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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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b/h

STATE OF WASHINGTON,
Respondent,

v.

W.R., Jr.,
Appellant.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS

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 ORIGINAL

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I.
ISSUES PRESENTED

1. In *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), this Court held that the legislature implicitly created an affirmative defense of consent in cases of rape by forcible compulsion. Should *Camara* be overturned because its analysis of legislative intent was faulty?
2. Should *Camara* be overturned because an affirmative defense that negates an element of the crime violates due process?
3. May an appellate court disregard the trial court's signed, written findings on the assumption that they were drafted by a party and did not truly reflect the judge's views?

II.
STATEMENT OF THE CASE

WACDL accepts the statement of the case set out in W.R.'s
petition for review.

III.
ARGUMENT

- A. IN VIEW OF THE PROSECUTOR'S CONCESSIONS, LITTLE IS IN DISPUTE

In its supplemental brief, the State concedes the following points:

1. Contrary to this Court's holding in *State v. Camara*, supra, the federal due process clause prohibits a state from designating a factor as an affirmative defense if it negates an element of the crime. State's Supplemental Brief at 3, 12-13.
2. In the vast majority of cases in which a defendant is charged with rape in the second degree by forcible compulsion, the element of forcible compulsion necessarily negates consent.
3. The State need not expressly prove both lack of consent and forcible compulsion because the findings would be "redundant." *Id.* at 2-18.

WACDL agrees with those three points and will touch on those issues only briefly. WACDL disagrees with the State, however, that there is an exception for "rough sex" or "pretend rape."

B. THE *CAMARA* COURT MISINTERPRETED *MARTIN V. OHIO*

The *Camara* Court recognized that the due process clause of the Fourteenth Amendment requires the State to prove every element of a crime beyond a reasonable doubt. *Camara*, 113 Wn.2d at 640. It concluded, however, that this principle was not violated by placing the burden of proving an affirmative defense on the defendant, even when the defense completely negated an element of the crime. It based that conclusion on a mistaken reading of *Martin v. Ohio*, 480 U.S. 228, 230,

107 S.Ct. 1098, 94 L.Ed.2d 267, *reh'g denied*, 481 U.S. 1024, 107 S.Ct. 1913, 95 L.Ed.2d 519 (1987).

In *Martin*, an aggravated murder case, the State was required to prove beyond a reasonable doubt that the defendant killed her husband, that she had the specific purpose and intent to kill, and had done so with “prior calculation and design.” *Martin*, 480 U.S. at 233. The self-defense instruction provided for acquittal if the jury found, by a preponderance of the evidence, that Martin “had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger.” *Id.*

As defined under Ohio law,¹ self-defense did not necessarily negate the elements of aggravated murder. *Id.* at 234. In fact, “[appellant] did not dispute the existence of [the elements of aggravated murder], but rather sought to justify her actions on grounds she acted in self-defense.” *Id.* quoting *Ohio v. Martin*, 21 Ohio St.3d 91, 94, 488 N.E.2d 166, *cert. granted in part*, 475 U.S. 1119, 106 S.Ct. 1634, 90 L.Ed.2d 180 (1986). Clearly, a person may kill with prior calculation and design while also acting in self-defense. That there might be some overlap between proof of

¹ Under Washington law, on the other hand, self-defense does negate the elements of murder. See *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

the elements and proof of the affirmative defense did not violate due process. *Id.*

In view of more recent developments in case law, particularly *Smith v. United States*, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013), there is no longer any doubt that a state cannot designate as an affirmative defense any factor that negates an element of the crime. *See State v. Lynch*, 178 Wn.2d 487, 497-503, 309 P.3d 482 (2013) (Justice Gordon McCloud, concurring).

As noted above, the State concedes this point. It therefore agrees that in a typical prosecution for rape by forcible compulsion, consent cannot be an affirmative defense. The State maintains, however, that “[w]here the conduct at issue is what is sometimes referred to as ‘rough sex’ or ‘pretend rape’, consent will not necessarily negate forcible compulsion.” State’s Supplemental Brief at 14.

WACDL disagrees with the latter point. If a person willingly participates in “pretend rape,” the intercourse may be “forcible” but it is not truly compelled. A person who requests a particular result has not been compelled to accept it.

The Washington Court of Appeals dealt with a similar issue in *State v. Shelley*, 85 Wn. App. 24, 929 P.2d 489, *review denied*, 133 Wn.2d

1010, 946 P.2d 402 (1997). The issue was whether consent to engage in a sporting event could be a defense to assault.

One common law definition of assault recognized in Washington is “an unlawful touching with criminal intent.” At the common law, a touching is unlawful when the person touched did not give consent to it, and was either harmful or offensive.

Id. at 28-29 (citations omitted).

Logically, consent must be an issue in sporting events because a person participates in a game knowing that it will involve potentially offensive contact and with this consent the “touchings” involved are not “unlawful.” (citation omitted).

Id. at 29. Thus, the Court recognized that consent to engage in a sport negates the “unlawful touching” element of assault.

The prosecutor’s scenario of “pretend rape” is no different from a sporting event. Just as willing participation in a wrestling match negates the “unlawful touching” element of assault, willing participation in “rough sex” negates the “compulsion” element of second degree rape. To be sure, in either setting the scope of consent may be at issue. In a basketball game, a player has not consented to be punched in the jaw. *Shelley*, 85 Wn. App. at 33. Likewise, a participant in “rough sex” might make clear that he or she wishes force to be used in only certain ways and only to compel certain sex acts. Further, even with consent, there are public policy limits to the force that can be considered lawful. *Id.* at 29-30.

But this court need not decide all the ramifications of “rough sex” in this case. It is not at issue here, and such conduct may be so rare that it never comes before an appellate court. WACDL asks only that the Court decline the State’s invitation to make create an affirmative defense in this unusual scenario.

Because the federal due process clause prohibits an affirmative defense of consent in all cases of rape by forcible compulsion, there is no need to determine whether the legislature intended to create such an affirmative defense. In any event, Justice Gordon McCloud’s concurrence in *Lynch* convincingly demonstrates that the legislature did not create that defense. *See Lynch*, 178 Wn.2d at 503-18.

C. THE STATE’S ARGUMENT THAT IT SHOULD NOT BE REQUIRED TO DISPROVE CONSENT IS A STRAW MAN

Much of the State’s brief argues that it should not be required to *expressly* disprove consent in a case of rape by forcible compulsion. WACDL agrees. As the State points out, proof of forcible compulsion “implicitly disproves” consent. State’s Supplemental Brief at 16. Listing both lack of consent and forcible compulsion as elements would be “redundant.” *Id.* at 17. Nevertheless, when the correct burden of proof is applied, the State will in fact prove lack of consent whenever it proves forcible compulsion.

By analogy, a person is guilty of manslaughter in the second degree if he causes a death through criminal negligence, RCW 9A.32.070, and he is guilty of manslaughter in the first degree if he causes a death through recklessness. RCW 9A.32.060. The first-degree statute does not expressly require the State to prove both criminal negligence and recklessness because one is subsumed by the other. But proof of recklessness does invariably prove criminal negligence.

In view of *Camara*, however, judges and juries have not always understood that evidence of consent must be considered when determining whether the State has proved forcible compulsion beyond a reasonable doubt. Rather, they may have believed that consent could be considered only in the context of an affirmative defense. In such cases, a finding that the defendant is guilty of forcible compulsion does not necessarily mean that the State disproved consent beyond a reasonable doubt. This confusion will disappear if the Court overrules *Camara*.

D. THIS COURT CANNOT DISREGARD THE TRIAL COURT'S WRITTEN FINDINGS

The State concedes that the trial court's written findings include the following: "The respondent did not prove, by a preponderance of evidence, that the sexual intercourse was consensual." State's Supplemental Brief at 19. It appears to argue, however, that this Court

should disregard that finding because the court's oral comments do not include it, and the court's written findings were prepared by the parties.

The State cites no authority for the proposition that a finding, signed by a judge, maybe be disregarded because the parties drafted it. That practice is nearly universal in the superior courts of this State. It is the judge's responsibility to ensure that the findings accurately reflect his views before signing off. A judge's oral comments do not take precedence over the written ones. In fact, when there is an apparent inconsistency between them, the written findings control. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211, 214 (2000); *State v. Eppens*, 30 Wn. App. 119, 126, 633 P.2d 92 (1981).

It may be true, as the State maintains, that this case turned on the credibility of the defendant and the alleged victim. But credibility, like any other factor, must be evaluated under the correct standard of proof. A court might not find a defendant credible by a preponderance of the evidence, while also finding a reasonable doubt as to the alleged victim's credibility.

IV. CONCLUSION

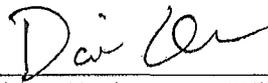
This Court should overrule *Camara* and hold that the defendant cannot be required to prove any factor that negates an element of the

crime. Specifically, it should find that consent cannot be an affirmative defense when the defendant is charged with rape by forcible compulsion.

Because the trial court expressly relied on the defendant's failure to prove consent, remand is required.

DATED this 14th day of February, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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Please find attached for filing the WACDL Brief of Amicus Curiae and the Motion of WACDL to File Amicus Curiae Brief in *State v. W.R., Jr.*

Thank you for your assistance.

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