the analysis one step farther and determined that consent and forcible compulsion cannot exist in the same set of facts, calling them "conceptual opposites."

This holding incorrectly analyzes the distribution of the burdens. The State no longer could obtain a conviction by proving a lack of consent for first and second degree rape so that is not its

burden any longer. The State's new burden was to prove that the defendant employed "physical force that overcame resistance." The conceptual opposite of "physical force that overcame resistance" is "no force and no resistance." Consent is one method by which to prove "no force and no resistance" but it is not the only means. *State v. Ritola,* 63 Wn.App. 252, 817 P.2d 1390 (1991) proves this: a juvenile could not be convicted of indecent liberties for grabbing the breast of a counselor at a boy's ranch because the State did not prove that the physical force overcame resistance. The counselor certainly did not consent, but that was not the issue the State must prove. Without proof of force, the state cannot prove Rape in the Second Degree, even if it can prove a lack of consent.

The Legislature understood that forcible compulsion is not the same as lack of consent. Amicus correctly points out that the Legislature refers to lack of consent for third degree rape but then errs by extending the analysis farther. The Legislature said, in effect, some allegations of rape do not involve violence. When

there is no violence – physical force that overcomes resistance – the State must prove a lack of consent. But, the Legislature created two degrees of rape that focused on violence and never said a word about consent in either of the two statutes. There is nothing in RCW 9A.44.040 and RCW 9A.44.050 that relates to consent. Both are about violence or threats of violence. Thus, for third degree rape, the State has the burden to prove lack of consent. That's not the burden for first and second degree rape and consent is not the conceptual opposite in these two statutes.

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), understood the connection between *Martin v. Ohio,* 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) and *Camara, supra.* At page 803, the *Gregory* court stated the analysis quite clearly: First, the burden is always on the State to prove forcible compulsion beyond a reasonable doubt. Second, so long as the jury instructions permit the defendant to introduce consent to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the two

elements does not relieve the State of its burden.

Gregory's analysis points directly to the due process burden the State must carry and, more importantly, what the defendant must be permitted to do in order to meet the dictates of due process. The defendant must be permitted to introduce evidence of consent at all stages of the case. Still, because evidence of consent does not address the State's burden, it is an affirmative defense.

ISSUE TWO

Was the confusion in the instant case caused by a systemic failure of pattern jury instructions, or was it in reality caused because the trial court attempted to address both sexual intercourse and sexual contact in the same instruction?

RESPONSE

Amicus raises the issue of "jury confusion," a concept the United States Supreme Court has never accepted. As recently as 2012, the United States Supreme Court has reaffirmed that the defendant has the burden of proof for an affirmative defense. There is no due process issue.

Perhaps a new instruction like the instruction proposed by Mr. Lynch and presented to the jury would be helpful in all cases in which an affirmative defense is presented. In this case, however, the State does not believe there is an issue.

The jury requested further instruction about how to address the burdens of proof. Mr. Lynch proposed an instruction and the Court, after some modification, sent it to the jury:

> The state has the burden of proving each of the elements of each crime beyond a reasonable doubt. The defendant's burden of proof as stated in Instr. 16 is by a preponderance of the evidence and that burden is limited to consent only.

No exception was taken to this answer to the jury. The State does not believe the Supreme Court should address the issue both because Mr. Lynch helped draft the answer and because the Court of Appeals did not address whether the instruction was confusing. The Court of Appeals held the modifications to instruction 16 were incorrect because Mr. Lynch had not claimed sexual contact was consensual. The answer is an appropriate statement of the defendant's burden, as expressed in *Camara* and *Gregory*.

ISSUE THREE

When a defendant chooses to ignore precedent when presenting a defense, can it really be said that the defendant has authority to present a defense in any manner it believes appropriate?

RESPONSE

Like the trial court in this case and in *State v. Coristine,* 161 Wn.App. 945, 252 P.3d 403 (2011), the State is mystified by the argument of Amicus that the Court cannot instruct a jury on an affirmative defense the defendant has raised. It seems simply incongruous that a defendant believes it can raise what clearly has been demarked as an affirmative defense and claim the trial court erred by "forcing" a defense upon them. Both appellate courts had no problem addressing the argument: *Camara* and *Gregory* both say it is an affirmative defense and the jury should be so instructed.

The argument tortures both due process and *stare decisis.* As *State v. Lynch,* No. 41749-9-II (2012) stated, the jury was provided "a correct and accurate statement of the law." Because it is a correct statement of the law, and because the defendant raised

it, then the trial court would err if it did not give the instruction. The defense chose to defend by asserting the digital penetration was consensual. It chose the defense it wanted; no one forced the defense to proceed as it did. To now argue that the trial court did something unconstitutional by forcing it to follow the law is disingenuous.

CONCLUSION

The Supreme Court should issue an opinion that confirms again that consent is an affirmative defense because the Due Process Clause of the United States Constitution only requires the state to prove the elements of the crime. The Court should hold that, because consent is not an element of second degree rape, it is not the state's burden to disprove it. The Court should consider adopting an instruction that clarifies the burdens of persuasion in a case involving an affirmative defense. The Court should affirm Mr. Lynch's conviction.

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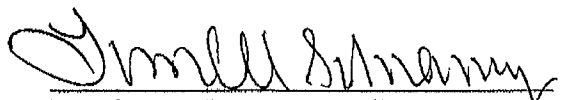
Respectfully submitted this 4/16/13

DEBORAH KELLY, Prosecutor



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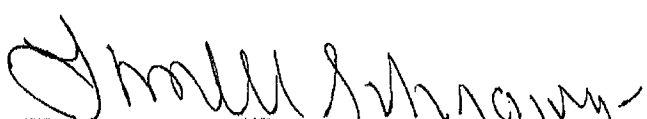

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<<Answer to Amicus brief.pdf>> Attached is a pdf copy of the State's answer to Amicus. Copies will be mailed to Mr. Mr. Grannis and Mr. Zuckerman

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