

64335-5

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No. 64335-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED HASSAN MOHAMED,

Appellant.

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

The Honorable Jay V. White

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 4

D. ARGUMENT 5

 1. THE EXCLUSION OF EVIDENCE OF MS. TRULSON'S PRIOR DRUG USE VIOLATED MR. MOHAMED'S CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE 5

 a. A defendant has the constitutionally protected right to present a defense which encompasses the right to present relevant testimony. 6

 b. The exclusion of evidence of Ms. Trulson's drug use denied Mr. Mohamed the right to present his defense. 8

 c. The court's error in refusing to admit evidence of Ms. Trulson's drug use was not a harmless error. ... 11

 2. COURT'S INSTRUCTION 16 IMPERMISSIBLY SHIFTED THE BURDEN OF DISPROVING AN ELEMENT OF THE CHARGED OFFENSE THUS VIOLATING MR. MOHAMED'S RIGHT TO DUE PROCESS 12

 a. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. 13

b.	Lack of consent is an essential element of first degree rape, and the burden of persuasion on consent may not be placed with the defendant.	14
c.	Consent is not an affirmative defense to first degree rape.....	16
d.	The meaning of <i>State v. Camara</i> should be clarified to prohibit requiring a defendant to prove consent by a preponderance of the evidence.	20
e.	The trial court's instructional error was not harmless.	27
3.	THE STATE'S QUESTIONING OF DETECTIVE EARLY REGARDING MR. MOHAMED'S POST-ARREST SILENCE VIOLATED HIS RIGHT TO DUE PROCESS	29
a.	It is improper to question a defendant regarding their post-arrest, post- <i>Miranda</i> silence.....	30
b.	The prosecutor's questioning of Detective Early regarding Mr. Mohamed's post-arrest silence violated his right to due process and a fair trial.	32
c.	The prosecutor's questioning of Detective Early was not harmless error.	33
F.	CONCLUSION	34

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....	2, 30
U.S. Const. amend. VI.....	6, 9, 10
U.S. Const. amend. XIV	1, 2, 13, 32

WASHINGTON CONSTITUTIONAL PROVISIONS

Const. Art. I § 22	1, 7
Const. Art. I, § 9	30

FEDERAL CASES

<i>Brecht v. Abrahamson</i> , 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)	31
<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)	11, 27, 33
<i>Doyle v. Ohio</i> , 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)	31, 32
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)	6, 7, 11
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	13
<i>Martin v. Ohio</i> , 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987)	passim
<i>Miranda v Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	3
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)	13, 14
<i>Patterson v. New York</i> , 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1979)	passim

<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)	6, 11
<i>Rock v. Arkansas</i> , 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)	8
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 29 (1979)	13
<i>United States v. Scheffer</i> , 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)	8
<i>United States v. Whittington</i> , 783 F.2d 1210 (5 th Cir., 1986)	6
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	6, 7, 18
<i>White v. Am</i> , 788 F.2d 338 (6th Cir. 1986)	23
WASHINGTON CASES	
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	passim
<i>State v. Box</i> , 109 Wn.2d 320, 745 P.2d 23 (1987)	17, 25
<i>State v. Bright</i> , 77 Wn.App. 304, 890 P.2d 487 (1995)	15, 16
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	28
<i>State v. Brown</i> , 45 Wn.App. 572, 726 P.2d 60 (1986)	27
<i>State v. Camara</i> , 113 Wn.2d 631, 781 P.2d 483 (1989)	16, 20, 22, 26
<i>State v. Carter</i> , 154 Wn.2d 71, 109 P.3d 823 (2005)	27
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	8
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	30, 31, 33
<i>State v. Ellis</i> , 136 Wn.2d 498, 963 P.2d 843 (1998)	6
<i>State v. Hanton</i> , 94 Wn.2d 129, 614 P.2d 1280, <i>cert. denied</i> , 449 U.S. 1035 (1980)	27

<i>State v. Hicks</i> , 102 Wn.2d 182, 683 P.2d 186 (1984).....	26
<i>State v. Jones</i> , ___ Wn.2d ___, 2010 WL 1492583 (April 15, 2010).....	8, 9, 10, 12
<i>State v. Kester</i> , 38 Wn.App. 590, 686 P.2d 1081 (1984).....	16, 18
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	11
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	14, 25, 27
<i>State v. McNight</i> , 54 Wn.App. 521, 774 P.2d 532 (1989).....	15
<i>State v. Moses</i> , 79 Wn.2d 104, 483 P.2d 832 (1971), <i>cert. denied</i> , 406 U.S. 910 (1972).....	17
<i>State v. Pistona</i> , 127 Wash. 171, 219 P. 859 (1923).....	17
<i>State v. Riker</i> , 123 Wn.2d 351, 869 P.2d 43 (1994)....	17, 18, 25, 26
<i>State v. Roberts</i> , 80 Wn.App. 342, 908 P.2d 892 (1996).....	7
<i>State v. Roberts</i> , 88 Wn.2d 337, 562 P.2d 1259 (1979).....	7, 13
<i>State v. Tigano</i> , 63 Wn.App. 336, 818 P.2d 1369 (1991).....	10
STATUTES	
RCW 9A.44.010	14, 15
RCW 9A.44.040	14
RULES	
CrR 3.5.....	31

A. SUMMARY OF ARGUMENT

Mohamed Mohamed contends his convictions for first degree rape, first degree robbery, and taking a motor vehicle should be reversed for three independent reasons. First, the trial court violated his right to present a defense when it barred him from introducing evidence of the complainant's prior drug use to support his claim the current offenses arose out of a drug deal gone wrong. Second, the trial court impermissibly shifted the burden of proof to him when it required him to prove the sexual intercourse was consensual. Third, Mr. Mohamed's constitutionally protected right to silence was violated when a police officer was allowed to testify Mr. Mohamed never disclosed to the police his claim the events occurred as a result of a drug deal gone bad.

B. ASSIGNMENTS OF ERROR

1. Mr. Mohamed's Sixth and Fourteenth Amendment rights as well as art. I, section 22 of the Washington Constitution right to present a defense were violated when the trial court barred him from introducing evidence about the victim's drug use.

2. The trial court violated Mr. Mohamed's Fourteenth Amendment right to due process when it instructed the jury on consent in Court's Instruction 16.

3. The prosecutor's questioning of Mr. Mohamed regarding his post-arrest silence violated his Fifth and Fourteenth Amendment and art. I section 9 of the Washington Constitution rights to silence and due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As a part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the defendant has the right to present relevant, admissible evidence on his behalf. Here, the trial court excluded evidence of Dana Trulson's prior drug use, finding it prejudicial despite the fact the evidence was the basis of Mr. Mohamed's entire defense: that Ms. Trulson agreed to trade sex for drugs. Did the trial court's exclusion order prevent Mr. Mohamed from presenting a defense, thus entitling him to reversal of his convictions?

2. The Fourteenth Amendment Due Process Clause requires the State to bear the burden of proving each element of the charged offense beyond a reasonable doubt. Here, the trial court placed the burden of proving consent by a preponderance of the evidence on the defendant. Did the trial court violate due process by shifting to the defense the burden of disproving an

element of the crime charged, forcible compulsion, when it required Mr. Mohamed prove consent by a preponderance of the evidence?

3. Whether the “forcible compulsion” element of first degree rape necessarily includes lack of consent such that proof of consent negates forcible compulsion?

4. Whether *State v. Camara*¹ permits shifting to a defendant the burden of disproving the forcible compulsion element of the crime of first degree rape?

5. The Fifth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right not to incriminate himself and the rights to due process and a fair trial. Due process is violated when the prosecutor questions a police witness about the defendant’s post-arrest silence following *Miranda*² warnings. Here the prosecutor questioned Detective Early about Mr. Mohamed’s failure to disclose potentially exculpatory evidence to the police following his arrest. Is Mr. Mohamed entitled to reversal of his conviction for a violation of his rights to silence and to due process?

¹ 113 Wn.2d 631, 781 P.2d 483 (1989).

² *Miranda v Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. STATEMENT OF THE CASE

Mohamed Mohamed was charged with first degree rape, first degree robbery, and taking a motor vehicle for acts arising out of an encounter with Dana Trulson. CP 14-15. Mr. Mohamed testified he was standing outside a market in Tukwila when Ms. Trulson drove up and asked if anyone knew where she could buy drugs.

9/29/09RP 29-31. Mr. Mohamed got into Ms. Trulson's car and he later secured drugs for Ms. Trulson. 9/29/09RP 38-39. According to Mr. Mohamed, Ms. Trulson drove to the park, where the two negotiated a deal in which Ms. Trulson received the drugs in return for her providing Mr. Mohamed with sex. 9/29/09RP 40-45. Mr. Mohamed withdrew from the negotiated deal, demanding money for the drugs he purchased for Ms. Trulson instead of sex. 9/29/09RP 44-46. When Ms. Trulson refused to give him money, Mr. Mohamed admitted driving away in her car. 9/29/09RP 50. Mr. Mohamed testified Ms. Trulson's injuries came when she initially struck him because he had given her too little drugs, he punched back, and the two fought. 9/29/09RP 46.

Ms. Trulson claimed Mr. Mohamed forced his way into her car and ordered her to drive to a secluded park. 7/23/09RP 18-22. There, according to Ms. Trulson, Mr. Mohamed beat and raped her.

7/23/09RP 27. Mr. Mohamed also allegedly took money from Ms. Trulson before driving away in Ms. Trulson's car. 7/23/09RP 27-29.

The jury subsequently found Mr. Mohamed guilty as charged. 10/1/09RP 12-13.

D. ARGUMENT

1. THE EXCLUSION OF EVIDENCE OF MS. TRULSON'S PRIOR DRUG USE VIOLATED MR. MOHAMED'S CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE

Prior to the beginning of trial, the State moved *in limine* to bar Mr. Mohamed from presenting any evidence of past drug use by Ms. Trulson. 9/15/09RP 102; 9/16/09RP 7-8. Mr. Mohamed objected, noting this evidence was extremely important to his defense:

Well, the drug -- the drug transaction that was testified to by Mr. Mohamed is sort of the crux of the case from the defense. And so I think I would be moving in the direction of trying to inquire from her what -- about her drug use. I don't know how that -- I'm not sure why that should be excluded from this, it's not -- it's not like rape shield or something like that, it's -- and it's not character assassination. I think that's the only reason for excluding it if it were character assassination, and I'm not trying to do that. *I'm trying to get to the heart of the defense case.*

9/15/09RP 102-03 (emphasis added).³ The trial court granted the State's *in limine* motion: "What the Court will do at this time is to grant the motion, which is to exclude the mention of any prior drug use of the alleged victim in this case." 9/16/09RP 16.

a. A defendant has the constitutionally protected right to present a defense which encompasses the right to present relevant testimony. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present witnesses in one's defense is a fundamental element of due process of law. *United States v. Whittington*, 783 F.2d 1210, 1218 (5th Cir., 1986), *citing* *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis*, 136 Wn.2d 498, 527, 963 P.2d 843 (1998). This right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord* *Washington*, 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to

³ The prosecutor noted during the argument on the *in limine* motion that there was evidence that Ms. Trulson had a past history of heroin and powder cocaine use. 9/16/09RP 13-14.

present a defense, the right to present the defendant's version of the facts . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”).

Washington defines the right to present witnesses as a right to present material and relevant testimony. Const. Art. I § 22; *State v. Roberts*, 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

The right to present a defense is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “ ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’ ” *Holmes*, 547 U.S. at 324-25, citing *United States v.*

Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), *quoting Rock v. Arkansas*, 483 U.S. 44, 56, 58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

The evidence sought to be admitted by the defendant need only be “of at least minimal relevance.” *State v. Jones*, ___ Wn.2d ___, 2010 WL 1492583 at 3 (April 15, 2010), *quoting State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the evidence is relevant, the burden shifts to the State to prove “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.*

b. The exclusion of evidence of Ms. Trulson’s drug use denied Mr. Mohamed the right to present his defense. Mr. Mohamed’s defense at trial was that Ms. Trulson traded sex for crack cocaine, thus the State failed to prove forcible compulsion. 9/16/09RP 12. Mr. Mohamed contended Ms. Trulson solicited drugs from him. Although he did not sell drugs he knew people who did, and Ms. Trulson invited him into her car in order to procure the drugs. *Id.* A dispute occurred when Mr. Mohamed initially agreed to trade sex for drugs, then decided he would rather have the money. *Id.*

A recent decision from the Washington Supreme Court provides guidance on this issue. In *Jones, supra*, the trial court excluded evidence that the victim and another woman engaged in an all night drug and sex party where the victim engaged in consensual intercourse with several men, including the defendant, who was subsequently charged with second degree rape. 2010 WL 1492583 at 2. The trial court barred the evidence, finding it was being used by the defendant to challenge the veracity of the victim and, as a result, the evidence was barred by the rape shield statute. *Id.* The Supreme Court disagreed, ruling the evidence was not merely

of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence.

After the court effectively barred Jones from presenting his defense and after all witnesses had already testified, the trial court attempted to say that Jones had not been precluded from testifying to the issue of consent alone. The trial court's formulation would have allowed testimony of consent, but devoid of any context about how the consent happened or the actual events. These were essential facts of high probative value whose exclusion effectively barred Jones from presenting his defense. The trial court

prevented him from presenting a meaningful defense.
This violates the Sixth Amendment.

Jones, 2010 WL 1492583 at 3.

Here, the evidence that Ms. Trulson was a drug user and utilized Mr. Mohamed to feed her habit was not merely relevant evidence, as stated in *Jones*, it was Mr. Mohamed's "entire defense." *Id.* As in *Jones*, if his evidence was believed, it would show a lack of forcible compulsion which would allow the jury to acquit him. Without this evidence, Mr. Mohamed had no defense which had any credibility before the jury. Thus, Mr. Mohamed was prevented from presenting a meaningful defense.

To the extent the trial court here relied upon the decision in *State v. Tigano*, which held past drug use or addiction is not admissible to impeach a witness because this type of evidence is overwhelmingly prejudicial, the court erred. 63 Wn.App. 336, 344-45, 818 P.2d 1369 (1991). *Tigano* is inapposite because Mr. Mohamed was not attempting to impeach Ms. Trulson's credibility nor her ability to perceive; he was attempting to prove his defense with relevant evidence that she allowed him into her car to procure drugs then sought to trade sex for the drugs. *Tigano* has no relevance to Mr. Mohamed's matter and the trial court erred in

relying on it. In addition, if the evidence was properly barred under *Tigano*, *Holmes* and *Jones* require the rule give way because it “infring[es] upon a weighty interest of the accused” and prevented Mr. Mohamed from presenting his defense. *Holmes*, 547 U.S. at 324-25.

c. The court’s error in refusing to admit evidence of Ms. Trulson’s drug use was not a harmless error. A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Ritchie*, 480 U.S. at 58; *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Once again, the decision in *Jones* provides the framework for this analysis in Mr. Mohamed’s case. In finding the error in precluding Mr. Jones’ evidence not harmless, the Court noted:

Admittedly, Jones’s version of the events is not airtight. He did not call any of the other members of the alleged sex party as witnesses, K.D.’s testimony directly contradicted Jones’s account, and only Jones’s semen was found on K.D. Nevertheless, a reasonable jury that heard of a consensual sex party may have been inclined to see the encounter in a different light. The jury would have heard a completely different account of the events of that night, so it is possible that a reasonable jury may have reached a different result. The trial court’s error

prevented Jones from presenting his version of the events.

Jones, 2010 WL 1492583 at 5.

The same analysis is true here. Mr. Mohamed was barred from presenting to the jury any evidence of the drug transaction he alleged occurred. This evidence would have directly contradicted Ms. Trulson's version of the events. A reasonable jury hearing this evidence of a drug deal gone bad "may have been inclined to see the [] encounter in a different light, and may have reached a different result. *Id.* As a result, as in *Jones*, the trial court's error in excluding this evidence was not harmless and Mr. Mohamed is entitled to reversal of his convictions and remand for a new trial. *Id.*

2. COURT'S INSTRUCTION 16
IMPERMISSIBLY SHIFTED THE BURDEN OF
DISPROVING AN ELEMENT OF THE
CHARGED OFFENSE THUS VIOLATING MR.
MOHAMED'S RIGHT TO DUE PROCESS

The trial court instructed the jury in Instruction 15, the "to convict" instruction, that among other things, the State bore the burden of proving forcible compulsion in order to find Mr. Mohamed guilty of first degree rape. CP 98. Over defense objection, the trial court also instructed the jury in Instruction 16 that Mr. Mohamed bore the burden of proving the sexual intercourse was consensual.

CP 100; 9/30/09RP 23. Mr. Mohamed contended this instruction impermissibly shifted the burden of proof to him. 9/30/09RP 13-14. Mr. Mohamed contended his defense was not consent but that the State failed to prove forcible compulsion beyond a reasonable doubt. 9/30/09RP 14.

a. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *Martin v. Ohio*, 480 U.S. 228, 230, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 29 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

It is well established under the Due Process Clause that the burden of proving or disproving an element of a crime may never be shifted to the defendant. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Roberts*, 88 Wn.2d 337, 340, 562 P.2d 1259 (1979). 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; *Acosta*, 101 Wn.2d 614 (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. Thus, the burden on a defense which “negates” an element of the crime charged must remain with the State. *Patterson v. New York*, 432 U.S. 197, 206-07, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1979); *McCullum*, 98 Wn.2d at 486.

b. Lack of consent is an essential element of first degree rape, and the burden of persuasion on consent may not be placed with the defendant. Mr. Mohamed was charged with first degree rape pursuant to RCW 9A.44.040. This offense requires the State to prove, beyond a reasonable doubt, that the defendant had sexual intercourse with another person by “forcible compulsion.” *Id.* The “forcible compulsion” element is defined 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) (emphasis added).

On the other hand, "consent" is defined as follows:

"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.

RCW 9A.44.010(7) (emphasis added).

The defendant must use force which "overcome[s] resistance," a phrase which necessarily encompasses a lack of consent, as the victim must be somehow rendered unable to resist. *State v. McNight*, 54 Wn.App. 521, 536, 774 P.2d 532 (1989) (Some type of resistance from victim must be shown. Issue of resistance is a fact question to be determined on a case-by-case basis). Further, forcible compulsion could be achieved through threat, which implicitly renders any resistance impossible. At the same time, to have consent, the victim must agree "freely" to the intercourse. RCW 9A.44.010(7); *State v. Bright*, 77 Wn.App. 304, 311, 890 P.2d 487 (1995). Under these definitions, the victim *cannot* consent where "forcible compulsion" is present, 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 first

and second degree rape. See *Camara*, 113 Wn.2d at 637 (forcible compulsion is conceptual opposite of consent); *State v. Kester*, 38 Wn.App. 590, 594, 686 P.2d 1081 (1984) (forcible compulsion is antonym of consent). See also *Bright*, 77 Wn.App. at 311 (third degree rape, which requires intercourse “without consent” is lesser included of second degree rape, as “without consent” element is established where forcible compulsion is shown). By requiring Mr. Mohamed to prove consent by a preponderance of the evidence, the trial court also required him to disprove the element of forcible compulsion. Due process prohibits the court from requiring Mr. Mohamed to do anything more than raise reasonable doubt as to his guilt. The trial court improperly shifted the burden of proof on an element of the crime, thereby depriving Mr. Mohamed of his due process rights.

c. Consent is not an affirmative defense to first degree rape. The State's ultimate burden of disproving consent follows from the fact consent is not an “affirmative defense.” The State may require the defendant to bear the burden of proving an “affirmative defense,” which does not negate an element of the crime charged. See *Patterson*, 432 U.S. at 202, 210; *Martin*, 480 U.S. at 235; *State v. Riker*, 123 Wn.2d 351, 366, 869 P.2d 43

(1994) (duress defense); *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971) (treaty exemption defense to violation of fishing laws), *cert. denied*, 406 U.S. 910 (1972); *State v. Box*, 109 Wn.2d 320, 323, 745 P.2d 23 (1987) (insanity defense). This is so in part because an affirmative defense admits the elements of the crime charged, but advances an excuse or justification for the defendant's conduct, and asks that punishment be mitigated because the defense somehow reduces the defendant's culpability. *Riker*, 123 Wn.2d at 367-68. Further, an affirmative defense is generally uniquely within the defendant's knowledge and ability to establish. *Id.*

Here, unlike duress or insanity, an assertion the alleged victim consented to intercourse does not admit the defendant committed the crime of rape, nor does it ask the court to condone or excuse the defendant's otherwise criminal conduct. *Contrast Riker*, 123 Wn.2d at 367-68 (duress admits the defendant committed the unlawful act, but pleads an excuse for doing so) and *Box*, 109 Wn.2d at 326-27 (insanity defense asks the court to excuse unlawful conduct) *with State v. Pistona*, 127 Wash. 171, 219 P. 859 (1923) (alibi defense denies defendant was present at the scene of the crime or that he could have committed offense)

and *Acosta*, (as defined in Washington, self-defense dispute whether murder defendant killed with appropriate *mens rea* and therefore, denies that defendant committed murder). An assertion of consent is merely another way of saying no forcible compulsion was used. *Kester*, 38 Wn.App. at 594 (unnecessary to instruct the jury on the definition of consent as the instruction describing forcible compulsion adequately allowed the defendant to argue his theory that the victim consented to intercourse with the defendant.) Further, unlike these affirmative defenses, whether the alleged victim consented is not a fact which is uniquely within the defendant's knowledge or ability to establish. *Riker*, 123 Wn.2d at 367 (burden of persuasion for affirmative defenses placed on defendants because generally, affirmative defenses are uniquely within the defendant's knowledge and ability to establish). Therefore, a rape defendant may only be required to raise sufficient evidence of consent to raise a reasonable doubt as to his or her guilt.

To contrast this case with *Martin v. Ohio, supra* is instructive. In *Martin*, Ohio law defined murder as "purposely causing the death of another with prior calculation or design." *Martin*, 480 U.S. at 228. The Ohio statute placed the burden on the defendant of proving self

defense by a preponderance of the evidence by showing: (1) the defendant was not at fault for creating the self-defense situation; (2) the defendant had an honest belief he was in imminent danger of death or great bodily harm and that the only means of escape from such danger was in the use of such force; and (3) the defendant did not violate any duty to retreat or avoid danger. *Martin*, 480 U.S. at 230. Noting that traditionally, affirmative defenses, including self-defense, were matters for the defendant to prove, the Supreme Court held requiring the defendant to prove self-defense by a preponderance of the evidence did not violate due process because the State was still required to prove the elements of prior calculation and design beyond a reasonable doubt. *Martin*, 480 U.S. at 233, *citing Patterson*, 432 U.S. at 202. In *dicta*, the Court noted that while there may be some evidentiary overlap between proof of self defense and proof of the required mental state for murder, the ultimate burden of proving the individual elements of remained with the State. *Martin*, 480 U.S. at 233. The Court also emphasized that the jury was entitled to use evidence presented by the defendant regarding self-defense to find the elements of murder had not been established beyond a reasonable doubt. *Id.*

In contrast to *Martin*, the Washington legislature and courts have defined “forcible compulsion” and “consent” to be mutually exclusive terms. As outlined above, proof of forcible compulsion disproves consent. There is much more than mere evidentiary overlap between the two concepts. Burdening the defendant with proving consent by a preponderance of the evidence necessarily requires the defendant to convince the jury that forcible compulsion was not used. Therefore, due process requires the defendant present evidence of consent only to the extent necessary to create a reasonable doubt he committed first degree rape.

d. The meaning of *State v. Camara* should be clarified to prohibit requiring a defendant to prove consent by a preponderance of the evidence. *Camara, supra*, can be read as permitting courts to place the burden on the defendants to prove consent by a preponderance of the evidence, as it questions the validity of the “negates” analysis. Mr. Mohamed instead asks this Court to interpret *Camara* consistent with the due process principles outlined above, and forbid shifting the burden of persuasion on consent to the defense. Alternatively, Mr. Mohamed argues *Camara* represents a flawed reading of United States Supreme Court precedent. See *Martin, supra; Patterson, supra*. In

the expectation of further review in the state and federal system, Mr. Mohamed wishes to preserve the issue by raising it here to urging reconsideration of *Camara*.

The *Camara* decision relied, in large part, upon *Martin*, *supra*, in reaching its conclusion regarding the burden of proof on consent. In *dicta*, the *Martin* Court acknowledged that evidence regarding an affirmative defense may also be relevant to whether the underlying elements of the crime charged have been established. The Court observed that the defendant's evidence she acted in self-defense could lead to a finding she did not act purposefully or with prior calculation and design. 480 U.S. at 233. The Court concluded, however, that this did not mean requiring the defendant bear the burden of proving self defense violated due process, as the ultimate burden of proving the required mental state lie with the state, as the jury was instructed that all evidence must be examined in determining whether the state had met its burden of proving each element of the crime charged. *Martin*, 480 U.S. at 234.⁴

⁴ In that regard, the Supreme Court stated:

We are thus not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the

The *Camara* court cited to this portion of *Martin* and found the “negates analysis” no longer applied to due process analysis, stating:

In light of [*Ohio v. Martin*], we have substantial doubt about the correctness of [the] “negates” analysis and thus decline to apply it in this case. . . . Following *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 the crime. Thus, while there is a conceptual overlap between the consent defense to rape and the rape crime’s element of forcible compulsion, we cannot hold that for that reason alone the burden of proof must lie with the State.

Camara, 113 Wn.2d at 639-640. This portion of *Camara* effectively opens the door to permit the State to shift the burden of proving an element of an offense to the defendant under the guise of creating a “defense.”

Camara misreads *Martin* as a rejection of the “negates” analysis. First, precedent relied upon and embraced by the *Martin*

latter will often tend to negate the former. It may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state’s case.

Martin, 480 U.S. at 234.

Court endorsed the “negates” analysis. *Martin* relied primarily upon *Patterson, supra*, which upheld a state statute shifting the burden of proving an affirmative defense to the accused. New York law required the prosecutor to prove all of the statutorily-defined elements of murder beyond a reasonable doubt, but permitted a defendant to reduce the charge to manslaughter by showing he acted while suffering an extreme emotional disturbance. The Supreme Court found this burden-shifting did not violate due process, largely because the affirmative defense did “not serve to negative any facts of the crime which the State is to prove in order to convict of murder.” *Patterson*, 432 U.S. at 207. The clear implication of this ruling is that when a defense does negate an element of the crime, the State may not shift the burden. *Martin*, 480 U.S. at 237 (Powell, J., dissenting); *White v. Arn*, 788 F.2d 338, 344-45 (6th Cir. 1986).

The *Martin* Court analogized the facts before it to those present in *Patterson*, and found, as in *Patterson*, the defendant's due process rights had not been violated because the State was still required to prove each element of the crime beyond a reasonable doubt. *Martin*, 480 U.S. at 233. The Court relied on *Patterson* as the framework to guide its decision, and, at one point,

explicitly refused to depart from *Patterson's* reasoning in any way.⁵

By endorsing that case as a whole, the *Martin* Court endorsed *Patterson's* “negates” analysis. Therefore, contrary to *Camara's* conclusion, the “negates” analysis must still be applied to examine whether what is designated a “defense” is actually a euphemism for the lack of an essential element of the crime. This is essential to ensure the burden of proving each element of the crime charged remains with the state.

A more consistent reading of *Martin* is that it represents an effort to distinguish situations where a defense may, through overlapping evidence, tend to cast doubt on the existence of an underlying element of the crime, from cases where the “defense” in question actually and legally represents the absence of an essential element of the crime. While the same evidence may be relevant to determine whether one kills with premeditation, and whether he acts in self-defense, there remains an ultimate legal difference between the two. An Ohio defendant asserting self-defense is

⁵ Justice Powell wrote a dissenting opinion in *Martin* asserting the majority had abandoned the central tenets of *Patterson* regarding defenses which negate an element of the crime. *Martin*, 480 U.S. at 237, 239. (Powell, J. dissenting) The majority responded to Justice Powell by stating, “[w]e do not depart from *Patterson v. New York*, [citation omitted], in this respect or in any other.” *Martin*, 480 U.S. at 234-35 fn.

saying he committed murder *because* of his urge to act in self-defense. In contrast, arguing consent is merely another way of arguing lack of forcible compulsion, as the two terms have been defined in this state. Legally, the two terms encompass one another. Thus, by designating consent as a defense, and placing the burden of proving it on the defendant, the trial court shifted to the defendant the burden to disproving forcible compulsion, and due process was violated.

Further, Washington Supreme Court cases decided after both *Martin* and *Camara* appear to have embraced *Patterson's* “negates” analysis. In *State v. Box, supra*, a post-*Martin* decision, the Supreme Court rejected the defendant's argument that insanity in a murder case must be disproved by the State. The Court concluded the defense did not negate an element of the crime of murder as the defendant's sanity was not an element of that crime. *Box*, 109 Wn.2d at 328-29. The Court then held that a defendant must prove the affirmative defense of insanity by a preponderance of the evidence. *Id* at 330, citing *McCullum, supra*, and *Acosta, supra*.

Likewise, in *Riker, supra*, the Supreme Court again applied the “negates” analysis to the statutory defense of duress. The

Court ruled that a defendant must prove duress by a preponderance of the evidence. However, despite the earlier holding in *Camara*, the Supreme Court distinguished duress from other “defenses” such self defense and alibi, stating:

[t]he duress defense, unlike self-defense or alibi, does not *negate* an element of the offense, but pardons the conduct even though it violates the literal language of the law. . . . Generally an affirmative defense which does not negate an element of the crime charged, but which only excuses the conduct, should be proved by a preponderance of the evidence.

Riker, 123 Wn.2d 368.

Thus, it appears the Washington Supreme Court has refused to read *Martin* as broadly as the *Camara* Court, and has continued to apply the “negates” analysis. The majority of post-*Martin* cases which have applied the “negates analysis” represent a better reading of Supreme Court precedent. Rejecting the “negates analysis” at this time would mean abandoning well-established precedent in this state which has prevented the State from shifting to the defendant the burden of disproving an element of the crime with which he or she is charged. *See, State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (prosecution must disprove the defense of good faith claim of title in robbery case because the defense negates intent element of robbery); *Acosta*, 101 Wn.2d at

616-19; *McCullum*, 98 Wn.2d at 494-96; *State v. Hanton*, 94 Wn.2d 129, 133, 614 P.2d 1280, *cert. denied*, 449 U.S. 1035 (1980). Mr. Mohamed asks this Court to follow the established precedent of this state, and give *Martin* its intended reading, by applying the “negates analysis” to this case. Under this analysis, the trial court violated due process by instructing the jury that Mr. Mohamed was required to prove consent by a preponderance of the evidence.

e.. The trial court's instructional error was not harmless. An instruction error is harmless only if it is “trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Brown*, 45 Wn.App. 572, 576, 726 P.2d 60 (1986). Where the error is of constitutional magnitude, it is presumed prejudicial unless the State can prove beyond a reasonable doubt the jury would have reached the same result absent the error. *Chapman*, 386 U.S. at 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). “An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) (alteration in original), *quoting State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d

889 (2002). Whether a flawed jury instruction is harmless error depends on the facts of a particular case. *Id.*

Here, the State cannot prove the outcome of the trial would have been the same absent the trial court's erroneous instruction. As in most rape cases, Mr. Mohamed's guilt or innocence hinged primarily upon the swearing match between him and Ms. Trulson, regarding whether she agreed to trade sex for drugs or he forced her to have sexual intercourse. Ms. Trulson denied allowing Mr. Mohamed into her car and testified at length regarding her allegations that he beat and raped her before stealing her car. On the other hand, Mr. Mohamed contended he was allowed into the car by Ms. Trulson and the act of sexual intercourse was part of the payment for the drug transaction and not an act of forcible compulsion. Had the jury merely been instructed it had to find the State proved forcible compulsion beyond a reasonable doubt, it could have altered the outcome of the trial. The error in instructing the jury on consent was not harmless.

3. THE STATE'S QUESTIONING OF
DETECTIVE EARLY REGARDING MR.
MOHAMED'S POST-ARREST SILENCE
VIOLATED HIS RIGHT TO DUE PROCESS

During the State's case-in-chief, the prosecutor asked the following questions of Detective Early of the Tukwila Police

Department:

- Q: Were you aware of – just generally of the contents of what [Mr. Mohamed] had said about what happened that night?
- A: Vaguely.
- Q: Okay.
- A: On that evening – or that morning.
- Q: And there were subsequent requests made [for lab analysis of Ms. Trulson's blood and urine for the presence of alcohol or drugs], and by that time you'd had an ability to review this statement, correct?
- A: Correct.

9/24/09RP 82. Mr. Mohamed immediately objected that the questions were comments on Mr. Mohamed's right to silence and also shifted the burden of proof to the defense.

9/24/09RP 83, 96-99, 105. The trial court overruled the objection agreeing with the prosecutor that the questioning was merely designed to elicit why the officer had ordered the tests he did. 9/24/09RP 83, 96-97. The prosecutor then continued:

- Q: Was there any indication that – was there any – did Ms. Trulson’s statement say that she had been using drugs on that night?
- A: Not that I recall.
- Q: Did the defendant’s statements say that she’d been using drugs that night?
- A: I don’t recall that.
- Q: When was the first time that you wound up hearing somebody say that – or a witness in this case saying there had been some type of drug use or drug purchase in this case?
- A: Several – a few days.

9/24/09RP 84-85. Mr. Mohamed again objected and the court again overruled the objection. *Id.* The detective was allowed to continue: “It was several days ago with a new witness.” 9/24/09RP 85.

a. It is improper to question a defendant regarding their post-arrest, post-Miranda silence. The Fifth Amendment to the federal constitution provides, in pertinent part, that no person “shall . . . be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V; *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). The state constitution similarly denotes that no person “shall be compelled in any criminal case to give evidence against himself.” Const. art. I, § 9; *Easter*, 130 Wn.2d at 235. These provisions have been interpreted to provide the same protections to the accused. *Easter*, 130 Wn.2d at 235.

The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process because *Miranda* warnings implicitly assure that remaining silent when facing the State's accusations carries no penalty. *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *Easter*, 130 Wn.2d at 237. Silence in the wake of such warnings is “insolubly ambiguous” and may merely reflect reliance on the right to remain silent rather than a fabricated trial defense. *Doyle*, at 617. Further, *Miranda* warnings impliedly assure that a defendant's silence will not be used against him at trial. *Doyle*, at 618. This right to “remain” silent applies both before and after arrest. *Easter*, 130 Wn.2d at 238-39.

When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence.

Id.

Here, Mr. Mohamed submits the prosecutor's questions of Detective Early regarding the failure of Mr. Mohamed to tell the police about Ms. Trulson's drug use prior to his testimony at the CrR 3.5 hearing violated his right to a fair trial.

b. The prosecutor's questioning of Detective Early regarding Mr. Mohamed's post-arrest silence violated his right to due process and a fair trial. In *Doyle, supra*, the prosecutor questioned the defendants about why they had not disclosed to the police officer after their arrest and after *Miranda* warnings their exculpatory explanations given at trial. The trial court allowed the cross-examination as impeachment of the defendants' credibility. The United States Supreme Court disagreed, finding this questioning violative of the defendants' right to due process and a fair trial. *Doyle*, 426 U.S. at 619 ("We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment").

The prosecutor's questioning here was equally violative of *Doyle*. The prosecutor's questions went to whether Mr. Mohamed had failed to provide his explanation Ms. Trulson was using drugs during their encounter to the police following his arrest and after *Miranda* warnings. This is the precise situation in *Doyle* the Supreme Court found so repugnant to the Fourteenth Amendment. Mr. Mohamed's right to due process was violated by the prosecutor's questioning.

c. The prosecutor's questioning of Detective Early was not harmless error. A comment on a defendant's post-arrest silence is an error of constitutional magnitude, which requires reversal unless the State proves beyond a reasonable doubt it is harmless. *Chapman*, 386 U.S. at 23-24; *Easter*, 130 Wn.2d at 242.

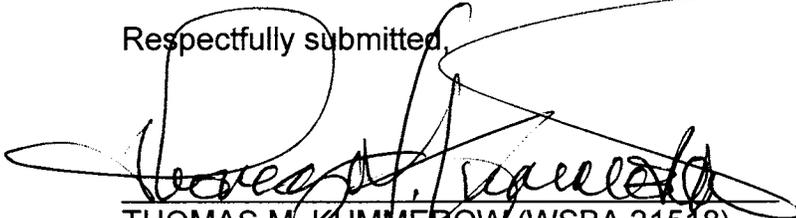
The trial court allowed the State's questioning of Detective Early about Mr. Mohamed's failure to tell the police of Ms. Trulson's drug connection, presumably to impeach Mr. Mohamed's anticipated testimony. The jury's decision turned on its determination of the relative credibility of Mr. Mohamed and Ms. Trulson. Allowing the police to tell the jury Mr. Mohamed failed to disclose facts to them which he subsequently used in his defense rendered Mr. Mohamed not credible and scuttled his defense. Given the fact the entire case turned on the credibility of the two actors, the police imprimatur on Ms. Trulson's version of events tipped the balance impermissibly to her. The error in allowing the comment on Mr. Mohamed's post-arrest silence was not harmless.

F. CONCLUSION

For the reasons stated, Mr. Mohamed submits this Court must reverse his convictions and remand for a new trial.

DATED this 7th day of May 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
Respondent)	NO. 64335-5
v.)	
MOHAMED MOHAMED,)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 7TH DAY OF MAY, 2010, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

Mohamed Mohamed
300315
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

2010 MAY -7 PM 4:08

SIGNED IN SEATTLE, WASHINGTON THIS 7th DAY OF MAY, 2010

x. *Ann Joyce*