

No. 88341-6

Court of Appeals No. 67340-8-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

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

Petitioner.

**FILED**  
E JAN 23 2013  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
CPB

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

PETITION FOR REVIEW

GREGORY C. LINK  
Attorney for Petitioner

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

~~FILED~~  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 JAN 16 PM 4:44

**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER..... 1

B. OPINION BELOW ..... 1

C. ISSUE PRESENTED..... 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT ..... 3

**This Court should accept review and reaffirm that  
due process requires the State carry the burden of  
disproving any fact which negates and element of an  
offense..... 3**

F. CONCLUSION..... 9

## TABLE OF AUTHORITIES

### **Washington Constitution**

Const. Art. I, § 2 .....	7
--------------------------	---

### **United States Constitution**

U.S. Const. amend XIV .....	1, 3, 6
U.S. Const. Art. VI .....	7

### **Washington Supreme Court**

<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984).....	4
<i>State v. Camara</i> , 113 Wn.2d 631, 781 P.2d 483 (1989) .....	5, 6, 7, 9
<i>State v. Deer</i> , __ Wn.2d __, 287 P.3d 539 (2012).....	8
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876, 887 (2012).....	7
<i>State v. Lively</i> , 130 Wn.2d 1, 921 P.2d 1035 (1996).....	8
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	4
<i>State v. Riker</i> , 123 Wn.2d 351, 869 P.2d 43 (1994).....	8
<i>State v. Valdez</i> , 167 Wn.2d 761, 224 P.3d 751 (2009).....	7

### **United States Supreme Court**

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) .....	3, 6
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	3, 6
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).....	4, 5, 6
<i>Ohio v. Martin</i> , 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).....	6
<i>Patterson v. New York</i> , 432 U.S. 197, 215, 97 S. Ct. 2319, 52 L. Ed. 2d 281(1977).....	4

### **Other Courts**

<i>State v. Drej</i> , 233 P.3d 476 (Utah 2010) .....	9
---	---

*State v. Urena*, 899 A.2d 1281 (R.I. 2006)..... 9  
*United States v. Deleveaux*, 205 F.3d 1292 (11<sup>th</sup> Cir. 2000)..... 9  
*United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011)..... 8

**Statutes**

RCW 9A.44.010 ..... 5  
RCW 9A.44.050 ..... 4

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Winfred R. ( a juvenile) asks this court to accept review of the opinion of the Court of Appeals in *State v. W.R., Jr.*, 67340-8-I.

B. OPINION BELOW

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, due process requires the State disprove that fact defense beyond a reasonable doubt.

There is no dispute that consent negates the “forcible compulsion” element of second degree rape. Thus, seemingly, due process requires the State disprove consent beyond a reasonable doubt. Nonetheless, the opinion of the Court of Appeals concludes there is no constitutional violation in requiring Winfred to carry the burden of proving consent.

C. ISSUE PRESENTED

Consistent with United States Supreme Court precedent, this Court has consistently interpreted the Due Process Clause to require the

State prove not only the elements of an offense but also to disprove any fact which negates an element of an offense. Thus, because they negate elements of an offense, the State must disprove self-defense and diminished capacity. But in lone anomalous case, this Court refused to apply the negates analysis with respect to consent, even though the court recognized consent negates the forcible compulsion element of second degree rape. Requiring a defendant bear the burden of proving consent is contrary to this Court's remaining due process jurisprudence, is contrary to United States Supreme Court decisions, and is a substantial constitutional issue.

D. 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 as well. 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, concluding Winfred had not proved consent by a preponderance of the evidence. 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.

E. ARGUMENT

**This Court should accept review and reaffirm that due process requires the State carry the burden of disproving any fact which negates and element of an offense.**

In a criminal prosecution, 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).

Therefore, 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; *State v. Acosta*, 101 Wn.2d 612, 614-15, 683 P.2d 1069 (1984) (self-defense to a charge of murder); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983) (self-defense to a charge of assault). Unlike the pure affirmative defenses, such a “defense” effectively denies the commission of the underlying crime.

The State charged Winfred with second degree rape. CP 1-3. To convict Winfred, the State was required to prove, beyond a reasonable doubt, that he had sexual intercourse with another person by “forcible compulsion.” RCW 9A.44.050(1)(a). “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) (emphasis added). 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.

(emphasis added).

A person cannot consent where forcibly compelled to do something, because forcible compulsion must overcome any resistance, or make resistance impossible. Likewise, because any consent must be free, forcible compulsion cannot occur where there is consent. Therefore, consent negates the forcible compulsion element of second degree rape. *See State v. Camara*, 113 Wn.2d 631, 637, 781 P.2d 483 (1989). *Camara* recognized that nonconsent remains the “essence” of the crime of rape and is the “conceptual opposite” of forcible compulsion.” *Id.* at 636-37. Under a straightforward application of *Mullaney*, the State must therefore disprove consent beyond a reasonable doubt. *Mullaney*, 421 U.S. at 686-87.

However, in what is at best an anomalous opinion, *Camara* declined to apply this negates analysis to consent. 113 Wn.2d at 640.

*Camara* reasoned that the United States Supreme Court's decision in *Ohio v. Martin*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987), eliminated the negates analysis. But *Martin* did not do so. Instead, *Martin* concluded that because under Ohio law self-defense did not negate any element of the offense, but merely created an evidentiary overlap, due process did not require the State to bear the burden of proof. 480 U.S. at 234-36.

Beyond simply misreading *Martin*, *Camara*'s conclusion is inconsistent with subsequent United States Supreme Court decisions reaffirming the fundamental point of *Winship* and *Mullaney*; that the government must beyond a reasonable doubt prove every fact necessary to punishment. *Apprendi*, 530 U.S. at 476-77. *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. As such, the Fourteenth Amendment requires the State bear the burden of proving that fact.

The federal constitution provides:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything

in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. Art VI.. The Washington Constitution provides:

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

Const. Art. I, § 2.

These provisions require that all courts must accept the United States Supreme Court's interpretation of the United States Constitution, and "based upon United States Supreme Court precedent to date." *State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876, 887 (2012), *see also*, *State v. Valdez*, 167 Wn.2d 761, 780, 224 P.3d 751 (2009) (J.M. Johnson, J. concurring) ("The United States Supreme Court's interpretation of the United States Constitution is binding on the State of Washington, including its courts, through the supremacy clause."). Because the United States Supreme Court has said the Due Process Clause requires the State disprove any fact which negates an element, and because consent negates an element of the crime, the State was required to carry the burden of proof. *Camara* notwithstanding..

Aside from its constitutional infirmity, *Camara's* refusal to apply the negates analysis to consent is an anomaly in this Court's

jurisprudence, as the Court has continued its adherence to the analysis for other facts. For example even after *Camara* the Court employed the negates analysis to determine that the State does not bear the burden of disproving entrapment only because it does not negate an element of the offense. *State v. Lively*, 130 Wn.2d 1, 10–11, 921 P.2d 1035 (1996); *see also, State v. Riker*, 123 Wn.2d 351, 366, 869 P.2d 43 (1994) (determining duress does not negate an element of the offense and thus the burden may be placed on defendant). Additionally, the Court has never retreated from the requirement that the State bears the burden of disproving self-defense or good-faith claim of title. Indeed, only recently this Court reiterated that “when a defense ‘negates’ an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense.” *State v. Deer*, \_\_ Wn.2d \_\_, 287 P.3d 539, 543 ( 2012). Thus, other than *Camara* this Court has never doubted the correctness of the negates analysis.

And, the correctness of the negates analysis has been repeatedly recognized by several federal circuits and state supreme courts. *See e.g., United States v. Prather*, 69 M.J. 338, 342-43 (C.A.A.F. 2011) (concluding that because it negates element government must disprove consent in sexual assault trial); *United States v. Deleveaux*, 205 F.3d

1292, 1298 (11<sup>th</sup> Cir. 2000) (government must disprove fact which negates an element); *State v. Urena*, 899 A.2d 1281, 1288 (R.I. 2006) (because it negates element due process requires state to disprove self-defense); *State v. Drej*, 233 P.3d 476, 481 (Utah 2010) (same).

The anomalous decision in *Camara*, relied on by the Court of Appeals here, is contrary to this Court's jurisprudence as well as that of the United States Supreme Court. Further relieving the State of its burden of proving a fact which negates an element of the offense presents a substantial constitutional issue. This Court should grant review under RAP 13.4.

F. CONCLUSION

This court should accept review of Winfred's case.

Respectfully submitted this 16<sup>th</sup> day of January, 2013.



---

GREGORY C. LINK -25228  
Washington Appellate Project  
Attorney for Petitioner

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 67340-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Deborah Dwyer, DPA  
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: January 16, 2013

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 JAN 16 PM 4:44

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	No. 67340-8-1
Respondent,	)	
	)	
v.	)	
	)	
W.R., JR.,	)	
D.O.B. 09/26/96,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 29, 2012
	)	

Per Curiam — W.R. appeals a juvenile court disposition finding him guilty of second degree rape by forcible compulsion. He contends the court erred in requiring him to prove that the charged act was consensual. He concedes this contention is at odds with State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989), but argues that Camara rests on a flawed reading of United States Supreme Court precedent. Our Supreme Court rejected a similar challenge to Camara in State v. Gregory, 158 Wn.2d 759, 801-04, 147 P.3d 1201 (2006). Gregory and Camara control W.R.'s contention here.

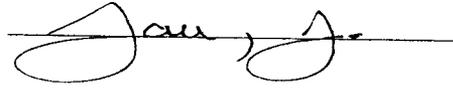
Affirmed.

FOR THE COURT:





No. 68060-9-1/2

A handwritten signature in black ink, appearing to be "Jau J.", written over a horizontal line.