

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 04, 2014, 3:42 pm
BY RONALD R. CARPENTER
CLERK

E

NO. 88341-6

RECEIVED BY E-MAIL

2/4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

W.R.,

Petitioner.

STATE'S SUPPLEMENTAL BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>RELEVANT FACTS</u>	1
C. <u>SUMMARY OF ARGUMENT</u>	1
D. <u>ARGUMENT</u>	2
1. DUE PROCESS DOES NOT REQUIRE THE STATE TO DISPROVE CONSENT BEYOND A REASONABLE DOUBT WHERE RAPE BY FORCIBLE COMPULSION IS CHARGED.....	2
a. The Legislature Did Not Intend To Treat Absence Of Consent As An Element Of Rape By Forcible Compulsion.....	3
b. Due Process Does Not Require The State To Prove The Absence Of Consent Where Rape By Forcible Compulsion Is Charged	11
i. Consent does not always negate forcible compulsion.....	11
ii. Proof of forcible compulsion subsumes lack of consent.....	15
2. W.R.'S CONVICTION NEED NOT BE REVERSED.....	18
E. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

In re Winship, 397 U.S. 358,
90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)..... 3, 11

Kucana v. Holder, 558 U.S. 233,
130 S. Ct. 827, 175 L. Ed.2d 694 (2010)..... 4

Patterson v. New York, 432 U.S. 197,
97 S. Ct. 2319, 53 L. Ed.2d 281 (1977)..... 11

Smith v. United States, ___ U.S. ___,
133 S. Ct. 714, 184 L. Ed.2d 570 (2013)..... 13

State v. Martin, 480 U.S. 228,
107 S. Ct. 1098, 94 L. Ed.2d 267 (1987)..... 11, 12, 13, 14

Washington State:

In re Detention of Williams, 147 Wn.2d 476,
55 P.3d 597 (2002)..... 4

Nissen v. Obde, 55 Wn.2d 527,
348 P.2d 421 (1960)..... 20

State v. Calle, 125 Wn.2d 769;
888 P.2d 155 (1995)..... 3

State v. Camara, 113 Wn.2d 631,
781 P.2d 483 (1989)..... 12, 13

State v. Deer, 175 Wn.2d 725,
287 P.3d 539 (2012)..... 3

State v. Gonzalez, 168 Wn.2d 256,
226 P.3d 131 (2010)..... 4

<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	13, 18
<u>State v. Huddleston</u> , 80 Wn. App. 916, 912 P.2d 1068, <u>review denied</u> , 130 Wn.2d 1008 (1996).....	20
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	19
<u>State v. Landsiedel</u> , 165 Wn. App. 886, 269 P.3d 347, <u>review denied</u> , 174 Wn.2d 1003 (2012).....	14
<u>State v. Lively</u> , 130 Wn.2d 1, 921 P.2d 1035 (1996).....	3, 14
<u>State v. Lynch</u> , 178 Wn.2d 487, 309 P.3d 482 (2013).....	18
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	3
<u>State v. Riker</u> , 123 Wn.2d 351, 869 P.2d 43 (1994).....	14
 <u>Other Jurisdictions:</u>	
<u>People v. Jansson</u> , 116 Mich. App. 674, 323 N.W.2d 508 (1982)	10, 17
<u>People v. Khan</u> , 80 Mich. App. 605, 264 N.W.2d 360 (1978)	17
<u>People v. Stull</u> , 127 Mich. App. 14, 338 N.W.2d 403 (1983)	10

Constitutional Provisions

Federal:

U.S. Const. amend. XIV 2, 11

Statutes

Washington State:

1973 Wash. Laws (1st Ex. Sess.)
ch. 154, § 122 (repealed 1975) 6

RCW 9A.44.010 6, 15, 16

RCW 9A.44.040 5, 15

RCW 9A.44.050 5, 15

RCW 9A.44.060 6

Other Authorities

13A Fine, Seth A. & Ende, Douglas J., Washington Practice:
Criminal Law § 105 (2d ed. 1998) 14

13B Fine, Seth A. & Ende, Douglas J., Washington Practice:
Criminal Law § 2408 (2d ed. 1998) 14

Loh, Wallace D., The Impact of Common Law and
Reform Rape Statutes on Prosecution:
An Empirical Study, 55 Wash. L. Rev. 543 (1980) 8, 9, 16

Nordby, Legal Effects of Proposed Rape Reform Bills:
S.B. 1207 and H.B. 5802, submitted to the House
Judiciary Committee [Michigan] on April 23, 1974)..... 17

Tutt, Helen Glenn, Washington's Attempt to View Sexual Assault as More than a "Violation" of the Moral Woman – The Revision of the Rape Laws, 11 Gonz. L. Rev. 145 (1975) 7, 8

Wicktom, Cynthia Ann, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 Geo. Wash. L. Rev. 399 (1988)..... 10

A. ISSUE PRESENTED

Where the State proves all of the elements of rape in the first or second degree, including forcible compulsion, does due process nevertheless require the State to assume the additional burden of *disproving* consent beyond a reasonable doubt?

B. RELEVANT FACTS

W.R., a juvenile, was charged with second degree rape, by forcible compulsion, of 12-year-old J.F. CP 1-3. Concluding that the case turned on credibility, and finding J.F. credible and W.R. not credible, the trial judge, sitting as the fact-finder at a bench trial, found W.R. guilty as charged. CP 43-51; RP (6/21/2011) 110-24. The court's written findings contained the following conclusion of law: "The respondent did not prove, by a preponderance of evidence, that the sexual intercourse was consensual." CP 50.

A detailed statement of the facts of the crime may be found in the Brief of Respondent, filed in the Court of Appeals, at 1-6.

C. SUMMARY OF ARGUMENT

A major goal of Washington's 1975 rape reform legislation was to shift the focus of criminal prosecution from the victim's actions to those of the perpetrator. To that end, the legislature removed the element of "lack of consent" from the crimes of rape in

the first and second degree, replacing it with "forcible compulsion."

Lack of consent remained as an element of third degree rape.

In most situations, consent will negate forcible compulsion. In such cases, a defendant may not be required to prove consent; rather, evidence of consent may be used to create reasonable doubt. This does not mean that the State must explicitly *disprove* consent. The State's burden is to prove forcible compulsion, proof of which subsumes lack of consent. Requiring the State to disprove consent would be redundant and meaningless. Moreover, the imposition of such a requirement by this Court would usurp the authority of the legislature to specify the elements of crimes.

The appropriate constitutional balance requires the trial court to instruct the jury on the definition of consent where relevant, but to limit instruction on the burden of proof to the State's burden to prove the elements of the crime beyond a reasonable doubt.

D. ARGUMENT

1. DUE PROCESS DOES NOT REQUIRE THE STATE TO DISPROVE CONSENT BEYOND A REASONABLE DOUBT WHERE RAPE BY FORCIBLE COMPULSION IS CHARGED.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires proof beyond a reasonable

doubt of every fact necessary to constitute the charged crime before an accused may be convicted. In re Winship, 397 U.S. 358, 359-64, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). The State has the burden of proving the absence of a defense beyond a reasonable doubt if the absence of the defense is an "ingredient" of the offense and there is some evidence to support the defense. State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983).

There are two ways to determine whether the absence of a defense is an "ingredient" of the offense: 1) the statute may reflect a legislative intent to treat the absence of the defense as an element of the offense; or 2) the defense may negate an element of the offense. Id.; State v. Lively, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996). Where the defense negates an element of the charged offense, due process requires the State to bear the burden of proving the absence of the defense beyond a reasonable doubt. State v. Deer, 175 Wn.2d 725, 734, 287 P.3d 539 (2012).

- a. The Legislature Did Not Intend To Treat Absence Of Consent As An Element Of Rape By Forcible Compulsion.

The legislature has the power to define criminal conduct. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). This power is of course subject to constitutional constraints. Id.

The court's goal in interpreting a statute is to carry out the legislature's intent. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). The first step is to examine the plain language of the statute. Id. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. Id. If the statute is not ambiguous after a review of its plain meaning, the court's inquiry ends. Id.

Where necessary, courts have used additional means to discern legislative intent. For example, legislative changes may be considered when determining legislative intent. Id. at 265. And under the canon of statutory construction known as "expressio unius est exclusio alterius," the expression of one thing in a statute implies the exclusion of the other. In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Omissions are deemed to be exclusions. Id.; see also Kucana v. Holder, 558 U.S. 233, 249, 130 S. Ct. 827, 175 L. Ed.2d 694 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Starting with the plain language of the current rape statutes, both first degree and second degree rape require proof of "forcible compulsion." "A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion" and the perpetrator or an accessory engages in specified aggravating activity. RCW 9A.44.040. "A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) By forcible compulsion" RCW 9A.44.050. While forcible compulsion is an element of both first and second degree rape, and the State must prove that element beyond a reasonable doubt, the legislature omitted any mention of consent, or the lack thereof.¹ Thus, the plain language of these statutes does not require the State to *disprove* consent beyond a reasonable doubt.

Moreover, "expressio unius est exclusio alterius" can also play a role in discerning the meaning of the rape statutes. Unlike first and second degree rape, third degree rape explicitly requires proof of nonconsent: "A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or

¹ Other ways of committing second degree rape are listed in the statute, some of which refer to consent, but only rape by forcible compulsion is at issue here.

second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator: (a) Where the victim *did not consent* as defined in RCW 9A.44.010(7),^[2] to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" RCW 9A.44.060 (italics added). Because the legislature explicitly required proof of *lack of consent* for third degree rape, and made no mention of consent in the first and second degree rape statutes, this Court should conclude that the legislature made the purposeful choice not to include lack of consent as an element of first and second degree rape that the State must prove.

Changes to the rape statutes also support the conclusion that the legislature did not intend to place a burden on the State to disprove consent beyond a reasonable doubt when proving first or second degree rape. Prior to 1975, Washington defined rape as "an act of sexual intercourse with a person not the wife or husband of the perpetrator committed against the person's will *and without the person's consent.*" 1973 Wash. Laws (1st Ex. Sess.) ch. 154, § 122, at 1198 (repealed 1975) (italics added). Once the legislature

² "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7).

divided the crime of rape into three distinct levels, however, it explicitly omitted any mention of lack of consent from the two degrees of rape that may be committed by forcible compulsion (i.e., first and second degree rape). This change indicates the legislature's intent to replace "lack of consent" with "forcible compulsion" as the element that the State must prove.

Legal commentaries written contemporaneously with the rape reform legislation reinforce this conclusion. One commenter observed that, in Washington's 1975 revision of its rape laws, the legislature "define[d] consent in a positive manner whereas previously, the *lack* of consent was an essential element of rape." Helen Glenn Tutt, Washington's Attempt to View Sexual Assault as More than a "Violation" of the Moral Woman – The Revision of the Rape Laws, 11 Gonz. L. Rev. 145, 154 (1975) (italics in original) ["Tutt Comment"]. In a section titled "*First and Second Degree Rape – Removal of 'Lack of Consent' as an Element of the Crime*," Tutt elaborated on the significance of this change:

First and second degree rape basically require violence or a threat of violence for conviction. An important change from prior law is the omission of any language pertaining to consent unless the victim is physically or mentally incapacitated. The law previously made lack of consent an element of the crime, and the burden was on the state to prove lack

of consent. This wording emphasized the victim's behavior rather than the defendant's.

Under the new statute, the emphasis is on proof of forcible compulsion. This focuses attention on the defendant's acts rather than the victim's.

Narrowing the issues to credibility and forcible compulsion rather than consent is especially important [in the context of second degree forcible rape] to effecting the policy of the new law.

Tutt Comment, at 156-57.

The Tutt comment contrasted first and second degree forcible rape with third degree rape, where "lack of consent is mentioned for the first time." *Id.* at 157. Noting that one type of third degree rape occurs when sexual intercourse with a non-spouse is without forcible compulsion but also without consent, the commenter observed that "[i]n this situation, the state must prove lack of consent, and consent is thus at issue." *Id.* at 158.

A few years after Washington's revision of its rape statutes, another legal scholar wrote an article on rape reform statutes, and included an examination of Washington's changes. Wallace D. Loh, The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study, 55 Wash. L. Rev. 543 (1980) ["Loh Article"]. Like the Tutt Comment, the Loh Article focused on the consent issue, elaborating on policy considerations:

Nonconsent is one of the main evidentiary issues around which the trial revolves. As a practical matter, a prosecutor still must demonstrate nonconsensual intercourse whether this was because of actor's force, victim's resistance, or both. The same kinds of evidence are used to establish the crime regardless of the statutory formulation and language. *As a legal matter, though, a prosecutor under the new legislation no longer has the burden of proving victim resistance or nonconsent.* He is relieved of the risk of nonpersuasion as to that element.

Thus, although nonconsent is the basic substantive element of the crime and its evidentiary proof at trial remains unchanged, the standard chosen as its operational indicator has important legal implications. The new law channels the jury's focus, via instructions, on the culpability of the actor rather than the response of the victim. It may render the jury's exercise of its nullification power less likely because of stereotypes about rape and rape complainants. In addition, with [the] victim's conduct no longer a separate formal element of the crime, there is less legal justification for evidentiary rules unique to rape law based on the victim's past sexual actions. *The symbolic value of the shift should not be minimized.* The reform statutes announce society's interest in accurately identifying perpetrators of rape, not in reinforcing traditional assumptions regarding appropriate behavior of virtuous women.

Loh Article, at 557 (italics added).

In drafting its own rape reform laws, Washington's legislature looked to the "sweeping revision" of prior law that Michigan had already undertaken. Loh Article, at 552-53. Michigan was "[t]he first state to shift the focus of rape law from the victim's nonconsent

to the defendant's forceful or violent conduct." Cynthia Ann

Wicktom, Focusing on the Offender's Forceful Conduct:

A Proposal for the Redefinition of Rape Laws, 56 Geo. Wash. L.

Rev. 399, 418 (1988) ["Wicktom note"]. Like Washington, Michigan

eliminated nonconsent as an element of forcible rape:

Unlike traditional rape law, Michigan's criminal sexual conduct statute is silent on the issue of consent. Michigan's courts have interpreted the statute's silence to mean that nonconsent is not an element of the crime. This interpretation relieves the prosecution of the burden of proving the victim's nonconsent beyond a reasonable doubt in its case-in-chief.

Id. at 419.³ See People v. Stull, 127 Mich. App. 14, 19-20, 338 N.W.2d 403 (1983) (nonconsent is not an element of criminal sexual conduct by force or coercion); People v. Jansson, 116 Mich. App. 674, 682, 323 N.W.2d 508 (1982) (prosecution is not required to prove nonconsent as an independent element of criminal sexual conduct by force or coercion).

In sum, based on the plain language of the rape statutes, the changes made by the legislature, and the course taken by another state to which the Washington legislature looked in reforming its own rape laws, the legislative intent is clear – nonconsent is no

³ The issue of nonconsent is not completely absent from a case of criminal sexual conduct in Michigan, however; a defendant may "either present evidence of consent to disprove the prosecution's evidence of force or raise consent as a defense to admittedly forceful conduct." Wicktom Note, at 419.

longer an element of forcible rape, and the State need not disprove nonconsent beyond a reasonable doubt.

b. Due Process Does Not Require The State To Prove The Absence Of Consent Where Rape By Forcible Compulsion Is Charged.

i. Consent does not always negate forcible compulsion.

In State v. Martin, 480 U.S. 228, 230, 107 S. Ct. 1098, 94 L. Ed.2d 267 (1987), the Supreme 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 by the State of Ohio with committing the crime of aggravated murder, which, as relevant to this case, is defined . . . as ‘purposely, and with prior calculation and design, caus[ing] the death of another.’” The Court explicitly adhered to the due process analysis previously set out in In re Winship, *supra*, and Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed.2d 281 (1977), reiterating that, while the Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the charged crime, the states are nevertheless permitted to place on the defendant the burden of proving an affirmative defense that mitigates the seriousness of the crime. Martin, 480 U.S. at 231-32.

The Court specifically found that Ohio's practice of placing the burden of proving self-defense on a defendant charged with aggravated murder did not violate due process.⁴ The Court acknowledged that the elements of aggravated murder and self-defense "overlap in the sense that evidence to prove [self-defense] *will often tend to negate* [aggravated murder]." *Id.* at 234 (italics added). The Court rejected Martin's argument that self-defense negated the unlawfulness "element" of Ohio's aggravated murder statute, concluding that the argument "founders on state law." *Id.* at 235. Nowhere in its opinion did the majority explicitly reject the "negates" analysis, i.e., that where a defense wholly negates an element that the State must prove, it violates due process to require the defendant to bear the burden of proof on that defense.

The Washington Supreme Court's conclusion in State v. Camara, 113 Wn.2d 631, 640, 781 P.2d 483 (1989), that "[f]ollowing *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," represents an overly

⁴ The elements of self-defense under Ohio law were that the defendant 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. Martin, 480 U.S. at 233.

broad reading of that case.⁵ In accordance with its interpretation of Martin, the Camara court held that, where rape by forcible compulsion is charged, the burden of proof as to consent lies with the defendant. Camara, 113 Wn.2d at 640. Seventeen years later, the court in State v. Gregory, 158 Wn.2d 759, 801-04, 147 P.3d 1201 (2006), adhered to this position.

The United States Supreme Court recently revisited the appropriate placement of the burden of proof. Affirming the lower court's placement of the burden on the defendant to show by a preponderance of evidence that he had withdrawn from a criminal conspiracy outside the relevant statute of limitation, the Court explained that "[t]he State is foreclosed from shifting the burden of proof to the defendant only 'when an affirmative defense *does* negate an element of the crime.'" Smith v. United States, ___ U.S. ___, 133 S. Ct. 714, 719, 184 L. Ed.2d 570 (2013) (quoting Martin, 480 U.S. at 237 (Powell, J., dissenting)) (italics in original). Smith confirms that the "negates" due process analysis survived Martin.

⁵ Such a broad reading is understandable, given that the dissent in Martin also seemed to interpret the majority opinion as an unequivocal rejection of the "negates" analysis. See Martin, 480 U.S. at 240-41 (Powell, J., dissenting) ("After today's decision, however, even if proof of the defense *does* negate an element of the offense, burdenshifting still may be permitted because the jury can consider the defendant's evidence when reaching its verdict.") (italics in original).

As with the defense in Martin, consent will “often tend to negate” forcible compulsion; however, the overlap is not complete. Where the conduct at issue is what is sometimes referred to as “rough sex” or “pretend rape,”⁶ consent will not necessarily negate forcible compulsion. The State may prove forcible compulsion beyond a reasonable doubt, while the defendant may admit that element of the crime but nevertheless argue that the alleged victim consented in advance to the force used.⁷ In such a situation, consent would be a true affirmative defense to a charge of forcible rape, and the burden of proof would properly be placed on the defendant by a preponderance of the evidence.⁸

⁶ See, e.g., State v. Landsiedel, 165 Wn. App. 886, 888, 269 P.3d 347 (defendant had arranged through a “chat room” to engage in sexual intercourse and “pretend” rape), review denied, 174 Wn.2d 1003 (2012).

⁷ See 13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 2408, at 39 n.9 (2d ed. 1998) (if two people agree to “pretend rape,” where one resists and the other physically overcomes the resistance, consent and forcible compulsion would coexist, and one would not negate the other).

⁸ See 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 105, at 7 (2d ed. 1998) (“An affirmative defense is a set of facts that entitle the defendant to acquittal, even though the State has proved every element of the crime charged.”); State v. Riker, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994) (defense of duress admits defendant committed the unlawful act, but pleads an excuse for doing so); Lively, 130 Wn.2d at 12 (affirmative defenses normally must be proved by defendant by preponderance of evidence).

- ii. Proof of forcible compulsion subsumes lack of consent.

Even in a factual scenario where consent could be said to negate forcible compulsion, the State need not explicitly *disprove* consent beyond a reasonable doubt. Due process is satisfied where the State proves the element of forcible compulsion.

To convict a person of first degree rape, the State must prove that he "engage[d] in sexual intercourse with another person by forcible compulsion," along with at least one of four aggravating factors. RCW 9A.44.040. To convict a person of second degree rape, the State must prove that he "engage[d] in sexual intercourse with another person . . . by forcible compulsion," under circumstances not amounting to first degree rape.

RCW 9A.44.050(1)(a).⁹

The legislature has defined "forcible compulsion" 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). The legislature has defined "consent" to mean that "at the time of the act

⁹ While there are other ways of committing second degree rape, W.R. was charged with the "forcible compulsion" alternative. CP 1-3.

of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7).

Except in the case of "pretend rape," proof of forcible compulsion implicitly *disproves* consent. Once the State has proved "physical force which overcomes resistance," the State has necessarily precluded the possibility that the victim indicated "freely given agreement" by "actual words or conduct."¹⁰ Given the relevant definitions, reinstating "consent" as an element of forcible rape and requiring the State to explicitly disprove consent would elevate form over substance. Due process does not require this.

Again, cases interpreting Michigan's rape reform statutes are instructive. Addressing the interplay between force and consent, the Court of Appeals of Michigan quoted contemporaneous legal commentary on the effects of the proposed laws:

"The present law imposes an extra and unfair burden on the prosecutor by requiring a showing of nonconsent in (rape) cases. If actual force or threats of force sufficient to meet the 'force' requirement can be shown, it is redundant to also require a separate showing of 'nonconsent' as part of the case in chief."

¹⁰ See Loh Article, 55 Wash. L. Rev. at 552 n.43 ("Modern statutory and decisional law do not treat force and nonconsent as separate formal elements. Indeed, if force (or resistance) is not an objective indicator of nonconsent, it is unclear how else the subjective state would be determined.").

People v. Khan, 80 Mich. App. 605, 619 n.5, 264 N.W.2d 360
(1978) (quoting Nordby, Legal Effects of Proposed Rape Reform
Bills: S.B. 1207 and H.B. 5802, submitted to the House Judiciary
Committee [Michigan] on April 23, 1974). A different Michigan
court elaborated on the common-sense basis for this position:

The statute is silent on the defense of consent. However, this Court has previously stated that the statute impliedly comprehends that a willing, non-coerced act of sexual intercourse between persons of sufficient age who are neither mentally defective, or incapacitated nor physically helpless is not criminal sexual conduct.

Although consent therefore precludes conviction of criminal sexual conduct in the third degree by force or coercion, the prosecution is not required to prove nonconsent as an independent element of the offense. If the prosecution offers evidence to establish that an act of sexual penetration was accomplished by force or coercion, that evidence necessarily tends to establish that the act was nonconsensual.

...

If it is established that the actor *overcame the victim*, it necessarily follows that the victim's participation in the act was nonconsensual. Likewise if the actor *coerces the victim to submit* by threats of present or future harm, it necessarily follows that the victim engaged in the act nonconsensually. In short, to prove force or coercion as those terms are defined in the statute is to establish that the victim did not consent.

Jansson, 116 Mich. App. 674, 682-83 (*italics in original*).

Requiring the State to disprove consent beyond a reasonable doubt where rape by forcible compulsion is charged would refocus the jury on the *victim's* conduct, and would represent a major step backward in the prosecution of rape. The legislature in 1975 adopted a more progressive approach; due process does not require a return to the previous legal scheme.

The constitutionally appropriate approach is contained in the facts of Gregory, supra. In that case, “[t]he defense requested an instruction that defined consent but did not impose a separate burden apart from the burden on the prosecution to prove each element beyond a reasonable doubt.” Gregory, 158 Wn.2d at 801. This Court should approve this approach for jury trials.¹¹

2. W.R.’S CONVICTION NEED NOT BE REVERSED.

W.R., as a juvenile respondent, was not convicted by a jury under any sort of instructions, but rather by a judge at a bench trial. The trial court prefaced its findings by pointing out that “the key issue, as counsel have argued consistently, is credibility.”

¹¹ This approach is consistent with this Court’s opinion in State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013), holding that the jury may not be instructed on the affirmative defense of consent over the defendant’s objection. In the wake of Lynch, it is unlikely that any defendant would request an instruction placing the burden of proving consent on himself. Thus, in a forcible rape case, the only instruction given on the burden of proof will be the one that places the burden of proving the elements of the crime, including forcible compulsion, on the State beyond a reasonable doubt.

RP (6/21/2011) 110. The court examined in considerable detail the credibility of J.F. and W.R. RP (6/21/2011) 116-21 (J.F.), 121-24 (W.R.). The court found J.F. credible, and W.R. not credible. Id.; CP 47-49. In finding W.R. guilty beyond a reasonable doubt of rape in the second degree by forcible compulsion, the court never mentioned any burden of proof as to consent. RP (6/21/2011) 124.

While the written findings of fact and conclusions of law appear on the court's letterhead, it is clear from the record that they were initially prepared by the parties. CP 43-51; RP (6/29/2011) 134-35. These written findings contain the only mention of a burden of proof as to consent. CP 50 ("The respondent did not prove, by a preponderance of evidence, that the sexual intercourse was consensual.").

The trial court reached its decision on guilt based on its assessment of credibility. The after-the-fact inclusion of the burden of proof on consent could not have affected this decision. Any error in including this burden of proof in the court's written findings was harmless beyond a reasonable doubt. See State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (constitutional error is harmless if the appellate court is convinced beyond a reasonable

doubt that any reasonable fact-finder would have reached the same result without the error).

Even if the misstatement on the burden of proof is not deemed harmless, the remedy is not reversal. At most, the case should be remanded for the trial court to reconsider the question of W.R.'s guilt under a proper allocation of the burden of proof.¹²

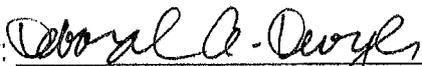
E. CONCLUSION

For all of the foregoing reasons, this Court should conclude that, where rape by forcible compulsion is charged, the State need not disprove consent. The State respectfully asks this Court to affirm W.R.'s conviction for Rape in the Second Degree.

DATED this 4th day of February, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

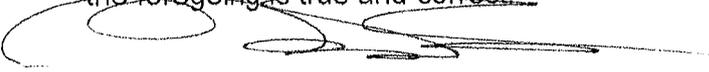
By: 
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

¹² See Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960) (where court misapplied burden of proof at bench trial, remedy was remand to determine whether court's findings were sustainable under correct application of burden of proof rule); State v. Huddleston, 80 Wn. App. 916, 924-26, 912 P.2d 1068 (where court at a bench trial failed to apply correct definition of "great bodily harm," remedy was remand for application of correct definition to evidence already presented, unless trial court believed it could not fairly do so), review denied, 130 Wn.2d 1008 (1996).

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 **Gregory C. Link**, the attorney for the petitioner, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **State's Supplemental Brief**, in **STATE V. W.R., JR.**, Cause No. 88341-6, in the Supreme Court of the State of Washington.

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

02-04-13
Date

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Subject: RE: State of Washington v. W.R., Jr./Case # 88341-6

Received.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ly, Bora [mailto:Bora.Ly@kingcounty.gov]
Sent: Tuesday, February 04, 2014 3:42 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dwyer, Deborah; 'greg@washapp.org'; 'wapofficemail@washapp.org'
Subject: State of Washington v. W.R., Jr./Case # 88341-6

Dear Supreme Court Clerk:

Attached for filing in the above-referenced case, please find the State's Supplemental Brief.

Please let me know if you should have difficulties with this electronic filing. Thank you.

Sincerely,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-296-9489
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Debbie Dwyer
Senior Deputy Prosecuting Attorney
Attorney for the Respondent