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No. 88341-6

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

WINFRED R., Jr.,  
(A minor child)

Petitioner.

---

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

---

SUPPLEMENTAL BRIEF OF PETITIONER

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GREGORY C. LINK  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. INTRODUCTION

Decisions from this Court and the United States Supreme Court have long held that the Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. In addition, the Due Process Clause requires that where a fact negates an element of an offense, the State must disprove that fact beyond a reasonable doubt.

This Court has previously found consent negates the “forcible compulsion” element of second degree rape. Thus, the State must prove nonconsent beyond a reasonable doubt.

However, in *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), this Court concluded that despite its negating effect, the defendant could be required to prove consent. While that holding persists with respect to consent, this Court has never abandoned the “negates” analysis for every other fact. Thus, requiring a defendant bear the burden of proving consent is contrary to this Court’s remaining due process jurisprudence. Additionally, that conclusion is contrary to United States Supreme Court decisions. This Court should overturn *Camara*.

B. STATEMENT OF THE CASE

In July 2010, 14-year-old Winfred and 12-year-old J.F. engaged in sexual intercourse. 6/15/11 RP 12. By all accounts this act was consensual. 6/16/11 RP 135-52.

On January 2, 2011, the two again engaged in sexual intercourse. 6/16/11 RP 153-62. This time, however, J.F. contended she had not consented. Instead, J.F. testified that Winfred had pushed her to the ground, and restrained her while he engaged in sexual intercourse with her. 6/11/11 RP 30-37. Winfred testified that, as with the prior occasion, the January encounter was consensual. 6/16/11 153-62

The juvenile court found the State had proved the elements of second degree rape. CP 50. The court concluded Winfred “did not prove, by a preponderance of the evidence, that the sexual intercourse was consensual.” *Id.* The juvenile court found Winfred guilty of second degree rape. CP 50. In doing so, the court erroneously placed the burden of disproving an element of the offense on Winfred, contrary to the Due Process Clause of the Fourteenth Amendment.

C. ARGUMENT

**The juvenile court impermissibly placed the burden of proving an element of the crime on Winfred.**

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of trial and applies to every element necessary to constitute the crime.

*Davis v. United States*, 160 U.S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499 (1895). The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

*Mullaney [v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)] . . . held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

*Patterson v. New York*, 432 U.S. 197, 215, 97 S. Ct. 2319, 52 L. Ed. 2d 281 (1977).

Thus, in addition to the statutory elements of an offense, the State must disprove a defense where (1) the statute indicates the Legislature's intent to treat the absence of a defense as "one of the elements included in the definition of the offense of which the defendant is charged;" or (2) the defense negates an essential ingredient of the crime. *State v. McCullum*, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); *see also State v. Deer*, 175 Wn.2d 725, 734, 287 P.3d 539 (2012) ("when a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense"), *cert. denied*, 133 S. Ct. 991 (2013).

Applying this framework to the issue of consent in a second degree rape prosecution it is clear the State must bear the burden of proving lack of consent beyond a reasonable doubt. This is because consent negates the element of forcible compulsion, that is to say that proof of consent will necessarily disprove forcible compulsion. Moreover, and even if consent did not negate an element, the Legislature has not clearly indicated its intent to place the burden of proof on a defendant.

1. In *Camara*, this Court found that consent does negate forcible compulsion but that did not prevent the Legislature from placing the burden of proving consent on the defendant.

*Camara* concluded that by removing express reference to “nonconsent” from the modern second degree rape statute in 1975, the Legislature evidenced its intent to require the defendant to bear the burden of proving consent. 113 Wn.2d at 638-39. But *Camara* never doubted that consent and forcible compulsion negated one another. Indeed, it noted that the two were “conceptual opposites.” *Id.* at 637. *Camara* specifically rejected the argument that the statute had removed the issue of consent, saying the substitution of “forcible compulsion” for nonconsent was more “refinement than a reformulation.” *Id.* at 637 n.3. Thus, the Court reiterated that as it had traditionally, nonconsent remained the “essence of the crime of rape.” *Id.* at 636.

Although it recognized that consent negated forcible compulsion, the Court concluded that was not constitutionally significant in assessing whether the burden of proof could be placed on the defendant. *Id.* 639-40. Citing to *Martin v. Ohio*, 480 U.S. 228, 230, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987), the Court expressed “substantial doubt as to this ‘negates’ analysis” and declined to apply it. *Camara*, 113 Wn.2d at 639. The Court added that “[f]ollowing *Martin*,

it appears that the assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense ‘negates’ an essential element.” *Id.* at 640. Therefore, the holding of *Camara* was that while consent does in fact negate forcible compulsion, the Legislature placed the burden of proving consent on the defendant and there was no constitutional infirmity in that allocation.

Subsequently, this Court characterized the holding of *Camara* as finding the consent does not negate forcible compulsion. *State v. Gregory*, 158 Wn.2d 759, 803, 147 P.3d 1201 (2006). The heart of *Gregory*’s analysis on that point was:

[*State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994)] included the consent defense to rape in its list of defenses that did *not* negate an element of the crime, and the *Riker* court did not question the *Camara* holding.

*Gregory*, 158 Wn.2d at 366–67. Ironically, *Riker* applied the very negates analysis which *Camara* and then *Gregory* disavowed. 123 Wn.2d at 366-67. In any event, *Riker*’s inclusion of consent in the list of “defenses that did *not* negate” is dicta as duress, not consent, was at issue in that case. Further, its assessment of the holding of *Camara* is incorrect as *Camara* plainly reached the opposite conclusion.

The landscape after *Camara* is that consent does negate an element of rape, but that does not prevent the Legislature from placing

the burden of proving consent on the defendant. On the first point, that consent negates forcible compulsion, *Camara* is indisputably correct and should be affirmed. On the second point, that the Legislature placed the burden of proof on the defendant, *Camara* is incorrect and should be overturned. Third, regardless of whether the Legislature did in fact place the burden on the defendant, because consent negates an element due process does not permit the Legislature or courts to place the burden of proof on the defendant.

2. *Consent negates forcible compulsion.*

The 1975 statute, today's statute, delineates three degrees of the crime. As originally enacted, and as relevant to this discussion, the lowest of these degrees is committed "where the victim did not consent." Second degree rape is committed where either the victim is incapable of consent or the intercourse is the result of "forcible compulsion. First degree rape was defined as forcible compulsion accomplished by one of four specified means such as the use of weapon or kidnapping. This statutory scheme illustrates nonconsent remains the basic foundation of any degree of rape, and that the seriousness of the penalties increases with the increasing seriousness of the actor's force to overcome nonconsent. It defies common sense to assume the

Legislature intended the State carry the burden of proving nonconsent for the lesser offense but not for the greater offenses that remains unchanged. The Legislature did not eliminate nonconsent, instead it chose to employ the new phrase “forcible compulsion;” the “conceptual opposite” of consent. To use this Court’s own terms, that was “more a refinement than a reformulation.” *Camara*, 113 Wn.2d at 637 n.3.

The current statute “focuses more on the actor’s use of force or threat of force rather than the victim’s conduct as the external criterion of nonconsent.” W. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 Wash. L. Rev. 543, 550 (1980). This change was important to shift juries’ inquiry away from such outdated notions as whether the victim resisted sufficiently to indicate her nonconsent. *Id.* at 557. Nonetheless, “[t]he ‘common denominator’ to the three degrees of rape is the lack of consent.” *Id.* at 552. Lack of consent remains the “gravamen” of the offense. *Id.* at 556.

“Forcible compulsion” means:

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). RCW 9A.44.010(7) provides:

"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.

Forcible compulsion and consent are two sides of the same coin.

A person cannot consent where forcibly compelled to do something, because forcible compulsion must overcome any resistance, or make resistance impossible. Likewise, because consent must be freely given, forcible compulsion cannot occur where there is consent. Therefore, consent negates the forcible compulsion element of second degree rape. *Camara* recognized as much when it said nonconsent remains the "essence" of the crime of rape and that consent is the "conceptual opposite" of forcible compulsion. *Id.* at 636-37. Freely given consent can never be the product of forcible compulsion, and forcible compulsion can never occur where consent is freely given. As Professor Loh recognized, the exchange of "lack of consent" for the term "forcible compulsion" merely changed the "external criterion of nonconsent;" *i.e.* the manner in which nonconsent is proved. Loh, at 550. The two negate each other. Requiring a person to prove consent shifts on to them the burden of disproving the element of forcible compulsion.

This Court has recently recognized the negating effect of consent on proof of forcible compulsion when it held that requiring a defendant to prove consent by a preponderance of the evidence “impose[s] a burden [that is] greater than the burden necessary to create a reasonable doubt as to forcible compulsion.” *State v. Lynch* 178 Wn.2d 487, 494, 309 P.3d 487 (2013). While the majority did not go so far as to say as much, that is so because the one negates the other. *See Lynch*, 178 Wn.2d at 496 (Gordon McCloud, J., concurring).

3. *Because consent negates forcible compulsion, the State must bear the burden of proving the lack of consent beyond a reasonable doubt.*

The State is foreclosed from shifting the burden of proof to the defendant . . . “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 (2013) (quoting *Martin*, 480 U.S. at 237); *see also Deer* 175 Wn.2d at 734. To the extent *Camara* believed *Martin* cast any doubt on the continuing validity of the “negates” analysis, *Smith* makes clear that analysis remains intact.

Further, other than in *Camara* and *Gregory* this Court has always followed the analysis required by *Mullaney* and *Patterson*, asking whether a fact negates an essential element of the offense. That

was true before *Camara*. See *McCullum*, 98 Wn.2d at 492 (concluding State must disprove self-defense because lawfulness of self-defense negates mens rea of homicide and assault); *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984) (same). It was true in the period intervening between *Camara* and *Gregory*. See *State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996) (because entrapment does not negate an element burden may be placed on defendant); *Riker*, 123 Wn.2d at 366 (same as to duress). And it remains true following *Gregory*. See, *Deer* 175 Wn.2d at 734 (“when a defense ‘negates’ an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense.”). *Camara* and *Gregory* are outliers in this Court’s jurisprudence on this question. Consistent with *Smith*, *Patterson*, *Mullaney* and the great weight of this Court’s jurisprudence, where a fact negates an essential element of an offense, the State must disprove the fact beyond a reasonable doubt.

Because freely given consent can never be forcibly compelled, and forcible compulsion can never occur where consent is freely given, a defendant cannot prove consent without disproving forcible compulsion. In *United States v. Prather*, the court concluded that requiring a defendant to prove consent by a preponderance of the

evidence required the defendant to disprove the element of incapacity to consent. 69 M.J. 338, 343 (C.A.A.F. 2011). That shifting of the burden violated due process. *Id.* (citing *Martin*, 480 U.S. at 233; *Patterson*, 432 U.S. at 207).

There are no instructions which could properly convey to a jury the State's burden of proof on forcible compulsion all the while telling the jury that the defendant must prove consent by a preponderance of the evidence. As *Lynch* recognized, attempting to prove the "defense" by a preponderance is a far greater burden than simply establishing a reasonable doubt on forcible compulsion. 178 Wn.2d at 494. The effect of any instruction would be to tell the jury that the defendant must prove by a preponderance of the evidence that a reasonable doubt exists as to consent. More than just a logically impenetrable question, such an instruction is contrary to the guarantees of due process.

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. Requiring a defendant to prove consent does just that. *Camara* and *Gregory* are incorrect.

4. The Legislature has not clearly indicated its intent to place the burden on defendant.

Because it negates an element, it is not necessary to determine the Legislature intended to place the burden of proof on the defendant. Nonetheless, because *Camara* rested in part on the conclusion that the Legislature had elected to place the burden on the defendant, Winfred will address that conclusion

This Court found “[t]he Legislature's silence on the burden of proof of self-defense, in contrast to its specificity on . . . other defenses, is a strong indication that the Legislature did not intend to require a defendant to prove self-defense.” *Acosta*, 101 Wn.2d at 615-16 (contrasting various statutory defenses which specifically place burden on defense). Similar to self-defense, the Legislature has not placed the burden of proving consent on the defense, and which is a strong indication the burden is on the State. *McCullum*, 98 Wn.2d at 492; *Acosta* 101 Wn.2d at 615-16.

Rather than follow its own precedent, the Court in *Camara* looked past the Legislature's silence and instead inferred that by removing specific reference to nonconsent from second and first degree rape, the Legislature intended to place the burden of proving consent on

the defendant. The Court cited the Loh article to support that conclusion. But that looks past the overwhelming theme of Professor Loh's evaluation, that nonconsent remained the essential component of rape, and the Legislature had merely redirected the manner in which nonconsent was to be proved. *See* Loh, at 550.

Further, the Legislature's express placement of the burden of proving consent for one alternative of third degree rape, demonstrates the Legislature has not placed the burden of proof on defendants charged with the remaining alternatives. RCW 9A.44.050(1)(d) provides:

When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment.

The remaining portions of the statute are silent with respect to any defense.

Where the Legislature uses different terms it is deemed to have intended different meanings. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2006). A court "cannot add words or clauses to an

unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003). Instead, a court must assume the “the legislature ‘means exactly what it says.’” *Id.* (citing *Davis v. Dep’t of Licensing*, 137 Wash.2d 957, 964, 977 P.2d 554 (1999)). Where it intended the defendant to carry the burden of proving consent, the Legislature specifically said so. Because it has not assigned the burden of proof on the remaining alternatives of second degree rape, it must be inferred that the Legislature did not intend to place the burden on the defendant.

Additionally, the three-degree structure of the rape statutes demonstrates the Legislature did not intend to shift the burden of proof on consent. Third-degree rape requires proof of the lack of consent. Again, it is illogical say that the State’s burden of proof diminishes with the increasing seriousness offense. Indeed, the basic structure of every crime that is segregated into degrees is that the greater requires proof of the lesser plus some additional fact. Because of that, a defendant charged with “an offense consisting of different degrees” can be convicted “of any degree inferior thereto.” RCW 10.61.003. The structure of the three degrees of rape makes clear the Legislature

intended the State to prove lack of consent. The Legislature has not placed the burden of proving nonconsent on the defendant.

5. The Court should overturn *Camara and Gregory*.

“The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (internal citation omitted.). However, “the force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.” *Alleyne v. United States*, \_\_ U.S. \_\_, 133 S. Ct. 2151, 2163 n.5, 186 L. Ed. 2d 314 (2013).

*Camara* recognized nonconsent remains a necessary component of rape. 113 Wn.2d at 636-37. Thus, nonconsent is a fact necessary to support a conviction of and punishment for second degree rape. The contrary conclusion of both *Camara* and *Gregory* is incorrect and harmful and should be abandoned. The United States Supreme Court has reaffirmed the correctness of the negates analysis. *Smith*, 133 S. Ct. at 719. In every instance aside from consent, this Court has properly followed *Mullaney* and *Paterson* and applied the negates analysis. See *Deer*, 175 Wn.2d at 734. As demonstrated above, *Camara* and *Gregory* are plainly incorrect. Moreover, by permitting the shifting of the burden

of proof the analysis in those cases is harmful. This Court should overturn its prior decisions.

6. *This Court should reverse Winfred's conviction.*

Where a constitutional error occurs a conviction must be reversed unless the State can prove beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In the context of jury instruction, the Court has said “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). That reasoning is consistent with the Supreme Court’s conclusion that a misstatement of the beyond a reasonable doubt standard could never be deemed harmless. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). The Court reasoned “the essential connection to a ‘beyond a reasonable doubt’ factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings.” *Id.*

Here, while there were no jury instructions, it is clear from the juvenile court’s findings that it misallocated and improperly defined the State’s burden of proof. That error cannot be deemed harmless as it

vitiates all of the court's findings. The court found the State proved forcible compulsion beyond a reasonable doubt. CP 50. However, the juvenile court also specifically found Winfred had not proven consent by a preponderance. *Id.* The error is more than merely placing the burden on Winfred to prove a reasonable doubt. Instead, the error more fundamentally required Winfred prove that doubt by a preponderance of the evidence. That error vitiates the trial court court's remaining factual findings. As in *Sullivan* that error cannot be deemed harmless.

The fact that the court understood forcible compulsion and consent to be two separate factual determinations defeats any argument that the error is harmless. Based on that mistaken understanding the court may well have had a reasonable doubt on the question of consent but nonetheless found Winfred guilty based on his failure to prove consent by a preponderance. *See Lynch*, 178 Wn.2d at 494. Certainly the facts admitted would have permitted a rational fact finder to entertain a reasonable doubt on the question of consent. The State cannot prove that, having separated the two conceptually, the court would have reached the same conclusion if it had properly understood consent and forcible compulsion to be the two sides of the same coin.

D. CONCLUSION

This Court should clarify the continuing application of the negates analysis overturn *Camara* to the extent it is contrary and reverse Winfred's conviction.

Respectfully submitted this 4<sup>th</sup> day of February, 2013.

s/Gregory C. Link  
GREGORY C. LINK -25228  
Washington Appellate Project  
Attorney for Petitioner

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King County Prosecutor's Office-Appellate Unit
- appellant
- Suzanne Elliott; Travis Stearns  
Attorneys for amicus

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: February 4, 2014

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### **Supplemental Brief of Petitioner**

Gregory C. Link - WSBA #25228  
Attorney for Petitioner  
Phone: (206) 587-2711  
E-mail: [greg@washapp.org](mailto:greg@washapp.org)

By

*Maria Arranza Riley*  
**Staff Paralegal**  
**Washington Appellate Project**  
**Phone: (206) 587-2711**  
**Fax: (206) 587-2710**  
**E-mail: [maria@washapp.org](mailto:maria@washapp.org)**  
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