W.R., ~~Jr.~~ III?

Pushing *State v. W.R., Jr.* beyond forcible rape?

BY CASSANDRA STAMM

For criminal defense lawyers and their clients, the burden of proof beyond a reasonable doubt is like Linus' blanket. The analogy is not meant to trivialize the concept; note that Linus' blanket was absolutely integral to his persona and character. Ever-present and comforting, Linus' blanket is also versatile — to be used alternatively as a bullfighter's cape, a parachute, a whip (remember the fastest blanket in the west?), or a hammock as the circumstances dictate. Perhaps inevitably though, someone like Lucy constantly tries to get rid of Linus' blanket, even resorting to cutting pieces of it away for her doll bed.

In various circumstances, our legislature and courts have tried to cut away pieces of the state's burden of proof beyond a reasonable doubt in criminal cases by designating certain matters affirmative defenses the defendant must prove by a preponderance of the evidence. Thankfully, a recent decision in this area warrants new and reinvigorated challenges to this practice in a number of areas.

State v. W.R., Jr.[1]

In *State v. W.R., Jr.* the Washington State Supreme Court examined a case of alleged forcible rape, where the state bears the burden of proving forcible compulsion (force overcoming physical resistance or threat of death, physical injury, or kidnapping) beyond a reasonable doubt.[2] Though consent (words or conduct indicating freely given agreement to have sexual intercourse) is a defense to forcible rape, our courts have held that it is an affirmative defense with the burden resting on the defense to prove consent by a preponderance of the evidence.[3] The result was that the fact-finder in *W.R.* was simultaneously obligated to hold the state to its burden of proving forcible compulsion beyond a reasonable doubt while allowing consent as a defense only if the defendant could prove by a preponderance the consent was expressed with specific words or conduct.[4]

After denying the argument twice over the course of some twenty-five years, our supreme court has finally recognized the problem with this scheme, holding that due process forbids burdening the defendant with proving consent in a prosecution for forcible rape.[5] In general, the due process clauses of the Fourteenth Amendment and our state constitution provide that the state may not deprive any person of liberty without due process.[6] These provisions require the state to prove every fact necessary to constitute a charged crime.[7] As a corollary, the state cannot require the defendant to disprove any fact that constitutes the crime charged.[8] When a defense necessarily negates an element of the offense, it is not a true affirmative defense and neither the legislature nor the courts may allocate to the defendant the burden of proving the defense.[9]

The crux of the *W.R., Jr.* court's reasoning was that consent negates forcible compulsion.[10] In other words, there can be no forcible compulsion when the alleged victim consents, because with consent there is no resistance to overcome.[11] There is no circumstance where a defendant could forcibly compel an alleged victim to engage in consensual sexual intercourse.[12] For all of these reasons, the state must bear the burden of proving lack of consent as part of its proof of the element of forcible compulsion consistent with Due Process.[13]

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All of which got me thinking, for what other defenses has the burden of proof been impermissibly been allocated to the defense?

Beyond *W.R., Jr.* — *W.R. III*?

There are a number of statutes purportedly allocating the burden of proving certain defenses to the defendant. Many of them apply to sex

offenses[14] and most of the rest are collected in WPIC Chapter 19.[15] The reasoning of *W.R., Jr.* appears to apply to a number of these defenses. Given the space constraints of this publication, I have not attempted to comprehensively lay out each of these arguments. Rather, what follows below is very much only a partial recitation confined to a few crimes against life and personal security as well as sex crimes meant to spark further inquiry and argument.

Crimes against Life and Personal Security

In some areas, the due process issues seem quite obvious. For example, a person is guilty of kidnapping in the second degree when she or he intentionally abducts another person.[16] *Abduct* is defined in pertinent part as restraining a person by using or threatening to use deadly force.[17] But it is purportedly an affirmative defense which the defendant must establish by a preponderance of the evidence that the defendant was a relative of the person abducted, the defendant's sole intent was to assume custody, and the abduction did not include the use, intent to use, or threat to use deadly force.[18] While it is likely permissible to make the fact that the defendant was a relative and intended to assume custody an affirmative defense, there is a problem with making proof of a lack of deadly force the defendant's burden. It cannot simultaneously be the state's burden to prove restraint through the use or threatened use of deadly force and the defense's burden to show the abduction did not include any element of deadly force. This portion of the defense (lack of force) negates an element of the offense (abduction) so lack of force cannot be an affirmative defense.

In other areas, the due process issues are only apparent after some more careful parsing of the statutes at issue. For example, a person is guilty of felony murder in the first degree when he or she commits or attempts to commit a specified felony — including arson in the first degree or robbery in the first degree — and in the course of, furtherance of, or immediate flight from the felony the defendant or another participant causes the death of another.[19] Where the defendant was not the sole participant, it is an *affirmative defense* that the defendant did not commit the homicidal act him or herself, was not armed, and *had no reasonable grounds to believe any other participant intended to engage in conduct likely to result in death or serious physical injury.*[20]

> Due process would forbid allocating the burden of showing the lack of such grounds to the defense.

But one way of charging arson in the first degree is to allege knowing and malicious causing of a fire or explosion manifestly dangerous to human life.[21] In such a circumstance, it violates due process to put the burden of proving by a preponderance that the defendant had no reason to believe any participant intended to engage in conduct likely to result in death or serious physical injury, because it is the state's burden to prove beyond a reasonable doubt knowing and malicious intent to cause a fire or explosion manifestly dangerous to human life. In a case so charged, there is arguably no circumstance where a defendant could knowingly and maliciously cause a manifestly dangerous fire or explosion yet have no grounds to believe there would be any conduct likely to result in death or serious physical injury. Due process would forbid allocating the burden of showing the lack of such grounds to the defense.

Likewise, one means of committing robbery is when a defendant is armed with a deadly weapon.[22] In a case charged under this prong, the defense allowed by statute cannot depend on the defendant's ability to present proof that the defendant was not armed because it is the state's burden to prove defendant was armed with a deadly weapon. For this reason, only the state could be assigned the burden of proving a deadly weapon in a case so charged (as felony murder based on robbery in the first degree with a deadly weapon).

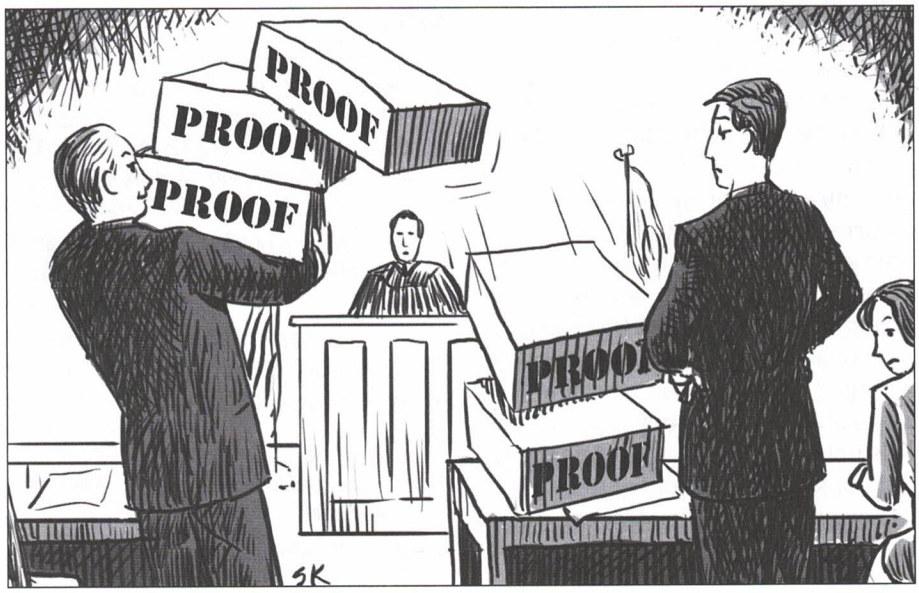
Sex Crimes

Not surprisingly, the legislature and courts have been most active in trying to cut away pieces of the state's burden in the context of sex offenses. For example, a person is guilty of indecent liberties if the person knowingly has sexual contact with another when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.[23] But it is purportedly only an affirmative defense to this charge that the defendant reasonably believed the other person was not physically helpless or mentally incapacitated.[24] Given the requisite mens rea of knowledge, the burden of proving this defense cannot be placed upon the defense consistent with due process. Just as there can be no forcible compulsion when the alleged victim consents, there can be no knowing sexual contact with another who is physically helpless or mentally incapacitated if the defendant believed (reasonably or otherwise) the other person was not thus incapacitated.

Possession of or Dealing in Depic-

tions of a Minor Engaged in Sexually Explicit Conduct. A person commits this crime when he or she knowingly participates in the distribution of a visual or printed depiction of a minor engaged in sexually explicit conduct or possesses the same with intent to participate in the distribution thereof.[25] Though the statute defining this offense proscribes knowing distribution and possession with intent to distribute, the legislature has sought to limit these elements by declaring elsewhere it is not a defense that the defendant did not know the age of the child depicted unless the defendant can prove by a preponderance the defendant was not in possession of any facts on the basis of which he or she should reasonably have known the person depicted was a minor.[26] How could there be a circumstance where the defendant could knowingly participate in the distribution of child pornography and simultaneously not be in possession of facts on the basis of which to conclude a person depicted therein was a minor? Because such a circumstance would negate the elements of the crime, due process forbids placing the burden of disproving such facts on the defendant. Sexual misconduct with a minor and child molestation follow a similar pattern, in part, at least where the alleged means of committing the offenses requires knowledge (as where the defendant allegedly knowingly caused a minor to engage in sexual misconduct or molestation).[27]

Custodial Sexual Misconduct. This presents another interesting case. A person is guilty of custodial sexual misconduct if the person has sexual intercourse or contact with another when the perpetrator is a DOC employee or police officer and the alleged victim is a prisoner or some similarly situated person.[28] Consent is not required and no mens rea is expressly included in the statutory scheme.[29] Nonetheless, the act of sexual intercourse or contact arguably must have been volitional to warrant criminal liability.[30] But the legislature has effectively tried to remove this aspect of the elements of custodial sexual misconduct from the state's burden of proof in some cases, allowing a defense where the act of sexual intercourse or conduct resulted from forcible compulsion by the alleged victim but only if the defense proves the same by a preponderance of the evidence.[31] In such a case, forcible compulsion negates a volitional act of sexual intercourse or contact. Under the reasoning in *W.R., Jr.* the state alone should bear the burden of proving a volitional act of sexual intercourse or contact that was not the product of forcible compulsion by the alleged victim.



There are a surprising number of instances where it appears the burden of proving certain facts has been improperly allocated to the defense.

Commercial Sexual Abuse of a Minor. One means of committing the offense of commercial sexual abuse of a minor is paying or agreeing to pay "a fee to a minor pursuant to an understanding that in return therefore such minor will engage in sexual conduct."[32] At the same time, by statute, it is purportedly not a defense that the defendant did not know the alleged victim's age unless the defendant can prove by a preponderance a bona fide attempt to ascertain the true age of the minor through official identification.[33] But does not lack of knowledge of the alleged victim's age necessarily negate any understanding that the agreement was pursuant to an understanding that in return therefore some minor would engage in sexual conduct? It offends due process to require the defense to prove a bona fide attempt to establish the alleged victim's true age when the

state should solely bear the burden of proving an understanding the payment agreement was understood as an agreement for sex with a minor.

Communication with a Minor for Immoral Purposes. This is similarly situated. A person can only be guilty of communicating with a minor for immoral purposes if that person communicates with a minor or someone believed to be a minor for an immoral purpose of a sexual nature.[34] Since communication of all sorts of sexual natures is allowed between adults, how can the communication at issue be proven to have been for an immoral purpose without proof the defendant believed the other person was a minor? Though the answer might seem obvious, by statute it purportedly is not a defense that the defendant did not know the other person was a minor unless the defendant can prove she or he made a bona fide attempt to ascertain the true age of the minor by requiring production of official identification.[35]

It is a wonderful thing when a new case causes us to rethink old issues with a fresh perspective — like when you figure out your favorite and best blanket is also a pretty handy bullfighter's cape. There are a surprising number of instances where it appears the burden of proving certain facts has been improperly allocated to the defense. Each one of these encroachments on the burden of proof is serious and bears at least a second look based on the recent decision in *W.R., Jr.* By the time of publication, I will have hopefully begun litigating the issue in the context of the commercial sexual abuse of a minor statute. I look forward to seeing this issue pressed in other contexts as well.

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Notes

1. *State v. W.R., Jr.*,___ Wn.2d ___ (No. 88341-6 Oct. 30, 2014); overruling, *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), and *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006).
2. *W.R., Jr.*, slip opinion at p. 8; RCW §§ 9A.44.010(6), .050(1)(a); WPIC 41.01, .02.
3. *Camara*, 113 Wn.2d at 640; *Gregory*, 158 Wn.2d at 803.
4. *W.R., Jr.*, slip opinion at p. 3.
5. Id.
6. U.S. Const. Amend. XIV, § 1; Wash. Const. Art. I, § 3.
7. *W.R., Jr.*, slip opinion p. 4; citing, *In re Winship*, 397 U.S. 358, 364 (1970).
8. Id.
9. Id.; citing, *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010); *Mullaney v. Wilbur*, 421 U.S. 684, 699, 704 (1975).
10. *W.R., Jr.*, slip opinion at p. 5.
11. Id.
12. Id. at p. 11.
13. Id. at p. 5.
14. See, RCW §§ 9A.44.030 (defenses to prosecution under sex offense chapter), 9.68A.110 (certain defenses barred, permitted under sexual exploitation of children chapter).
15. WPIC Ch. 19 (collecting special statutory defenses to felony murder, kidnapping, luring, rape, indecent liberties, rape of a child, sexual misconduct with a minor, child molestation, communication with a minor for immoral purposes, sexual exploitation of a minor, possessing or dealing child pornography, custodial sexual misconduct, reckless burning, criminal trespass, theft, extortion, bigamy, compounding, custodial interference, criminal mistreatment, abandonment, escape, and bail jumping).
16. RCW § 9A.40.030(1); WPIC 39.10, .11.
17. RCW § 9A.40.010(1); WPIC 39.30.
18. RCW § 9A.40.030(2); WPIC 19.02.
19. RCW §§ 9A.32.030(1)(c)(1), (4); WPIC 26.03, .04.
20. RCW §§ 9A.32.030(1)(c)(i-iv); WPIC 19.01.
21. RCW § 9A.48.020(1)(a); WPIC 80.01, .02.
22. RCW § 9A.56.200(1)(a)(i); WPIC 37.01, .02.
23. RCW § 9A.44.100(1)(b); WPIC 49.01.
24. RCW § 9A.44.030(1); WPIC 19.03.
25. RCW §§ 9.68A.050(1)(a)(i-ii), .070.
26. RCW § 9.68A.110(2); WPIC 19.04.04.
27. See, RCW §§ 9A.44.093(1) (providing in part a person is guilty of sexual misconduct with a minor when the person knowingly causes a minor to have sex with another who is 16-18 years old, if the perpetrator abuses a supervisory position within a significant relationship with the victim to cause the sexual intercourse; when the person is a school employee who knowingly causes a minor to have sex with another who is 16-21 years old; or when the person is a foster parent who knowingly causes a minor to have sexual intercourse with another of his/her foster children who is at least 16 years old), .083-.089 (providing in part a person is guilty of child molestation if the person knowingly causes a minor to have sexual contact with a child), .030(2) (it is no defense that the perpetrator did not know the victim's age); WPIC 19.04.01 (it is not a defense that the defendant did not know the age of the alleged victim).
28. RCW §§ 9A.44.160-.170.
29. Id.
30. See, *State v. Deer*, 175 Wn.2d 725, 732, 287 P.3d 539 (2012), cert. denied, 133 S.Ct. 991 (2013) (rape of a child requires proof beyond a reasonable doubt of a voluntary act of sexual intercourse).
31. RCW § 9A.44.180; WPIC 19.04.05.
32. RCW § 9.68A.110(1)(b).
33. RCW § 9.68A.110(3).
34. RCW § 9.68A.090(1); WPIC 47.05, .06.
35. CW § 9.68A.110; WPIC 19.04.03.