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No. 88341-6

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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

PETITIONER'S ANSWER TO BRIEFS OF AMICI CURIAE

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 ORIGINAL

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A. ARGUMENT

1. *Camara* properly recognized nonconsent remains the essence of rape.

In *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), this Court found that although the Legislature removed consent from the language of the first and second degree rape statutes when those statutes were enacted in 1975, nonconsent remained the essence of the offense. *Id.* at 636. The Court 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.

Beyond its recognition that consent remained the essence of the offense, *Camara* never doubted that consent and forcible compulsion negated one another. Indeed, it noted that the two were “conceptual opposites.” *Id.* at 637. However, this Court concluded that despite its negating effect, the defendant could be required to prove consent.

Two Amici briefs have been submitted in support of the State in this matter. The first by several organizations (hereafter the

“coalition”),¹ and the second by the Washington Association of Prosecuting Attorneys (hereafter WAPA). Neither amici brief acknowledges the holding of *Camara*. Instead, each brief ignores this Court’s recognition that nonconsent is the essence of the offense rape and presupposes consent has not been an issue in rape prosecutions. Amici suggests Winfred’s argument will open the door to the outdated “rape myths” and will deter complaints from coming forward.

Because *Camara* long ago recognized the elemental nature of nonconsent in rape prosecution, Winfred’s argument does nothing to change to substance or nature of the evidence in a rape prosecution. Instead, Winfred simply seeks to have the Court place the burden of proof where due process requires it to lie, on the State.

That consent remains the gravamen of rape is amply illustrated by its inclusion in third degree rape, RCW 9A.44.060; by the “inability to consent” element of second degree rape, RCW 9A.44.050(1)(b); and by statutes which criminalize sexual intercourse with persons legally incapable of consent. *See e.g.*, RCW 9A.44.050(1)(b)(3); RCW 9A.44.073. Amici mistakenly embrace the belief that only by placing

¹ The organizations include the Washington Coalition of Sexual Assault Programs, King County Sexual Assault Resource Center, Legal Voice, and Sexual Violence Center.

the burden of proof of consent on a defendant can courts maintain the bulwark against the reintroduction of rape myths. As nonconsent has always remained the essence of the crime of rape, the question is not whether its proof will open the floodgates as amici suggest as it has not to this point. Rather, the question is why unconstitutionally shifting the burden of proof to the defendant is necessary to keep those floodgates closed. Amici offer no answer to that question. Nor could they.

For 39 years third-degree rape has included the statutory element of lack of consent. RCW 9A.44.060. *Camara* cites to RCW 9A.44.060 as proof that the concept of consent was retained in the post-1975 statute. 113 Wn.2d at 637. Throughout that same period, second degree rape has included an alternative where the victim was incapable of granting consent. RCW 9A.44.050(1)(b). Yet there is no evidence, that either element has reduced rape complaints or reintroduced outdated rape myths. And there is no reason to believe requiring the State to carry its constitutionally mandated burden of proving the elements of the offense will do so.

Accepting Winfred's argument does not introduce any additional facts to rape prosecutions that are not presently at issue. Accepting Winfred's argument does not open the door to outdated rape

myths. Neither consent nor resistance were ever removed from rape prosecutions. Rather, those concepts remained as they always have, but the burden was improperly placed on the defendant. That, violates due process. *Patterson v. New York*, 432 U.S. 197, 215, 97 S. Ct. 2319, 52 L. Ed. 2d 281 (1977); *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).

2. Consent negates forcible compulsion.

As set forth in Winfred’s brief, forcible compulsion and consent are two sides of the same coin. Supplemental Brief of Petitioner at 8-10. A person cannot “consent” where forcibly compelled to do something. 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. *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. 113 Wn.2d 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.

Amici claim that both in practice and in the abstract, consent does not negate forcible compulsion. As the State does in its brief, amici offer the example of “consensual simulations of rape.” Brief of Coalition at 15; Brief of WAPA at 6. The term “consensual simulations of rape.” proves Winfred’s point. Sexual intercourse between freely consenting adults is not a crime no matter what form it takes. *See Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508 (2003).

Forcibly compelled sexual intercourse is criminal by virtue of the fact that it is not consensual but compelled by force. Conversely where two freely consenting adults engage in a simulation of rape, there is no compulsion and there is no rape. An actor plunging a knife into a curtain in a production of *Hamlet* has not committed the offense of murder nor attempted murder simply because the actor behind the curtain feigns death. Where a player fouls another in a basketball game she has undoubtedly touched the other, perhaps even harmfully, but she has not done so unlawfully, as the players have consented to some degree of contact. *State v. Shelley*, 85 Wn. App. 24, 32, 929 P.2d 489

(1997). Thus, there is no assault. Consent negates, and cannot coexist with, the fact that makes sexual intercourse unlawful – forcible compulsion.

By suggesting consent is immaterial in rape prosecutions, amici denigrate the ability of adults to engage in consensual sexual relations. Indeed, if consent is immaterial to a prosecution of second degree rape by forcible compulsion as amici suggest, then there is no reason why even the “consensual simulations of rape” amici contrive would be legal. Amici would create victims of consenting persons, presumably over their own objections.

Next amici offer the hypothetical of a victim who acquiesces to a conditional threat of harm as an example where consent can coexist with forcible compulsion. Brief of Coalition at 19. But that example is not one of freely given consent at all. Consent is “freely given agreement.” RCW 9A.44.010(7). Acquiescence in the face of a threat of force is by no measure freely given. In other arenas, courts have long recognized a distinction between free and voluntary consent and acquiescence in the face of threat. *State v. Schultz*, 170 Wn.2d 746, 761, 248 P.3d 484 (2011) (consent is not established by acquiescence to a claim of right). Amici’s speculative example does not provide a

circumstances of consent either in reality or in the abstract, and thus does not provide an example of consent coexisting with forcible compulsion.

In every instance, consent negates forcible compulsion and vice versa. The two are conceptual opposites. *Camara*, 113 Wn.2d at 636-37. Consent negates forcible compulsion

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).

Nonetheless, amici argue that it is unnecessary to require the State to separately disprove consent because, they argue, proof of forcible compulsion necessarily establishes nonconsent. Brief of Coalition at 16-17. In this argument, amici are simply acknowledging the negating effect of consent; in essence, making Winfred’s argument for him.

It necessarily follows from amici’s argument that a trial court errs whenever it instructs the jury that the defendant bears the burden of

proving consent by a preponderance of the evidence. Further, a trial court necessarily errs whenever, following a bench trial, it enters a finding that the defendant is guilty because he failed to prove consent by a preponderance. In each instance, placing the burden of proving consent on the defendant necessarily relieves the State of its burden of proving each element of the offense beyond a reasonable doubt. Thus amici implicitly concede that *Camara* and *State v. Gregory*, 125 Wn.2d 759, 147 P.3d 1201 (2006), are incorrect to the extent they held such an instruction was proper. Moreover, amici must concede the trial court erred in this case. But there is more to it than that.

Because consent negates forcible compulsion, whenever a jury hears evidence of consent, it must be informed of the State's burden to disprove consent beyond a reasonable doubt. In assault cases where evidence of self-defense is presented, it is not enough to instruct a jury that the State must prove the elements of the charged offense. Instead, the jury should be unambiguously informed that the State must prove absence of self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984). Without such an instruction the jury is left without guidance on what to do with the evidence of lawful use of force. *Id.* at 623. The same is true where the jury hears evidence

of consent. Because consent negates forcible compulsion it is not enough to simply tell the jury the State must prove forcible compulsion as that leaves the impression that the defendant has some burden of proving consent. *Id.* Instead, the jury must be unambiguously informed of how to resolve that question without relieving the State of its burden of proof; i.e., informed the State must disprove consent beyond a reasonable doubt.

B. 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 7th day of March, 2014.

s/Gregory C. Link
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 88341-6
v.)	
)	
WINFRED R., JR.,)	
)	
Petitioner.)	

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