Supreme Court No. 92621-2
COA No. 71547-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE ALLEN JACKSON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Shane Allen Jackson requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Jackson, No. 71547-0-I, filed November 16, 2015. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. An essential element of the crime of third degree rape is that the victim did not consent to sexual intercourse and that this lack of consent was clearly expressed by words or conduct. In this case, the alleged victim's words and conduct at various times indicated she was a willing participant in the sexual intercourse and at other times indicated a lack of consent. Generally, it is up to the jury to resolve ambiguities in the evidence. But when an element of the crime requires the State to prove the victim expressed a lack of consent "clearly," any ambiguity in the victim's conduct necessarily means that the State failed to prove the element beyond a reasonable doubt. Here, the Court of Appeals misapplied the sufficiency of the evidence standard by looking only at aspects of the victim's conduct that seemed to express a lack of consent, without taking into account aspects of her conduct that were ambiguous. Should this Court grant review? RAP 13.4(b)(1), (3), (4).

2. In other published cases where the reviewing court held the evidence was sufficient to support a conviction for third degree rape, the victim's words and actions consistently communicated "no." Here, at times the victim's words and conduct communicated "no," and at other times communicated "yes" or "maybe." Does the Court of Appeals' decision to uphold this conviction conflict with those other cases, warranting review? Should this Court grant review to make clear to lower courts that the alleged victim's words and conduct expressing a lack of consent must truly be "clear" and not ambiguous, as required by the statute? RAP 13.4(b)(2), (4).

C. STATEMENT OF THE CASE

One evening, Shelbi Douty and her friend Alyschia McDowell went to Shane Jackson's house in Everett to socialize. RP 101. Ms. Douty had just broken up with her boyfriend and was interested in Mr. Jackson. RP 101. Ms. McDowell agreed to go along. RP 102. She was 20 years old. CP 65-66; RP 88.

Mr. Jackson prepared dinner while the two young women drank mixed drinks. RP 105-06. By the end of the night, they had finished two fifths of hard alcohol. RP 106. Mr. Jackson did not drink as much as the women and did not appear to be drunk that evening. RP 142.

Sometime after dinner, Ms. Douty had drunk so much that she became sick and threw up in the bathroom. RP 110. Ms. McDowell and Mr. Jackson helped her to Mr. Jackson's bedroom, where she lay down on the floor and fell asleep. RP 111-12. Ms. McDowell was also drunk; she was stumbling around and slurring her words. RP 107-08.

At first, Mr. Jackson seemed to be flirting with Ms. Douty, but as the evening progressed, he flirted with Ms. McDowell. RP 108. After Ms. Douty went to sleep, Mr. Jackson approached Ms. McDowell as she was walking through the laundry room. RP 116. He put his arms around her and pulled her close to him. RP 116. She asked what he was doing and put her hand on his chest, trying to push him away. RP 116-17. When he leaned down to kiss her, she was confused and said she thought he liked Ms. Douty. RP 117. He said he liked her—Ms. McDowell—too, and Ms. Douty would not mind. RP 117. Ms. McDowell later said she did not want to kiss Mr. Jackson but at the time, she willingly kissed him back. RP 119, 200.

After the couple kissed for a while, Mr. Jackson pushed Ms. McDowell up against the washer. RP 120. He hooked his fingers over the top of her shorts and tried to pull them down. RP 121. She said "No, don't," pushed his hand away, and pushed against his chest. RP

121. He stumbled backwards. RP 121. She said, "I'm sorry. But, no." RP 121. At that point, soap had spilled onto the top of the washer and onto Ms. McDowell's shorts. RP 121. She apologized again, they both laughed, and they cleaned up the soap with some towels. RP 122.

Mr. Jackson then took hold of Ms. McDowell's hips, propped her up on the washer, and tried to kiss her again. RP 122. He managed to pull off her shorts and underpants, which had elastic waists, then put his hand on her shoulder and told her to lean back. RP 123. He pushed her legs open and put his mouth between her legs. RP 123. She sat up quickly, pressed her legs together, and said "No, stop. Just don't." RP 123. He asked why not and she said "I don't want to." RP 124. He said, "I just want to kiss you down there," and she said "No. Thank you, though. I'm sorry." RP 124. He sighed, said "Okay, just kissing." RP 124. They then kissed some more, with Ms. McDowell participating willingly. RP 124, 200.

Ms. McDowell felt dizzy and said, "I'm really sorry but I just want to go to bed. I'm dizzy." RP 124. Mr. Jackson said, "Okay. Just stay right here. I'll be right back," and he left the room. RP 124. She hopped off of the washer, put her shorts back on, and walked out. RP 125. She saw him again in the hallway and said she needed to check on

Ms. Douty. RP 125. He said he had just checked on her and she was fine. RP 125. Ms. McDowell said she needed to lie down and asked where she was sleeping. RP 125. He took her elbow with one hand, put his other hand on the small of her back, and guided her to his brother's bedroom. RP 125-26. He gave her a blanket and she lay down on the bed. RP 126.

Mr. Jackson took off his shirt and knelt on the bed next to Ms. McDowell. RP 128. She asked what he was doing and he said, "Just kissing you." RP 128. He kissed her on the mouth and she kissed him back. RP 128, 200. He then hooked his fingers over her shorts and took them off. RP 129. She said, "No, don't," and when he asked, "Why not?" she said, "No, please don't." RP 129. Mr. Jackson then took hold of her knees and kissed her between her legs. RP 129. At first, she said, "No. Just stop," but then she said, "No. You're not even doing it right." RP 129-30. He looked at her, laughed, and said, "I love that you're trying to tell me what to do." RP 131. Ms. McDowell said, "you just suck at this, and I don't want you to." RP 131. She crossed her legs and turned to her side. RP 131. In response, Mr. Jackson stopped trying to give her oral sex. RP 131.

Mr. Jackson then put Ms. McDowell's legs around his waist, bumped his hips against her pelvis and said, "I just want you so bad." RP 131. She said, "I'm sorry but no," "I'm not even on birth control." RP 131-32. He sighed, said, "Okay," and left the room. RP 131-33. She did not put her pants back on because she was too tired. RP 133. She was beginning to fall asleep when Mr. Jackson returned to the room. RP 134. He lay down on the bed and she could see that he had a condom on his penis. RP 134-35. She said, "Oh," and looked at him. RP 135. He then took her knee, leaned forward, and the two engaged in vaginal intercourse. RP 135-36.

Ms. McDowell had never had sexual intercourse before. RP 93. She felt a great deal of pain. RP 136-37. She said "it hurt" and "[s]top." RP 137. Mr. Jackson asked why it hurt and she said, "Because this is like sandpaper. It's just dry." RP 138. He reached over and grabbed some "lube" from the windowsill by the bed and said, "I have lube." RP 138. Ms. McDowell said, "This hurts and I think I'm going to throw up." RP 138. She rolled onto her stomach, trying to get up because she felt sick but Mr. Jackson continued having intercourse with her. RP 140. She did not try to stop him or say anything because she was "very drunk" and had been told that if

something like this happened, she should not try to resist. RP 140. Ms. McDowell then asked Mr. Jackson if he had "whiskey dick or something." RP 142. She understood "whiskey dick" to mean "that sometimes guys have too much alcohol and can't finish." RP 142. Mr. Jackson stopped, looked at her, and said, "Oh, I wasn't going to finish." RP 142. He asked if she wanted him to stop, and when she said yes, he stopped and got off of her. RP 142, 203.

Ms. McDowell called Ms. Douty the next day and told her that she had had sex with Mr. Jackson. RP 320. Ms. Douty became angry and hung up the phone because she was interested in Mr. Jackson and felt betrayed. RP 320-21. Ms. Douty and Mr. Jackson had a romantic relationship for several months following the incident. RP 324-26. More than a year later, Ms. Douty continued to feel betrayed by her friend. RP 327.

About four days later, Ms. McDowell told her mother what had happened. RP 159. Her mother called 911 and took her to the hospital, where she was examined by a SANE nurse. RP 161, 252. The nurse noted Ms. McDowell had some redness and swelling to her private parts, including a tear and some bleeding in her hymen. RP 261-62.

The nurse testified the injuries were consistent with first-time sexual intercourse. RP 272.

Ms. McDowell did not make a report to police until two weeks after the incident. RP 224-25.

Mr. Jackson was charged with one count of third degree rape. CP 65-66. Following a jury trial, he was convicted as charged. CP 6-22. On appeal, the Court of Appeals affirmed the conviction.[1]

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the Court of Appeals misapplied the sufficiency of the evidence standard by considering only aspects of the alleged victim's words and conduct that expressed a lack of consent to sexual intercourse and not those aspects of her words and conduct that were ambiguous. RAP 13.4(b)(2), (3), (4).

1. The statute requires the State to prove beyond a reasonable doubt that the alleged victim expressed a lack of consent clearly and unambiguously.

To prove third degree rape, the State was required to prove that (1) Mr. Jackson engaged in sexual intercourse[2] with Ms. McDowell; (2)

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[1] Mr. Jackson also challenged two conditions of community custody on appeal, which are not at issue in this petition.

[2] "Sexual intercourse" means
that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight; or any penetration of the

Ms. McDowell did not "consent"[3] to the sexual intercourse; and (3) her lack of consent "was clearly expressed by words or conduct." RCW 9A.44.060(1)(a); CP 37, 65-66.

The term "clearly expressed" is not defined by statute. The Court applies the ordinary meaning of the term. State v. Higgins, 168 Wn. App. 845, 854, 278 P.3d 693 (2012), review denied, 176 Wn.2d 1012, 297 P.3d 708 (2013). "Clearly" means "something asserted or observed leaving no doubt," and "expressed" means "to make known an emotion or feeling." Id. (quoting Webster's Third New International Dictionary 420, 803 (1993). Thus, the statute requires the State to prove the alleged victim "did not freely agree to sexual intercourse," and "the lack of consent was made known to [the defendant] by words or conduct *without doubt or question*." Higgins, 168 Wn. App. at 854 (emphasis added). The focus is on the alleged victim's words and

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> vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex; or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 34; see RCW 9A.44.010(a).

[3] "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." CP 35; see RCW 9A.44.010(7).

actions rather than the defendant's subjective assessment of what is being communicated. Id.

Because the statute requires proof that the alleged victim communicated a lack of consent "without doubt or question," the State must prove the alleged victim's words or actions were "unambiguous." "Ambiguity" means "the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time." Webster's Third New International Dictionary 66 (1993). Thus, a communication that is "ambiguous," *i.e.*, that can be understood in more than one way, is not "without doubt or question." Accordingly, if the alleged victim's words or actions communicated both consent *and* non-consent—both "yes" *and* "no"—the State cannot prove the lack of consent was "clearly expressed." If the victim's words or actions communicated both "yes" and "no," therefore, the evidence is insufficient to prove an essential element of the crime.

The State bore the burden to prove beyond a reasonable doubt the essential element that the lack of consent was "clearly expressed." Apprendi v. New Jersey, 530 U.S. 466, 477, 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); U.S. Const. amend. XIV; Const. art. I, § 3.

The standard of review of a sufficiency of the evidence challenge is whether the Court can conclude, after viewing the evidence in the light most favorable to the State, that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In State v. Vasquez, 178 Wn.2d 1, 14, 309 P.3d 318 (2013), this Court recently held that the State did not prove the element of "intent" beyond a reasonable doubt in a prosecution for forgery because the evidence was "patently equivocal." The defendant's words and conduct "demonstrate[d] ambiguity" as to whether he intended to defraud the victim. Id. In other words, on review, the court may not look only at evidence offered in support of the element. The court must view the evidence as a whole to determine whether it is equivocal.

As with the element of intent in a prosecution for forgery, the evidence required to prove the element of the victim's expression of lack of consent in a prosecution for third degree rape must be "clear"

and not equivocal. See RCW 9A.44.060(1)(a). If the victim's words and conduct are equivocal or ambiguous, the evidence is insufficient to prove that essential element of the crime. Vasquez, 178 Wn.2d at 14; Higgins, 168 Wn. App. at 854.

2. *The Court of Appeals misapplied the sufficiency of the evidence standard because it looked only at aspects of the victim's words and conduct that expressed a lack of consent and did not take account of aspects of her words and conduct that were ambiguous.*

Ms. McDowell did not clearly express a lack of consent because her words and actions were capable of being understood in more than one way. First, when Mr. Jackson approached her and put his arms around her in the laundry room, she simply pushed him away, asked what he was doing, and said she thought he liked her friend, Ms. Douty. RP 116-17. By doing so, she communicated confusion rather than lack of consent. To reinforce the impression that she did not object to his overtures, when he proceeded to kiss her, she kissed him back. RP 119, 200.

Although at times Ms. McDowell said "no," or told Mr. Jackson to "stop," when she did so, he stopped and then continued only when her words or actions suggested "yes" or "maybe." For instance, when he propped her up onto the washing machine, opened her legs and put

his mouth between her legs, she said "no, stop" and pushed him away. RP 123-24. But then she willingly reciprocated when he began kissing her again. RP 124, 200.

Later, when they were in bed, and he had his mouth between her legs, she said "No. Just stop," but then said, "You're not even doing it right," and "you just suck at this." RP 129-30. This was not a clear communication of a lack of consent, but rather a critique of Mr. Jackson's method. In response, Mr. Jackson stopped trying to give her oral sex. RP 131.

Similarly, when Mr. Jackson began to try to have vaginal intercourse with Ms. McDowell, she said "I'm sorry but no," but then said, "I'm not even on birth control." RP 131-32. Again, this was not a clear communication of a lack of consent. A reasonable interpretation of her words was that she did not want to have intercourse because she was afraid of getting pregnant. In response, Mr. Jackson left the room and came back with a condom. RP 134-35. The two then engaged in sexual intercourse. RP 135-36.

Likewise, when Ms. McDowell experienced pain during the intercourse and said "it hurt," and "[s]top," Mr. Jackson asked why. RP 137-38. She replied, "Because it's like sandpaper. It's just dry."

RP 138. Again, her response was not a clear expression of non-consent. One meaning to draw from her words was that she was interested in continuing if not for the discomfort. In response, Mr. Jackson offered her some "lube" from the windowsill. RP 138.

Finally, when Mr. Jackson continued to have intercourse with Ms. McDowell, she did not try to stop him or say anything further because she was "very drunk" and believed it was not wise to say anything. RP 140. At the end, when he asked if she wanted him to stop and she said yes, he stopped. RP 142, 203.

In deciding that the evidence was sufficient to prove beyond a reasonable doubt that Ms. McDowell expressed a lack of consent clearly, the Court of Appeals focused on those aspects of her words and conduct expressing "no." The Court of Appeals said "A.M. told Jackson at least 15 times that she did not want to engage in sexual intercourse with him." Slip Op. at 8.

The Court of Appeals misapplied the sufficiency of the evidence standard because it disregarded those aspects of Ms. McDowell's conduct that indicated "yes" or "maybe." The court illogically reasoned that those aspects of her conduct that were ambiguous actually supported the State's position because they indicated her dissatisfaction with what Mr. Jackson was doing. Slip Op. at 9-10.

The Court of Appeals erred because those aspects of Ms. McDowell's words and conduct did not clearly express a lack of consent. By commenting on how the intercourse was proceeding, and her dissatisfaction with it, Ms. McDowell implied she was an active participant. An expression of dissatisfaction with sexual intercourse cannot equate to a clear expression of a lack of agreement to engage in it. The Legislature cannot have intended to criminalize a person's conduct simply because he engaged in sexual intercourse with another person which was unsatisfying to that person. Such an interpretation conflicts with the statute's requirement that the State prove the victim "clearly expressed" a lack of consent. RCW 9A.44.060(1)(a).

3. The Court of Appeals' opinion sharply differs from other decisions upholding the sufficiency of the evidence in third degree rape cases because in those cases the alleged victims' words and actions consistently communicated "no."

Ms. McDowell's communications were ambiguous because she expressed both "yes" and "no." In contrast, in cases where the courts held the evidence was sufficient to prove the alleged victims "clearly expressed" a lack of consent, their words and actions consistently communicated "no." In Higgins, for example, one night Higgins went camping with his girlfriend N.N. Higgins, 168 Wn. App. at 848. N.N.

fell asleep in the tent and awoke to find Higgins rubbing her chest and back. Id. She asked him to move over, moved herself closer to the tent door, and went back to sleep. Id. He again tried to wake her, began tugging on her shorts, and asked, "Do you want to?" Id. She replied "no" and went back to sleep. Id. He then moved on top of her and pulled down her shorts and underwear. Id. She said, "Stop. You're drunk," and he responded "you're drunk too." Id. She repeated "stop" five or six times and started crying. Id. While she struggled to get out from under his body weight, he pulled his pants down, pinned her arms, and had sexual intercourse with her. Id. Afterward, she grabbed her clothing and ran out to her car where she stayed for a few hours. Id.

Similarly, in State v. Corey, 181 Wn. App. 272, 274-75, 325 P.3d 250, review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014), Corey entered a hot tub with A.B. and A.R.B. A.B. told him she was 16 years old, was not interested in men, and was dating A.R.B. Id. Corey asked A.B. if she wanted to go to a nearby sex store with him and she said "no." Id. While in the hot tub he began rubbing her leg and she pushed his hand away and moved to the other side of the hot tub. Id. Corey moved next to her, put his hand up her shorts, and tried to touch her private areas. Id. She told him to stop and said she did not like to be

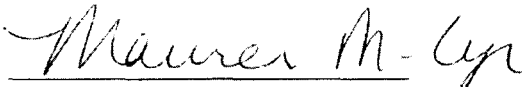
touched. Id. He laughed, told her he was not going to hurt her, then forcibly tried to put his fingers inside her. Id. She left the hot tub and sat on the side of the pool. Id. He entered the pool and tried to pull her in with him. Id. She told him to stop touching her, left the pool, and got back into the hot tub. Id. He followed her into the hot tub, took off his shorts, and touched her on her back with his penis. Id. He also touched her on the inside of her thighs and when she pushed his hand away, he pushed his hand up further and digitally penetrated her vagina. Id. She finally pushed him away and left the pool area. Id.

In contrast to those cases, in this case, Ms. McDowell did not consistently express a lack of consent. Her words and actions did not consistently communicate "no," but sometimes communicated "yes" or "maybe." Thus, she did not make her lack of consent known to Mr. Jackson "without doubt or question." Higgins, 168 Wn. App. at 854. Because her communications were susceptible to more than one interpretation, they were ambiguous. Thus, the State did not prove an essential element of the crime beyond a reasonable doubt.

E. CONCLUSION

For the reasons given, this Court should grant review.

Respectfully submitted this 15th day of December, 2015.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHANE ALLEN JACKSON, Appellant.	DIVISION ONE No. 71547-0-I UNPUBLISHED OPINION FILED: November 16, 2015

DWYER, J. — Following a jury trial, Shane Jackson was convicted of rape in the third degree. On appeal, Jackson contends (1) that insufficient evidence supports his conviction, (2) that the community custody condition requiring him to participate in substance abuse treatment as directed by the Department of Corrections (DOC) is invalid, and (3) that the community custody condition requiring him to "consent" to searches of his home by the DOC is facially unconstitutional. We affirm Jackson's conviction but remand for the judgment and sentence to be amended consistent with this opinion.

I

On August 24, 2012, Jackson asked S.D. to dinner at his house. S.D. asked her friend, A.M., to accompany her. Prior to this, A.M. had only met Jackson once. The plan was for A.M. and S.D. to play video games while Jackson made dinner. Since they would be drinking alcohol, S.D. and A.M. planned to sleep on the couch. A.M. was 20 years old at the time.

S.D. drove A.M. to Jackson's house. While Jackson prepared dinner, S.D. and A.M. drank mixed drinks. By the end of the night, the three of them had consumed two fifths of hard liquor. Jackson did not drink as much as S.D. and A.M.

After dinner, A.M. and S.D. were drunk. S.D. got sick and vomited in the bathroom. While A.M. was comforting S.D., Jackson came in and started rubbing A.M.'s back. A.M. "shoved" his hand off of her. When S.D. was done "being sick," A.M. and Jackson helped her to Jackson's bedroom, where she passed out on the floor. After situating S.D. in the bedroom, A.M. went to clean the dishes.

Later, while A.M. was checking the house to make sure things were in proper order,[1] Jackson approached her in the laundry room. Jackson put his arm around A.M.'s waist, pulled her in toward him, and tried to kiss her. She pushed him away and said, "No. What are you doing?" Jackson persisted, and A.M. decided to allow him to kiss her. She later explained her decision thusly: "It's very weird to be in a position where someone much larger than you is trying to hold you and is trying to force you into kissing them. And I tried to be okay with the idea. . . . I was hoping he was just doing a drunken thing and was going to give up on the whole kissing thing." Jackson then lifted A.M. up onto the washing machine and tried to remove her shorts. A.M. pushed his hand away, said, "No, don't." She jumped off the washing machine and pushed Jackson away. He stumbled back, and she said, "I'm sorry. But, no."

[1] Jackson, S.D., and A.M. had made a bonfire earlier, and A.M. was particularly concerned with making sure that it had been properly extinguished.

Despite A.M. telling him "no," Jackson again lifted her up onto the washing machine. This time, he removed her shorts and underwear in "one fell swoop." He pushed her back, spread her legs and "fitted his hips" between her legs. As Jackson leaned down to attempt oral sex on her, A.M. crunched up, clamped her legs together, and said, "No, stop. Just don't." Jackson asked why. She replied, "I don't want to." He then asked, "Why not?" This time A.M. said, "No. Thank you, though. I'm sorry." Jackson said, "Okay, just kissing." He tried to kiss her again. A.M. felt uncomfortable so, after several seconds, she stopped him, saying, "I'm really sorry but I just want to go to bed. I'm dizzy."

Jackson told A.M. to stay there and he would be right back. He then left the laundry room. A.M. did not wait but, instead, put her underwear and shorts back on and left the laundry room. She saw Jackson in the hallway, told him that she needed to lay down, and asked him where she was sleeping. Jackson grabbed A.M.'s elbow, placed his hand on her back, and took her to his brother's bedroom. A.M. thought she was going to be able to lie down and go to sleep. A.M. lay down on the bed. Jackson took off his shirt and knelt down on the bed next to her. A.M. asked Jackson what he was doing. He replied, "Just kissing you."

Jackson removed A.M.'s shorts. A.M. said, "No, don't." Jackson asked "Why not?" A.M. did not think that she had to give him an answer, but she replied, "No, please don't." Jackson grabbed her knees, put his mouth on her vulva, and attempted to perform cunnilingus. A.M. said, "No. Just stop." Jackson persisted. A.M. then pushed his head and said, "No. You're not even

doing it right." A.M. later explained that "[she] was so dizzy at that point, [she] just wanted him to stop. . . . [She] was angry and [she] figured that maybe if [she] tried to hurt his male ego, he would just give up." Jackson replied, "I love that you're trying to tell me what to do." A.M. said, "No, you just suck at this, and I don't want you to." She crossed her legs and turned to the side.

Jackson sat up, pulled A.M.'s legs around his waist, bumped his hips against her pelvis and said, "I just want you so bad." A.M. replied, "I'm sorry but no." Jackson asked, "Why not?" She replied, "I don't want you to." Jackson again asked, "Why not?" A.M. then replied, "I'm not even on birth control. I'm not going to get pregnant. No." Jackson told her that she could not get pregnant from the first time. A.M. said, "That's just stupid." Jackson said, "Okay, fine," patted her on the leg, and left the bedroom. A.M. thought she would finally be able to go to sleep.

Jackson came back into the bedroom and got on the bed. A.M. asked him what he was doing. Jackson showed her that he had placed a condom on his penis. Jackson then pushed the blanket away, grabbed A.M. by her knees, and forced his penis into her vagina. A.M. instantly felt excruciating pain, like she was being torn apart.[2] She pushed herself up on her elbows, scooted back on the bed and said, "Ow, ow, ow. Stop." Jackson's response to A.M.'s exclamation of pain was, "God, you're so fucking tight." He placed her legs over his shoulders and continued thrusting. When asked how she felt in that moment, A.M. explained, "It was really overwhelming. . . . I just felt completely defeated

[2] A.M. was examined by Sealja Puvogel, a Sexual Assault Forensic Nurse Examiner, on August 30, 2012. Puvogel observed a tear in A.M.'s fossa navicularis. According to Puvogel, "[A] tear to the fossa navicularis would be very uncomfortable."

because everything that I had done up to that point to kind of placate him without angering him and just trying not to let it happen was just over."

Jackson moved A.M.'s legs back around his waist and she again told him that his forcible penetrations were hurting her. He asked why. She said, "[b]ecause this is like sandpaper. It's just dry." Jackson then reached over, grabbed something from the window sill, and said, "I have lube." A.M. told Jackson that she did not feel well. He asked her what was wrong and she said, "This hurts and I think I'm going to throw up." A.M. removed her legs from Jackson's shoulder, tossed them to her left, and laid on her side. Jackson continued thrusting. A.M. attempted to get up by straightening her legs, rolling onto her front side, and pushing herself up onto her hands and knees. At that point, she got dizzy and her vision went black. As a result, she "slumped" back on her knees and her head "collapsed" in her hands. Jackson grabbed her waist and pulled her up saying, "Hey, hey, hey. Stay awake. Stay up here." A.M. collapsed on the bed. (At trial, A.M. was asked whether, at that moment, she had considered physically fighting Jackson in order to get away from him.[3] A.M. replied, "I did but I was very drunk. There was not a lot of strength going on. And a long time ago I remember being told that if something bad like that was going to happen to me that if I felt like they could overpower me that I shouldn't anger them or hit them because they might hit back.")

Jackson then flipped A.M. onto her back and raised one of her legs in the air. A.M. later remembered thinking in that moment, "I [can]'t do this anymore."

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[3] "Did you think about physically fighting [Jackson], just giving it everything you had physically to get out of that room?"

She became angry and asked Jackson, "Do you have a whiskey dick or something?" Jackson replied, "Oh, I wasn't going to finish." A.M. then said, "Get off of me," and Jackson moved away from her on the bed.

A.M. went to get S.D. so that they could leave, but she could not awaken her. Jackson pulled A.M. onto the bed with him and told her to just go to sleep. A.M. could not sleep and went to the bathroom. When she tried to use the toilet, she felt "a gush of blood." The sight of "all the blood" made A.M., who already felt sick, vomit. When she was done, A.M. went back to again try to awaken S.D. S.D. would not wake up, so A.M. ended up lying on the floor next to her.

As a result of these events, Jackson was charged with rape in the third degree. The jury found him guilty as charged. Jackson was sentenced to 20 months of confinement, followed by 36 months of community custody. The court imposed 25 conditions of community custody.

II

Jackson first contends that insufficient evidence supports the jury's verdict of guilt. This is so, he asserts, because the State did not establish that A.M. "clearly expressed," by her words or conduct, her lack of consent to sexual intercourse with Jackson, as required to sustain a conviction. His contention is unavailing.

The due process clauses of the federal and state constitutions require that the government prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3. "[T]he critical

inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

"The purpose of this standard of review is to ensure that the trial court fact finder 'rationally appl[ied]' the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt." State v. Rattana Keo Phuong, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (alteration in original) (quoting Jackson, 443 U.S. at 317-18), review denied, 182 Wn.2d 1022 (2015). This standard of review is also designed to ensure that the fact finder at trial reached the "subjective state of near certitude of the guilt of the accused," as required by the Fourteenth Amendment's proof beyond a reasonable doubt standard. Jackson, 443 U.S. at 315.

A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Circumstantial evidence and direct evidence can be equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the jury on questions of conflicting testimony, credibility of witnesses,

and the persuasiveness of the evidence. State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

In order to convict Jackson of rape in the third degree, the jury was required to find that "[A.M.] did not consent . . . to sexual intercourse with [Jackson] and such lack of consent was clearly expressed by [A.M.'s] words or conduct." RCW 9A.44.060. "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7). "'Clearly expressed' is not defined by the statute, but 'clearly' ordinarily means something asserted or observed leaving no doubt or question and 'expressed' ordinarily means to make known an emotion or feeling." State v. Higgins, 168 Wn. App. 845, 854, 278 P.3d 693 (2012) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 420, 803 (1993)). In determining whether a lack of consent was "clearly expressed," the focus is properly on the victim's words and actions rather than a defendant's subjective assessment of what is being communicated. Higgins, 168 Wn. App. at 854.

Herein, A.M. told Jackson at least 15 times that she did not want to engage in sexual intercourse with him: (1) When he tried to remove her shorts, she pushed his hand away and said, "No, don't." (2) After she pushed him away from her, she said, "I'm sorry. But no." (3) When he first forcibly put his mouth on her vulva, she clamped her legs together and said, "No, stop. Just don't." (4) When he asked her why, she said, "I don't want to." (5) When he again asked why not, she said "No. Thank you, though." (6) When he tried to kiss her again,

she said, "I'm really sorry but I *just* want to go to bed." (Emphasis added.) (7) When he started removing her underpants, she said, "No, don't." (8) When he again asked why not, she said "No, please don't." (9) When he again tried to put his mouth on her vulva, she said, "No. Just stop." (10) When he nonetheless continued, she pushed his head and said, "No. You're not even doing it right." (11) When he said that he loved her telling him what to do, she crossed her legs and said, "No, . . . I don't want you to." (12) When he bumped his hips against her pelvis, she said, "I'm sorry but no." (13) When he asked why not, she said, 'I don't want you to." (14) When he again asked why not, she said, "I'm not going to get pregnant. No." (15) When he forced his penis into her vagina, she said, "Ow, ow, ow. Stop," and pushed herself away from him. It is clear from this evidentiary recitation that the State presented not just sufficient—but overwhelming—evidence that A.M. clearly expressed her lack of consent to engage in sexual intercourse with Jackson.

Jackson nevertheless contends to the contrary, asserting that A.M.'s words and conduct were ambiguous with regard to whether she was consenting to sexual intercourse. However, when viewed in the light most favorable to the State—as the federal and state constitutions require—the specific statements to which Jackson points, in claiming ambiguity, actually support the State's position. A.M.'s statements to Jackson that he was not "doing it right" and that he "just suck[s] at this" when he forced oral sex on her, her statement that it was "like sandpaper" when Jackson forced his penis into her vagina, and her repeated statements that Jackson's actions were hurting her, particularly when combined

with A.M.'s many statements that she did not want to have sexual contact with Jackson, support the jury's finding that A.M. expressed her lack of consent with clarity.

III

Jackson next contends that a community custody condition requiring him to participate in DOC-directed substance abuse treatment is invalid. This is so, he asserts, because the condition is not related to the crime of which he was convicted. We disagree but remand for clarification that the condition applies to treatment for alcohol only.

A trial court's authority to impose sentencing conditions is derived wholly from statute. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). A condition of community custody requiring the offender to participate in alcohol or drug treatment must be "crime-related." RCW 9.94A.703(3)(c); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003); State v. Parramore, 53 Wn. App. 527, 529, 768 P.2d 530 (1989). A "crime-related prohibition" is one that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). To justify such a condition, the evidence must show and the court must find that alcohol or drugs contributed to the crime. Jones, 118 Wn. App. at 203, 208.

Sentencing conditions are reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion in imposing a condition if it applies the wrong legal standard. Rainey, 168 Wn.2d at 375.

The trial court herein ordered that Jackson "[p]articipate in substance abuse treatment as directed by the [DOC]," as a condition of community custody.

The evidence adduced at trial showed that, on the night that he raped A.M., Jackson supplied alcohol to A.M., notwithstanding that she was under the legal drinking age, and himself consumed alcohol. At sentencing, in explaining its decision, the trial court repeatedly referenced the involvement of alcohol in Jackson's commission of the crime. Thus, Jackson's contention that there was no evidence showing that alcohol contributed to his offense is without merit.

However, as the State concedes, Jackson's parallel contention that there was no evidence showing that drugs were involved in the crime is correct. Because, unlike several other conditions considered by the trial court, the challenged condition is not explicitly limited to alcohol but refers, generally, to "substance[s]," there is ambiguity regarding its application. Therefore, we remand the cause to the trial court to amend the judgment and sentence to indicate that the challenged condition applies only to alcohol abuse treatment.[4]

IV

Jackson's final contention is that the community custody condition requiring him to "consent" to certain searches of his residence by DOC is facially unconstitutional.[5]

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[4] The State contends that this is the warranted remedy. We agree.

[5] The condition at issue herein provided:
You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access.

Our Supreme Court recently addressed a facial constitutional challenge to a substantially similar community custody condition. See State v. Cates, 183 Wn.2d 531, 354 P.3d 832 (2015).[6] Therein, the court held that "[f]urther factual development [was] needed" before the challenge was ripe for review, and "[the defendant] [did] not face a significant risk of hardship by [the court] declining to review the merits in the absence of developed facts." Cates, 183 Wn.2d at 536.

The Cates decision controls our analysis. Therefore, we hold that the challenge presented is not ripe for review.

Affirmed, in part. Remanded for the judgment and sentence to be amended consistent with this opinion.

We concur:

[6] The condition at issue in Cates added, "to also include computers which you have access to" at the end. 183 Wn.2d at 533. This difference is of no moment to our analysis.

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