

COA NO. 41749-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY LYNCH,

Appellant.

11 AUG - 1 AM 10:00
STATE OF WASHINGTON
BY [Signature]
COURT OF APPEALS
DIVISION II

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

The Honorable George L. Wood, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	4
1. Procedural Facts.....	4
2. Trial.....	4
a. <u>Stone's Version of Events</u>	5
b. <u>Lynch's Version of Events</u>	7
c. <u>Aftermath</u>	8
C. <u>ARGUMENT</u>	10
1. THE COURT VIOLATED LYNCH'S CONSTITUTIONAL RIGHT TO CONTROL HIS OWN DEFENSE BY INSTRUCTING THE JURY ON AN AFFIRMATIVE DEFENSE OVER HIS OBJECTION.....	10
a. <u>After The Court Gave An Affirmative Defense Instruction For Both Counts Over Lynch's Objection, The Jury Expressed Confusion With The Instructions</u>	10
b. <u>A Trial Court Cannot Given An Affirmative Defense Instruction Over A Defendant's Objection Without Violating The Defendant's Constitutional Right To Control His Defense</u>	16
c. <u>The State Cannot Bear Its Burden Of Proving This Constitutional Error Was Harmless Beyond A Reasonable Doubt</u>	24

d.	<u>State v. Coristine: Analytically Flawed And Otherwise Distinguishable</u>	26
2.	THE AFFIRMATIVE DEFENSE INSTRUCTION ON CONSENT VIOLATED DUE PROCESS BY UNCONSTITUTIONALLY SHIFTING THE BURDEN OF PROOF ONTO LYNCH AND BY FAILING TO MAKE THE APPLICABLE LAW CLEAR TO JURORS.....	33
3.	THE SENTENCE FOR THE INDECENT LIBERTIES CONVICTION UNLAWFULLY EXCEEDS THE STANDARD RANGE.....	38
4.	THE COURT IMPOSED A NUMBER OF COMMUNITY CUSTODY CONDITIONS WITHOUT STATUTORY AUTHORITY.....	40
a.	<u>The Prohibition On Non-Prescribed Drugs And Drug Paraphernalia Must Be Stricken</u>	40
b.	<u>The Prohibition On Alcohol Possession And Entering Places Where Alcohol Is The Chief Item For Sale Must Be Stricken</u>	44
c.	<u>The Condition Requiring Lynch To Provide Copies Of All Prescriptions To The Community Corrections Officer Must Be Stricken</u>	45
d.	<u>The Condition Requiring Lynch To Pay Counseling Costs Must Be Stricken</u>	48
D.	<u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>1000 Virginia P'ship v. Vertecs,</u> 158 Wn.2d 566, 146 P.3d 423 (2006).....	33
<u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1,</u> 124 Wn.2d 816, 881 P.2d 986 (1994).....	24
<u>City of Bremerton v. Widell,</u> 146 Wn.2d 561, 51 P.3d 733 (2002).....	34
<u>In re Electric Lightwave, Inc.,</u> 123 Wn.2d 530, 869 P.2d 1045 (1994).....	24
<u>In re Pers. Restraint of Carle,</u> 93 Wn.2d 31, 604 P.2d 1293 (1980).....	43
<u>In re Pers. Restraint of Hubert,</u> 138 Wn. App. 924, 158 P.3d 1282 (2007).....	28-30
<u>In re Pers. Restraint of Rainey,</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	40
<u>In re Pers. Restraint of Sappenfield,</u> 92 Wn. App. 729, 964 P.2d 1204 (1998).....	49
<u>Kucera v. State,</u> 140 Wn.2d 200, 995 P.2d 63 (2000).....	24
<u>State v. Ager,</u> 128 Wn.2d 85, 904 P.2d 715 (1995).....	20
<u>State v. Ashcraft,</u> 71 Wn. App. 444, 859 P.2d 60 (1993).....	25
<u>State v. Bahl,</u> 164 Wn.2d 739, 193 P.3d 678 (2008)	43

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Barnett</u> , 139 Wn.2d 462, 987 P.2d 626 (1999).....	38, 41
<u>State v. Box</u> , 109 Wn.2d 320, 745 P.2d 23 (1987).....	34
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	30
<u>State v. Bryant</u> , 78 Wn. App. 805, 901 P.2d 1046 (1995).....	16
<u>State v. Camara</u> , 113 Wn.2d 631, 781 P.2d 483 (1989).....	22, 23, 31, 33-35, 37
<u>State v. Carter</u> , 154 Wn.2d 71, 109 P.3d 823 (2005).....	32
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	28
<u>State v. Coristine</u> , __ Wn. App. __, 252 P.3d 403 (2011).....	16, 26-29, 31, 32
<u>State v. Gobin</u> , 73 Wn.2d 206, 437 P.2d 389 (1968).....	16
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	11, 22, 23, 33, 35
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	25
<u>State v. Hicks</u> , 102 Wn.2d 182, 683 P.2d 186 (1984).....	34

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Iniguez,</u> 167 Wn.2d 273, 217 P.3d 768 (2009).....	16
<u>State v. Irons,</u> 101 Wn. App. 544, 4 P.3d 174 (2000).....	38
<u>State v. Jones,</u> 99 Wn.2d 735, 664 P.2d 1216 (1983).....	16-20, 24, 27
<u>State v. Jones,</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	44
<u>State v. Kester,</u> 38 Wn. App. 590, 686 P.2d 1081 (1984).....	31
<u>State v. Kinneman,</u> 122 Wn. App. 850, 95 P.3d 1277 (2004), <u>aff'd</u> , 155 Wn.2d 272, 119 P.3d 350 (2005).....	49
<u>State v. Kisor,</u> 68 Wn. App. 610, 844 P.2d 1038 (1993).....	49
<u>State v. Kolesnik,</u> 146 Wn. App. 790, 192 P.3d 937 (2008).....	46
<u>State v. LeFaber,</u> 128 Wn.2d 896, 913 P.2d 369 (1996), <u>abrogated on other grounds,</u> <u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	37
<u>State v. Lively,</u> 130 Wn.2d 1, 921 P.2d 1035 (1996).....	35
<u>State v. McCullum,</u> 98 Wn.2d 484, 656 P.2d 1064 (1983).....	34

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. McSorley,</u> 128 Wn. App. 598, 116 P.3d 431 (2005).....	11, 16, 18-20
<u>State v. Miller,</u> 131 Wn.2d 78, 929 P.2d 372 (1997).....	38
<u>State v. Motter,</u> 139 Wn. App. 797, 162 P.3d 1190 (2007), <u>overruled on other grounds,</u> <u>State v. Valencia,</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	41, 42, 46
<u>State v. Murray,</u> 118 Wn. App. 518, 77 P.3d 1188 (2003).....	41
<u>State v. O'Cain,</u> 144 Wn. App. 772, 184 P.3d 1262 (2008).....	42, 43
<u>State v. O'Hara,</u> 167 Wn.2d 91, 217 P.3d 756 (2009)	37
<u>State v. Parramore,</u> 53 Wn. App. 527, 768 P.2d 530 (1989).....	45
<u>State v. Paulson,</u> 131 Wn. App. 579, 128 P.3d 133 (2006).....	41
<u>State v. Perez,</u> 137 Wn. App. 97, 151 P.3d 249 (2007).....	16
<u>State v. Powell,</u> 150 Wn. App. 139, 206 P.3d 703 (2009).....	28-30
<u>State v. Rice,</u> 102 Wn.2d 120, 683 P.2d 199 (1984)	25

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Riker,
123 Wn.2d 351, 869 P.2d 43 (1994)..... 35

State v. Ross,
129 Wn.2d 279, 916 P.2d 405 (1996)..... 47

State v. Tang,
75 Wn. App. 473, 878 P.2d 487 (1994)..... 21

Whatcom County v. City of Bellingham,
128 Wn.2d 537, 909 P.2d 1303 (1996)..... 49

FEDERAL CASES

Chapman v. California,
386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 25

Cupp v. Naughten,
414 U.S. 141, 94 S. Ct. 396, 38 L.Ed.2d 368 (1973)..... 37

Dixon v. United States,
548 U.S. 1, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006)..... 36

Faretta v. California,
422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 17, 19, 24

In re Winship,
397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 33

Martin v. Ohio,
480 U.S. 228, 107 S. Ct. 1098, 94 L.Ed.2d 267 (1987)..... 35, 36

Neder v. United States,
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 25

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

North Carolina v. Alford,
400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)..... 18, 19

Patterson v. New York,
432 U.S. 197, 97 S. Ct. 2319, 2325, 53 L. Ed. 2d 281 (1977)..... 35, 36

Tremblay v. Overholser,
199 F. Supp. 569, 570 (D.D.C. 1961)..... 24

United States v. Daugherty,
269 U.S. 360, 46 S. Ct. 156, 70 L. Ed. 309 (1926)..... 50

United States v. Laura,
607 F.2d 52 (3d Cir. 1979) 18, 24

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 9.94A.515 (Laws of 2008 ch. 108 § 23) 39

Former RCW 9.94A.700 (Laws of 2003, ch. 379 § 4) 41

Former RCW 9.94A.700(4) 41

Former RCW 9.94A.700(4)(c)..... 43

Former RCW 9.94A.700(5) 41

Former RCW 9.94A.700(5)(d) 44

Former RCW 9.94A.700(5)(e)..... 41, 44

Former RCW 9.94A.703(3) 48

Former RCW 9.94A.703(3)(d) 45, 47

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES (CONT'D)

Former RCW 9.94A.712 (Laws of 2006, ch. 124 § 3)	39
Former RCW 9.94A.712(1)	39
Former RCW 9.94A.712(3)	39
Former RCW 9.94A.712(6)(a)(i)	41
RCW 9A.40.090.	18
RCW 9A.40.090(2)	18, 19
RCW 9A.44.060(1)(a)	10
RCW 9.94A.030(10)	41
RCW 9.94A.030(41)	49
RCW 9.94A.345.	39
RCW 9.94A.510	39
RCW 9.94A.535	39
RCW 9.94A.631(1)	48
RCW 9.94A.753(3)	48
RCW 9.95.425.	47
RCW 9.95.435(1)	47
RCW 9.95.435(2)	47
Sentencing Reform Act	39, 41, 48

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES (CONT'D)

U.S. Const. Amend. VI.....	24
U.S. Const. Amend. XIV	24, 33
Wash. Const. Art. I, § 3	24, 33
WPIC 18.25	1, 11, 23
WPIC 42.02	10

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to control his own defense by instructing the jury on an affirmative defense over appellant's objection.

2. The court erred in denying appellant's motion for a new trial based on the violation of appellant's right to control his own defense. CP 24-26.

3. In the order denying appellant's motion for new trial, the court erred in finding "The Defendant testified at trial that the sex encounter with T.S. was consensual." CP 24.

4. In the order denying appellant's motion for new trial, the court erred in finding "The Defense relied on the affirmative defense of consent and presented argument to that effect." CP 24.

5. In the order denying appellant's motion for new trial, the court erred in concluding the affirmative defense instruction based on WPIC 18.25 was properly given in this case and that "Any confusion of the overlap of these burdens was further eliminated by the Court's response to the jury's question clarifying the different burdens." CP 25.

6. The affirmative defense instruction issued by the court shifted the burden of proof onto appellant in violation of constitutional due process. CP 66 (Instruction 16).

7. The affirmative defense instruction issued by the court violated due process in not making the applicable law sufficiently clear to jurors. CP 66 (Instruction 16).

8. The court unlawfully imposed a minimum sentence on count II that was outside the standard range. CP 11.

9. The court erred in prohibiting possession or use of non-prescribed drugs and drug paraphernalia as conditions of community custody. CP 13, 22.

10. The court erred in prohibiting possession of alcohol and in ordering appellant to remain out of places where alcohol is the chief item for sale as conditions of community custody. CP 12, 13, 22.

11. The court erred in ordering appellant to provide copies or all prescriptions to his community corrections officer within 72 hours as a condition of community custody. CP 13, 22.

12. The court erred in imposing payment of counseling costs as a condition of community custody. CP 13, 23.

Issues Pertaining to Assignments of Error

1. The State sought to convict appellant of second degree rape and indecent liberties by forcible compulsion. Did the court violate appellant's right to control his own defense when it instructed the jury on the affirmative defense of consent over appellant's objection?

2. Where proof of consent negates the element of forcible compulsion, did the affirmative defense instruction violate due process in shifting the burden of proof onto defendant? In the alternative, was the instruction erroneous because it did not make the law manifestly clear?

3. In setting a minimum term of the indeterminate sentence for the indecent liberties conviction, did the court lack statutory authority to sentence appellant outside the standard range?

4. Did the court err when it prohibited appellant from possessing or using non-prescribed drugs and drug paraphernalia as conditions of community custody where the evidence did not show any kind of drug use was directly related to the offense?

5. Did the court err in prohibiting possession of alcohol and entry into places where alcohol is the chief item for sale as conditions of community custody where alcohol was not directly related to the offense?

6. Did the court err in ordering appellant to provide copies of all prescriptions to his community corrections officer within 72 hours as a condition of community custody because that condition is not reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community?

7. Must the community condition requiring payment of counseling costs be stricken because no such costs were imposed as part of restitution?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Jeffrey Lynch by amended information with one count of second degree rape and one count of indecent liberties under the forcible compulsion and mentally/physically helpless alternatives. CP 84-85. The court ultimately determined the evidence was insufficient to instruct the jury on the helplessness alternative. 2RP¹ 152-53. The jury convicted Lynch on both counts. CP 45-46. The court sentenced Lynch to minimum terms of 90 months on the rape count and 74 months on the indecent liberties count with a maximum term of life. CP 9, 11. This appeal follows. CP 5.

2. Trial

Tamara Stone met Lynch through a Narcotics Anonymous (NA) support group. 2RP 11, 27. They both served on a committee whose purpose was to provide a clean, non-drug, non-alcohol environment for group activities. 2RP 11. Stone, along with Nichole Simpson and Heather

¹ The verbatim report of proceedings is referenced as follows: 1RP - 10/25/10; 2RP - 10/26/10; 3RP - 10/27/10; 4RP - 12/21/10 and 2/1/11.

Case, went to Lynch's house on the evening of May 9, 2009 to watch movies. 2RP 12-13. Stone also brought her three-year-old son. 2RP 10, 13. The adults drank coffee, talked, and listened to music. 2RP 13. No drugs or alcohol were present. 2RP 13.

Case left before the movie started. 2RP 14, 27, 59. At around 11 p.m., Stone, Simpson and Lynch started watching a movie while sitting together on the couch. 2RP 15. At some point, Simpson woke up and crawled into bed next to Stone's son in Lynch's bedroom while the other two watched movies. 2RP 14, 64. Stone fell asleep on the couch. 2RP 15. Lynch fell asleep sometime after Stone. 2RP 100. Lynch and Stone differed on what subsequently happened.

a. Stone's Version of Events

Stone told the jury that she woke up to find Lynch on top of her. 2RP 16. Lynch had his right hand half way down her pants. 2RP 16-17, 33. His left arm was braced against her and the couch. 2RP 33. Stone grabbed his wrist with her free arm, pulled his hand up and said "no, mm-mm." 2RP 17. Lynch forced his hand down harder. 2RP 17. That happened two or three times, and the third time he touched her vagina with his fingers. 2RP 17. She did not scream because her son was nearby. 2RP 17. She did not know Simpson's whereabouts. 2RP 17.

The harder she tried to pull Lynch's hand out, the more forceful he became. 2RP 18, 36. The more she struggled, the more it hurt. 2RP 37. After telling Lynch "no" during the course of about 10 minutes, she gave up struggling. 2RP 37. She did not want to wake her son and was concerned for his safety. 2RP 18, 37.

Lynch digitally penetrated her vagina for 30 to 45 minutes, during which time she "checked out." 2RP 19, 36, 38. Lynch remained on top of her when he stopped with his hand still inside her vagina. 2RP 19, 38. She curled up on the couch with him on top of her. 2RP 45. Stone felt like she fell asleep again, but also said she "checked out" and it was a "kind of hazy." 2RP 19, 38-40.

Stone later "woke up" to him again trying to go down her pants and putting his fingers in her vagina. 2RP 19, 41. He took her hand and put in on his exposed, erect penis. 2RP 19, 41-42. Stone moved her hand away. 2RP 20. He put her hand back. 2RP 20. This second incident was of shorter duration than the first. 2RP 45. Lynch got up and smoked a cigarette in the doorway after he was "done." 2RP 20. Lynch then lay on floor in front of the couch. 2RP 45. Stone remained on the couch and went back to sleep. 2RP 20, 45. At trial, Stone acknowledged the two events she described were traumatic, but labeled her decision to go back to sleep a "coping mechanism." 2RP 46-47. The next thing she remembered

was waking up with her son in the living room and leaving. 2RP 20-21, 45-46. Stone was convicted of a crime of dishonesty in 2008. 2RP 10.

b. Lynch's Version of Events

Lynch told the jury he woke up with his head on Stone's shoulder. 2RP 101. He was not on top of her. 2RP 108. He started rubbing her thigh. 2RP 101. Stone woke up, looked at him and "just kind of brushed it off." 2RP 101. He did not think she was fully awake yet. 2RP 101. He laid there for a few minutes with his hand on her thigh. 2RP 101-03. He started rubbing it again. 2RP 101. At this point, she was awake. 2RP 101.

Lynch started kissing her on the lips and she kissed him back while they looked into each other's eyes. 2RP 102. He rubbed her crotch over her clothes. 2RP 103. She moaned and did not say anything. 2RP 103-04. Lynch inferred from the moaning that she was enjoying the experience. 2RP 104. She did not push or pull his hand away. 2RP 103, 104. He continued to rub her crotch for a few minutes while they kissed. 2RP 104.

Lynch then put his hand down her pants and touched the outside of her vagina. 2RP 104-05. He put his finger inside her vagina and started playing with her "clit ring" because, as Lynch said, "she's been bragging about it forever so I knew she had one." 2RP 105. They were still kissing one another. 2RP 105. She looked into his eyes the whole time and did not say anything to him. 2RP 105-06.

Stone did not try to brush his hand away or pull his hand out. 2RP 106. She did nothing to indicate his advances were unwelcome. 2RP 106. Lynch had his hand down her pants for about 10 minutes until she had an orgasm. 2RP 106. He then pulled his hand out, looked at her, kissed her, she smiled, and "that was it." 2RP 106. He went back to sleep on the floor. 2RP 106.

Lynch denied later putting his hand back inside Stone's pants a second time. 2RP 113. 2RP 113. He also maintained he did not have his penis outside his pants, Stone never touched his penis, and he did not do anything to try to force her to touch his penis. 2RP 113.

c. Aftermath

When Simpson went over to see Stone later that day, Stone looked like she had been crying. 2RP 66. Two days later, Stone told Simpson that she was sexually assaulted. 2RP 67-68. Stone did not seek medical treatment. 2RP 45. She made a police report three weeks later. 2RP 21.

Stone received text messages from Lynch on May 18. 2RP 21; Ex. 1, 2, 3. At trial, Lynch explained he was expressing regret about losing a friend by crossing the line between friendship and sex. 2RP 115-22.

In a recorded phone discussion with Stone on June 10, 2009, Lynch denied getting rough. Ex. 5² at 3, 5. He said he was sorry and it "cost me a friend." Ex. 5 at 4. Responding to Stone's allegation that he forced his hand down her pants, Lynch said "I only remembered you pushed me away once." Ex. 5 at 6. He agreed what happened was wrong, but "thought it was mutual, and . . . I obviously misread it." Ex. 5 at 6. Lynch denied waking Stone up again and further "messing around" with her. Ex. 5 at 7.

During police interrogation on June 23, Lynch said he started rubbing Stone's "clit" over her pants and was not sure if she was awake.³ Ex. 6⁴ at 5. At trial, Lynch said he was nervous when interrogated and that he did not touch her privates before she was awake. 2RP 130.

During the interrogation, Lynch said "she kind of brushed me away a little bit." Ex. 6 at 5. The ensuing sexual encounter was mutual. Ex. 6 at 5-6. Lynch later told the officer "She was asleep when I started . . . she was awake for the whole thing." Ex. 6 at 7. He again denied taking his penis out of his pants. Ex. 6 at 6.

² Ex. 5 is a transcript of the phone conversation and was admitted as a listening aid. Ex. 4 is the actual recording of the conversation.

³ The officer testified Lynch said during the non-recorded portion of the interrogation that he started rubbing Stone's clitoris before she woke up. 2RP 86. Lynch denied saying so. 2RP 128-29.

⁴ Ex. 6 is a transcript of the recorded interrogation and was admitted as a listening aid. Ex. 7 is the actual recording of the interrogation.

C. ARGUMENT

1. THE COURT VIOLATED LYNCH'S CONSTITUTIONAL RIGHT TO CONTROL HIS OWN DEFENSE BY INSTRUCTING THE JURY ON AN AFFIRMATIVE DEFENSE OVER HIS OBJECTION.

The trial judge instructed the jury on the affirmative defense of consent over Lynch's objection. This was error because criminal defendants have the constitutional right to control their own defense. This constitutional error was not harmless beyond a reasonable doubt because the jury expressed confusion about the burden of proof as a result of the affirmative defense instruction. Reversal of both convictions is required.

- a. After The Court Gave An Affirmative Defense Instruction For Both Counts Over Lynch's Objection, The Jury Expressed Confusion With The Instructions.

The defense proposed instructions on third degree rape as a lesser offense to second degree rape. CP 71-73. Consistent with RCW 9A.44.060(1)(a) and WPIC 42.02, the proposed "to convict" instruction for third degree rape required the State to prove Stone did not consent to sexual intercourse. CP 73. The court refused to instruct on third degree rape based on lack of affirmative evidence that only the lesser crime was committed. 2RP 154-55.

During continued discussion of jury instructions, the State argued "Mr. Oakley's To Convict Instruction put an element that I had to

overcome which was that the sexual act was nonconsensual. We have a Supreme Court case and also the standard WPIC that if we're going to be arguing consent I want the instruction given that the burden is actually on the defense." 2RP 155.

Defense counsel objected to the affirmative defense instruction on the basis that Lynch had the right to control his defense. 3RP 4-5 (citing State v. McSorley, 128 Wn. App. 598, 605, 116 P.3d 431 (2005)). Counsel acknowledged Lynch's testimony presented the defense that "it" was consensual, but argued "the issue of consent goes to whether the state has proved Forcible Compulsion." 3RP 7 (citing State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006)). The trial court believed Gregory authorized giving the instruction (WPIC 18.25) over defense counsel's objection, claiming "the very issue that was before Gregory is the one that we're dealing with here." 3RP 8-10.

The affirmative defense instruction given to the jury provides:

A person is not guilty of RAPE or INDECENT LIBERTIES if the sexual intercourse or sexual contact is consensual. 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.

The defendant has the burden of proving that the sexual intercourse or sexual contact was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true

than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 66 (Instruction 16).

The "to convict" instruction for second degree rape provides:

To convict the Defendant of the crime of RAPE IN THE SECOND DEGREE as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 10th day of May, 2009, the Defendant engaged in sexual intercourse with T.S.;
- (2) That the sexual intercourse occurred by forcible compulsion, and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 57 (Instruction 7).

The "to convict" instruction for indecent liberties provides:

To convict the Defendant of the crime of INDECENT LIBERTIES as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 10th day of May, 2009, the Defendant knowingly caused T.S. to have sexual contact with the Defendant;
- (2) That this sexual contact occurred by forcible compulsion.

(3) That the Defendant was not the spouse or registered domestic partner of T.S. at the time of the sexual contact; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 62 (Instruction 12).

The jury was also instructed on the definition of forcible compulsion: "Forcible compulsion means physical force that overcomes resistance." CP 60 (Instruction 10).

As argued by the prosecutor, the basis for the rape count occurred when Stone first woke up on the couch next to Lynch, i.e., digital penetration of the vagina. 3RP 19-20. The basis for the indecent liberties count was what happened after Stone woke up a second time, i.e., Lynch placing her hand on his penis and placing his hand on her vaginal region. 3RP 20-21. In closing argument, the prosecutor addressed the definition of consent, the affirmative defense instruction and Lynch's burden to prove consent. 3RP 22-23.

As a defense to the indecent liberties charge, defense counsel argued in closing that the alleged acts forming the basis for that charge

never happened. 3RP 27-28, 36-37. Counsel further argued Lynch's testimony showed Stone consented in relation to the event forming the basis for the rape allegation. 3RP 25-27. His closing argument framed the issue of consent in terms of the State's failure to prove beyond a reasonable doubt that forcible compulsion occurred. 3RP 28.

Counsel maintained the defense had met its burden of proof on the affirmative defense. 3RP 29. He later argued, "The issue is that we have to prove consent was by a preponderance of the evidence. Consent also goes to the issue of forcible compulsion[.]" 3RP 31. Counsel contended the State "has not proved forcible compulsion beyond a reasonable doubt because there was consent and when there is consent there can be no forcible compulsion because there is no resistance." 3RP 36- 37.

During deliberation, the jury sent this inquiry to the court:

Jury Inquiry: It seems contradictory re: burden of proof law.
(1) State needs to prove beyond a reasonable doubt re: 2nd
degree rape charge (pg. 4) (2) The defendant has the burden
of proof re: that the sexual intercourse or sexual contact
was consensual.

Does the defendant bear the burden of proving that
indecent liberties did not occur?

pg. 11, 12, 13, 16

Do we assume indecent liberties occurred unless evidence
shows us otherwise?

CP 47.⁵

⁵ Attached as appendix A.

The court stated, "So obviously they're somewhat confused by the instructions" and that "my feeling from this question which is quite long is that they're readily confused by what's going on." 3RP 52.

Following discussion with the attorneys, the court answered the jury's inquiry as follows:

The state has the burden of proving each of the elements of each crime beyond a reasonable doubt.

The defendant's burden of proof as stated in Inst. 16 is by a preponderance of the evidence and that burden of proof is limited to consent only.

CP 47; 3RP 52-54.

Defense counsel stated "I think that's right, I hope, I only hope it helps them." 3RP 54. The court answered, "I do too." 3RP 54.⁶ After the jury returned guilty verdicts, defense counsel filed a motion for new trial based on the court's error in giving the affirmative defense instruction over Lynch's objection. CP 39-44. The court heard argument and denied the motion. 4RP 4-16; CP 24-26.

⁶ Defense counsel later put on the record that he agreed to the supplemental instruction because he "had to make the best of a bad situation." 4RP 13. The court acknowledged no objection was waived. 4RP 13-14.

b. A Trial Court Cannot Given An Affirmative Defense Instruction Over A Defendant's Objection Without Violating The Defendant's Constitutional Right To Control His Defense.

Whether the trial court properly instructed the jury on an affirmative defense is a question of law reviewed de novo. State v. Coristine, __ Wn. App. __, 252 P.3d 403, 404 (2011). Claimed denials of constitutional rights are also reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A trial court's decision on a motion for new trial is reviewed de novo when predicated on an error of law. State v. Gobin, 73 Wn.2d 206, 208, 437 P.2d 389 (1968); State v. Bryant, 78 Wn. App. 805, 809, 901 P.2d 1046 (1995); see also Iniguez, 167 Wn.2d at 280 (a court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights.") (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

Every competent defendant "has a constitutional right to at least broadly control his own defense." State v. Jones, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). Accordingly, neither the State nor the trial court may compel a defendant to raise or rely on an affirmative defense. McSorley, 128 Wn. App. at 605.

But that is what happened here. Lynch's defense to the rape charge was that the State failed to prove forcible compulsion beyond a reasonable

doubt. 3RP 4-5, 25-28, 31, 36-37. His defense to the indecent liberties charge was that the alleged contact never happened. 2RP 113; 3RP 27-28, 36-37. Prior to the forced imposition of the affirmative defense instruction, his defense theory was not that he proved lack of consent by a preponderance of the evidence. The court foisted that defense upon Lynch through the unwanted instruction presenting an affirmative defense to the jury. This was error. Established precedent supports that conclusion.

In Jones, the Supreme Court held a trial court could not compel a defendant to raise and rely on the affirmative defense of insanity because every defendant has the constitutional right to control his own defense. Jones, 99 Wn.2d at 740. Reasoning that a defendant's right to raise or waive the defense of insanity should be no different from a defendant's right to assert or waive other defenses like alibi or self defense, Jones observed "courts do not impose these other defenses on unwilling defendants." Jones, 99 Wn.2d at 743.

In Faretta v. California, the United States Supreme Court held "the California courts [had] deprived [Faretta] of his constitutional right to conduct his own defense" when they refused to accept his knowing and voluntary choice to represent himself. Faretta v. California, 422 U.S. 806, 836, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Jones recognized "The language and reasoning of Faretta necessarily imply a right to personally

control one's own defense. In particular, Faretta embodies 'the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.'" Jones, 99 Wn.2d at 740 (quoting United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979)).

Jones accordingly embraced the proposition that "[courts] should not force any defense on a defendant in a criminal case." Jones, 99 Wn.2d at 740 (quoting North Carolina v. Alford, 400 U.S. 25, 33, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (holding courts properly permit defendants to plead guilty (and thus to waive all possible defenses) based on the State's evidence rather than his own admission of guilt)).

This Court in McSorley also recognized the constitutional right to control one's own defense. In that case, the trial court erred by instructing on an affirmative defense at the State's request and over the defendant's objection. McSorley, 128 Wn. App. at 600. McSorley involved a charge of child luring under RCW 9A.40.090. Id. at 601-02. The jury was instructed in accordance with RCW 9A.40.090(2), which provides "It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor." Id. at 602, 603.

Based on Jones, Faretta, and Alford, this Court held "neither the State nor the trial court may compel a defendant to raise or rely on the affirmative defense stated in RCW 9A.40.090(2), and that the trial court erred by giving Instruction 6 over McSorley's objection. Hence, a new trial is required." McSorley, 128 Wn. App. at 605.

McSorley and Jones establish Lynch has the right to control his own defense. Lynch chose to forego an affirmative defense. The trial court should have respected that decision. Whether the defendant is to seek an affirmative defense instruction is an important tactical decision. The defense, not the trial judge, has the power to control the defense presented to the jury. The court cannot hijack a defendant's trial strategy by forcing the defendant to assume an unwanted burden of proof.

In denying Lynch's motion for a new trial, the trial court sought to distinguish McSorley on the basis that the defendant in that case relied on a defense of general denial and did not rely on an affirmative defense. CP 25. The trial court misread McSorley and also misinterpreted the legal significance of Lynch's position.

The court's analysis fails of its own accord in relation to the indecent liberties count. Lynch testified the event never happened and defense counsel presented this theory to explain why the jury should not convict Lynch of indecent liberties. 2RP 113; 3RP 27-28, 36-37. In this

respect, the court erred in finding "The Defendant testified at trial that the sex encounter with T.S. was consensual." CP 24. There was no evidence of consent on the indecent liberties count. For that reason alone, it was error to have the affirmative defense instruction cover the indecent liberties count. "It is error for a trial court to give an instruction which is not supported by the evidence." State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

More fundamentally, the trial court misread McSorley. Neither McSorley nor Jones held the defense has the right to control its own defense only if the defense is general denial. Nor did either court hold the right disappears if a defendant presents evidence that could be used to support another defense. Jones held a defendant has a constitutional right to broadly control his defense and McSorley recognized that right in relation to the defendant's ability to decide whether to request an affirmative defense instruction. Jones, 99 Wn.2d at 740; McSorley, 128 Wn. App. at 605.

This Court in McSorley did not reverse because there was insufficient evidence to support the giving of the affirmative defense instruction. Rather, it reversed because the defense has the right to control its defense, which covers whether to raise an affirmative defense through jury instruction. McSorley, 128 Wn. App. at 600, 605.

In the order denying Lynch's motion for new trial, the court determined "The Defense relied on the affirmative defense of consent and presented argument to that effect." CP 24.⁷ That is incorrect. An affirmative defense for jury deliberation purposes does not exist unless the jury is instructed on one. See State v. Tang, 75 Wn. App. 473, 476, 878 P.2d 487 (1994) ("Jury instructions are meant to instruct the jury on what law to apply to the facts it finds."); CP 49 (Instruction No 1: "It is . . . your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.").

Lynch objected to the affirmative defense instruction. Lynch did not "rely" on an affirmative defense. The defense presented evidence of consent to the jury in relation to the rape charge and Lynch relied on that evidence to argue the State failed to prove the forcible compulsion element of its case. The defense did not want to be saddled with the burden of proving anything. Defense counsel addressed the affirmative defense in closing argument, but he was forced to do so by virtue of the fact that the jury was instructed on it over his objection.

⁷ Regarding the court's written order, Lynch's attorney said "the defense is certainly taking exception in general to the entirety of these." 4RP 46.

Under State v. Camara and Gregory, the State is not required to prove absence of consent to prove compulsion. State v. Camara, 113 Wn.2d 631, 640, 781 P.2d 483 (1989); Gregory, 158 Wn.2d at 802-03. But evidence of consent, if believed by the jury, necessarily undermines the forcible compulsion element. Indeed, constitutional due process requires the jury to consider all of the evidence, including evidence of consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion. Gregory, 158 Wn.2d at 803.

The current second degree rape statute replaced the concept of "nonconsent" with that of "forcible compulsion." Camara, 113 Wn.2d at 636. Camara stated "the concept of consent has been retained in the new rape statutes in the element of forcible compulsion, its conceptual opposite." Id. at 637. Camara rejected the suggestion that rape law reform eliminated consent as an issue in rape prosecutions, believing "the substitution of 'forcible compulsion' for lack of consent seems more a refinement than a reformulation." Id. at 637 n.3. It recognized "there is a conceptual overlap between the consent defense to rape and the rape crime's element of forcible compulsion." Id. at 640; accord Gregory, 158 Wn.2d at 803.

Lynch, as a matter of trial strategy, was constitutionally entitled to pursue his theory that the State failed to meet its burden of proof on

forcible compulsion in light of evidence of consent, and he was entitled to pursue that theory without being fettered by a burden of proof he never sought.

The false premise underlying the court's ruling is that Gregory authorized the trial court's action: "the very issue that was before Gregory is the one that we're dealing with here." 3RP 10. The issues are different.

Relying on Camara, the Supreme Court in Gregory held an instruction essentially worded the same as WPIC 18.25 complied with due process because it did not unconstitutionally shift the burden of proof on the issue of forcible compulsion. Gregory, 158 Wn.2d at 802-04. Gregory only argued "requiring him to prove consent by a preponderance of the evidence violated due process because the jury could have become confused, thinking that it could acquit only if consent is proved by a preponderance of the evidence, even if a reasonable doubt may have been raised with regard to the element of forcible compulsion." Id. at 801-02.

The theory advanced in Gregory, and the only issue decided by the Court, was whether the affirmative defense instruction violated due process. Gregory did not argue that his constitutional right to control his defense was violated when the trial court gave the affirmative defense instruction and the Court did not address that issue.

"In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Furthermore, cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

c. The State Cannot Bear Its Burden Of Proving This Constitutional Error Was Harmless Beyond A Reasonable Doubt.

The right to control one's own defense is grounded in the Sixth Amendment and constitutional due process. Jones, 99 Wn.2d at 740 (Sixth Amendment, citing Faretta); Laura, 607 F.2d at 56 (Sixth Amendment); Tremblay v. Overholser, 199 F. Supp. 569, 570 (D.D.C. 1961) (forcing any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which he does not desire to advance constitutes due process violation).

The trial court, in instructing the jury on an affirmative defense over Lynch's objection, therefore committed constitutional error. U.S. Const. amend. VI, XIV; Wash. Const. Art. I, § 3. "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the

error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); see also State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) ("Erroneous instructions given on behalf of the party in whose favor the verdict was returned are presumed prejudicial unless it affirmatively appears they were harmless).

The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The presumption of prejudice may be overcome if and only if the reviewing court is able to express an abiding conviction that the error cannot possibly have influenced the jury adversely to the defendant. State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The State cannot overcome the presumption of prejudice here. In fact, evidence in the record shows the court's improper decision to instruct the jury on the affirmative defense affected jury deliberations. The jury expressed its confusion over who had the burden of proof because the court used the affirmative defense instruction. CP 47.

In denying the motion for new trial, the trial court concluded the instructions clearly laid out the respective burdens of the parties. CP 25.

But the fact remains that the jury was confused by those instructions. CP 47. Indeed, the trial judge recognized the jury was confused. 3RP 52.

The court concluded, "Any confusion of the overlap of these burdens was further eliminated by the Court's response to the jury's question clarifying the different burdens." CP 25. How so? The court's answer, in restating what the instructions already stated, did nothing to dispel the jury's understandable confusion. The jury instructions already stated the State had the burden of proof on the forcible compulsion element and the defense had the burden of proof on consent. CP 57, 62, 66. The jury was confused as to how to reconcile those instructions. The supplemental instruction reinforced rather than eliminated any confusion.

That being said, it is not Lynch's burden to convince this Court that the error was prejudicial. The State has the burden of overcoming the presumption of prejudice by demonstrating the error was harmless beyond a reasonable doubt. In light of the juror's evident confusion caused by the presence of the affirmative defense instruction, the State is unable to show the error was harmless.

d. State v. Coristine: Analytically Flawed And Otherwise Distinguishable.

In Coristine, Division Three held an affirmative defense instruction on "reasonable belief" was properly given over defense objection to a

charge of second degree rape involving a physically or mentally incapacitated victim. Coristine, 252 P.3d at 403. Division Three believed the "reasonable belief" instruction was properly given because it did not initially shift the burden of proof on incapacity to the defendant, was a correct statement of the law, and was supported by evidence. Id. at 405.

Division Three did not even acknowledge the defendant's right to control his own defense. It claimed Jones was distinguishable because, unlike Jones, the defense "supplied the factual predicate for the instructions but did not want the legal implications of the factual predicate." Coristine, 252 P.3d at 405.

That asserted distinction does not save the indecent liberties conviction here. Lynch never produced evidence of consent nor presented a theory of consent on the charge of *indecent liberties* to the jury. 2RP 113; 3RP 27-28, 36-37. Even under Coristine, giving an affirmative defense instruction on the indecent liberties count was error.

Regardless, Coristine overlooks an important point. Whether the defense wants to pursue the legal implications of a factual predicate through pursuing an affirmative defense is a time-honored matter of trial strategy that rests in defense counsel's judgment. The reasoning in Coristine is infirm because it allows the trial court, or the State, to commandeer and potentially compromise a defendant's chosen trial

strategy. Coristine cites no authority for the proposition that a defendant's constitutional right to control his defense is sacrificed whenever a factual predicate exists to support the giving of an affirmative defense instruction over defense objection.

The Coristine court also opined "the failure to give the instruction might well have been error; it certainly would have compromised the legal implications of Mr. Coristine's evidence of his reasonable belief." Coristine, 252 P.3d at 405. Division Three was likely concerned with a "have your cake and eat it too" scenario, where a defendant could refuse an affirmative defense instruction but then claim ineffective assistance of counsel on appeal for failure to obtain such instruction. See In re Pers. Restraint of Hubert, 138 Wn. App. 924, 929, 932, 158 P.3d 1282 (2007) (counsel ineffective in failing to request affirmative defense instruction on reasonable belief that victim was not mentally incapacitated); State v. Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009) (same).

That concern is not present in this case. See State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001) (rejecting argument that failure to propose instruction to which defendant was entitled under the law constitutes per se ineffective assistance of counsel). The lack of an affirmative instruction in Lynch's case would not have been error.

Defense counsel would have provided effective assistance in successfully objecting to the affirmative defense instruction at issue here.

Unlike in Hubert and Powell, Lynch's counsel made a reasonable tactical decision not to request the affirmative defense instruction. To understand why, it is critical to recognize the affirmative defense instruction at issue in Coristine, Hubert and Powell is different than the one at issue here. The different instructions have distinct legal implications and present different options to the jury.

In Coristine, Hubert, and Powell, a "reasonable belief" defense as a basis for acquittal was only available through the affirmative defense instruction. There is no conceptual overlap between the elements of second degree rape under the incapable of consent by reason of being mentally incapacitated/physically helpless prong and the affirmative defense that the defendant *reasonably believed* the person was not in that condition. Evidence of reasonable belief provides no basis for acquittal unless it is presented to the jury in the form of a reasonable belief instruction. For that reason, a "reasonable belief" defense is entirely dependent on the presence of the affirmative defense instruction allowing the jury acquit based on that belief.

That is why the failure to request a reasonable belief instruction, when supported by the evidence and consistent with the defense theory, is

not a legitimate tactical decision and is prejudicial. Hubert, 138 Wn. App. at 932 (affirmative defense was the sole defense to the charge and in absence of affirmative defense instruction, jury "had no way to understand the legal significance of the evidence supporting the reasonableness of Hubert's belief that Wood was awake and capable of consenting to his advances."); Powell, 150 Wn. App. at 156, 158 n.12 (counsel's failure to request an affirmative defense instruction on reasonable belief was deficient and prejudicial because jury had (1) no way to recognize and weigh legal significance of Powell's reasonable belief testimony and counsel's closing argument on reasonable belief and (2) no way of acquitting Powell even if it found he had reasonably believed person was not mentally incapacitated or physically helpless).

But in Lynch's case, reliance on consent as the defense theory of the case is fully encompassed by the jury instructions without reference to an affirmative defense instruction. There is no "reasonable belief" defense to the charge of second degree rape by forcible compulsion.

The jury here was instructed on the definition of forcible compulsion. CP 60. This definition, together with the "to convict" instruction for second degree rape, allowed Lynch to completely argue his theory that he did not rape Stone because she consented to having sexual intercourse. 3RP 28, 31, 36- 37; see State v. Brown, 132 Wn.2d 529, 605,

940 P.2d 546 (1997) ("a specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case.").

As noted, there is a "conceptual overlap" between the consent defense to rape and the rape crime's element of forcible compulsion. Camara, 113 Wn.2d at 640; State v. Kester, 38 Wn. App. 590, 594, 686 P.2d 1081 (1984) (forcible compulsion is the opposite of consent). For this reason, the lack of affirmative defense instruction would not have compromised Lynch's defense in any way. In accordance with Lynch's deliberately chosen trial strategy, the jury did not need an affirmative defense instruction on consent to consider the legal significance of the consent evidence. Lynch's theory of consent was entirely encompassed by the argument that the State did not prove forcible compulsion element of its case beyond a reasonable doubt.

Division Three in Coristine concluded any error in that case was harmless, reasoning "There is no inconsistency between Mr. Coristine's defense theories and therefore no prejudice attends the affirmative defense. Again, the 'reasonable belief' instruction did not come into play until after the jury found each element of second degree rape. Thus, even without the instruction, the jury would have found Mr. Coristine guilty, and there

is sufficient evidence in this record (L.F.'s testimony) to support that finding." Coristine, 252 P.3d at 405.

The Coristine court, having failed to acknowledge the defendant's constitutional right to control his defense, did not employ the constitutional harmless error test. In any event, the same conclusion of harmless error cannot be drawn here. There is no "one size fits all" approach to prejudice. Simply because defense theories are not inconsistent does not categorically mean the error is harmless. Whether an error is harmless beyond a reasonable doubt in a particular case depends on the particular circumstances of a case. See State v. Carter, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) ("Whether a flawed jury instruction is harmless error depends on the facts of a particular case.").

In Lynch's case, the jury's evident confusion over how to reconcile the respective burdens of proof is strong evidence that the error was not harmless. CP 47. Because of the conceptual overlap between forcible compulsion and consent, the affirmative defense came "into play" right along with the jury's consideration of whether the State proved the elements of the crime. The State cannot affirmatively show the error was harmless beyond a reasonable doubt.

For the reasons set forth above, the court wrongly instructed the jury on the affirmative defense instruction and erred in denying Lynch's motion for a new trial. Reversal of both convictions is required.

2. THE AFFIRMATIVE DEFENSE INSTRUCTION ON CONSENT VIOLATED DUE PROCESS BY UNCONSTITUTIONALLY SHIFTING THE BURDEN OF PROOF ONTO LYNCH AND BY FAILING TO MAKE THE APPLICABLE LAW CLEAR TO JURORS.

The Washington Supreme Court in Camara and Gregory held an instruction that places the burden of proving consent on the defendant did not unconstitutionally shift the burden of proof. Camara, 113 Wn.2d at 639; Gregory, 158 Wn.2d at 802-04. A decision by the Supreme Court is binding on all lower courts in the state. 1000 Virginia P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

Lynch challenges the holdings of Camara and Gregory to preserve the issue for further review. Requiring Lynch to prove the affirmative defense of consent in a prosecution for rape by forcible compulsion violates due process because proof of consent negates proof of forcible compulsion. U.S. Const. amend. XIV; Wash. Const. Art. I, § 3.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Regardless of legislative intent as expressed through statute, imposing a burden of proof on criminal

defendants must pass constitutional requirements. Due process is violated if an element of the defense "negates" an element of the offense charged. State v. Box, 109 Wn.2d 320, 327, 330, 745 P.2d 23 (1987) (insanity defense); State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (good faith claim of title negates intent element of robbery); State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983) (self-defense).

The Supreme Court in Camara acknowledged proof of consent negates proof of forcible compulsion. Camara, 113 Wn.2d at 640. Consent is the *opposite* of forcible compulsion. Id. at 637. Logically, the elements of forcible compulsion and nonconsent completely overlap because there is no way to commit rape by forcible compulsion when the person consents to the act. Forcible compulsion requires resistance and there can be no resistance if the person has consented. CP 60. It is in this sense that proof of consent negates the element of forcible compulsion.

Camara, however, expressed "substantial doubt" about the correctness of the "negates" analysis and declined to apply it in holding the affirmative defense instruction on consent complied with due process. Camara, 113 Wn.2d at 639. Since that time, however, the Washington Supreme Court has continued to rely on the "negates" analysis as the correct one in determining whether a burden of proof has been unconstitutionally shifted onto a defendant. See City of Bremerton v.

Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002) (addressing defense to criminal trespass); State v. Lively, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996) (addressing defense to entrapment); State v. Riker, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994) (distinguishing affirmative defenses of duress from self-defense or alibi defenses). The Washington Supreme Court in Gregory refused to overrule Camara but offered no explanation as to why it continued to rely on the "negates" analysis in other cases. Gregory, 158 Wn.2d at 802-04.

Camara relied on Martin v. Ohio, 480 U.S. 228, 230, 107 S. Ct. 1098, 94 L.Ed.2d 267 (1987) as the basis for declining to apply the "negates" analysis. Camara, 113 Wn.2d at 639-40. Martin held requiring the defendant to prove self-defense by a preponderance of the evidence did not violate due process because it did not shift the burden of disproving any element of the state's case to the defendant. Martin, 480 U.S. at 233-34. Martin noted evidence offered to support the defense that the defendant had not planned the confrontation will "often tend" to negate the elements of purpose or prior calculation and design, but the Ohio law at issue did not shift to the defendant the burden of disproving any element of the state's case. Id. at 234.

Martin, however, expressly did not depart in any way from Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 2325, 53 L.Ed.2d

281 (1977). Martin, 480 U.S. at 234 n. Patterson held a New York law providing for the affirmative defense of emotional disturbance to the crime of murder complied with due process because it "does 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.

Just a few years ago, the United States Supreme Court applied the "negates" analysis in determining the duress defense at issue there did not unconstitutionally shift the burden of proof. Dixon v. United States, 548 U.S. 1, 6-8, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006) (existence of duress does not disprove any element of an offense; "Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully").

The United States Supreme Court's recent use of the "negates" analysis confirms it is the correct analysis in determining whether the burden of proof has unconstitutionally shifted. Lynch's right to due process was violated because proof of consent negates proof of forcible compulsion, resulting in an unconstitutional shifting of the burden of proof.

Even if there is no unconstitutional burden shifting in the abstract, the actual instructions given must adequately inform the jury of the State's unalterable burden of proving beyond a reasonable doubt every element of

the crime charged. Camara, 113 Wn.2d at 640. Camara concluded this test was met because the "to convict" instruction in that case specifically informed the jury of the State's burden of proof with respect to the elements of second degree rape and a separate instruction more generally described the State's burden and the presumption of the defendant's innocence. Id.

Lynch challenges this aspect of Camara as well. Instructions must accurately state the law without misleading the jury. State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). This is a due process requirement. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); see also Cupp v. Naughten, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L.Ed.2d 368 (1973) ("[T]he question is . . . whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.").

Camara ignored how a juror, when reading the instructions *as a whole*, was supposed to reconcile the affirmative defense instruction with the other instructions regarding the burden of proof. Camara, 113 Wn.2d at 640. When read as a whole, jury instructions must make the applicable legal standard manifestly apparent to the average juror. LeFaber, 128 Wn.2d at 900. Instructions must be "manifestly clear" because ambiguous instructions that permits an erroneous interpretation of the law are

improper. Id. at 902. Instructional error is informed by the way a reasonable juror could have interpreted an instruction. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997).

A reasonable juror could come to the conclusion that separating the burden of proof on consent and forcible compulsion makes no logical sense because proof of consent always negates proof of forcible compulsion. When confronted with that scenario, the jury in Lynch's case expressed confusion over the burden of proof. CP 47. The instructions here did not make the legal standard sufficiently clear because the instructions, when applied to the facts of this case, intractably muddied the issue of who properly bore the burden of proof. See State v. Irons, 101 Wn. App. 544, 553, 4 P.3d 174 (2000) ("[A]n instruction that is correct in the abstract, or correct as applied to one set of facts, may become misleading when applied to another set of facts.").

3. THE SENTENCE FOR THE INDECENT LIBERTIES
CONVICTION UNLAWFULLY EXCEEDS THE
STANDARD RANGE.

The court imposed a 74 month minimum term of confinement for the indecent liberties conviction under count II. CP 7, 11. This sentence must be vacated because a court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999).

The sentencing provisions of former RCW 9.94A.712 apply to offenders convicted of second degree rape and indecent liberties by forcible compulsion. Former RCW 9.94A.712(1).⁸ Former RCW 9.94A.712(3) provides "Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence."

RCW 9.94A.535 governs the imposition of exceptional sentences. The court did not impose an exceptional sentence on Lynch. Former RCW 9.94A.712(3) therefore required a minimum sentence within the standard range.

The standard range for indecent liberties by forcible compulsion, based on Lynch's offender score of zero, is 51 to 68 months. See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); Former RCW 9.94A.515 (Laws of 2008 ch.

⁸ Laws of 2006, ch. 124 § 3 (eff. July 1, 2006). This was the law in effect at the time of Lynch's alleged offense on May 10, 2009. Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345. All references to former RCW 9.94A.712 are to this version.

108 § 23, eff. June 12, 2008) (seriousness level of X for indecent liberties by forcible compulsion). The court therefore erred in imposing a 74 month minimum sentence for the indecent liberties conviction. Remand for resentencing is required.

4. THE COURT IMPOSED A NUMBER OF COMMUNITY CUSTODY CONDITIONS WITHOUT STATUTORY AUTHORITY.

a. The Prohibition On Non-Prescribed Drugs And Drug Paraphernalia Must Be Stricken.

As a condition of community custody, the court ordered Lynch to "abstain from the possession or use of drugs unless prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours." CP 13. The judgment and sentence also ordered Lynch to comply with the conditions set forth in the pre-sentence investigation (PSI) report attached as appendix "F." CP 13. In addition to the same condition described above, Appendix "F" required Lynch to "abstain from the possession or use of . . . drug paraphernalia except as prescribed by a medical professional." CP 22 (emphasis added). The court lacked statutory authority to impose these conditions.

The court's decision to impose a crime-related prohibition is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey,

168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). But a court may impose only a sentence that is authorized by statute. Barnett, 139 Wn.2d at 464. "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Former RCW 9.94A.712(6)(a)(i), applicable to offenders convicted of second degree rape and indecent liberties by forcible compulsion, requires a sentencing court to impose the conditions listed in former RCW 9.94A.700(4) and allows the imposition of the conditions listed in former RCW 9.94A.700(5). Former RCW 9.94A.700(5)(e)⁹ states a sentencing court shall impose conditions that require the offender to "comply with any crime-related prohibitions." A condition is "crime-related" only if it "directly relates to the circumstances of the crime." State v. Motter, 139 Wn. App. 797, 802, 162 P.3d 1190 (2007), overruled on other grounds, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).¹⁰

⁹ Laws of 2003, ch. 379 § 4. All references to former RCW 9.94A.700 are to this version.

¹⁰ RCW 9.94A.030(10) provides "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the

Substantial evidence must support a determination that a condition is crime-related. Motter, 139 Wn. App. at 801. No drugs were present on the night of the incident. 2RP 13. There is no evidence Lynch used or suffered from the effects of a non-prescribed drug on the day in question. Cf. Ex. 5 at 7 ("You don't even do drugs anymore!"). Lynch considered himself an addict but was not using drugs now and was participating in the NA program so that he would not use drugs in the future. 2RP 93, 120.

A non-prescribed drug had nothing to do with the offense. The condition prohibiting use of such drugs is not crime related and therefore unauthorized by statute. A community custody condition cannot be imposed if it is unauthorized by statute. Motter, 139 Wn. App. at 801. Community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Similarly, there is no evidence that use of any drug, controlled or otherwise, played a role in the offense. Cf. Motter, 139 Wn. App. at 803-04 (prohibition on drug paraphernalia upheld where crime related to offender's substance abuse). The appendix "F" condition prohibiting

circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct."

Lynch from possessing or using "drug paraphernalia" is therefore unauthorized by statute. CP 13, 22. That condition must be stricken because it is not crime-related. O'Cain, 144 Wn. App. at 775.

As a mandatory condition of community custody, former RCW 9.94A.700(4)(c) states an "offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions." The court here correctly imposed this condition on Lynch because the law required it. CP 12.

But it lacked authority to additionally order Lynch, as a non-mandatory condition of community custody, not to possess or use any non-prescribed drugs or drug paraphernalia. The non-prescribed drug condition is not limited to use of controlled substances and encompasses any legal drug not prescribed by a medical professional, including something as benign as aspirin.

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). This Court should therefore order the sentencing court to strike the condition pertaining to non-prescribed drugs and drug

paraphernalia. See State v. Jones, 118 Wn. App. 199, 207-08, 212, 76 P.3d 258 (2003) (community custody condition ordered in derivation of statutory requirements must be stricken).

b. The Prohibition On Alcohol Possession And Entering Places Where Alcohol Is The Chief Item For Sale Must Be Stricken.

The PSI report, attached as appendix "F" to the judgment and sentence, contains the community custody condition that Lynch "abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale." CP 13, 22. Another part of the judgment and sentence contains the latter two conditions. CP 12.

Prohibition of the *consumption* of alcohol is statutorily authorized under former RCW 9.94A.700(5)(d) because a sentencing court is authorized to order an offender to refrain from consuming alcohol, regardless of whether alcohol contributed to the offense. Jones, 118 Wn. App. at 206-07. However, other restrictions must be "crime-related." Former RCW 9.94A.700(5)(e).

The conditions prohibiting Lynch from *possessing* alcohol and from remaining out of places where alcohol is the chief item for sale are not crime-related and must be stricken. O'Cain, 144 Wn. App. at 775. Alcohol had nothing to do with this crime. There was no alcohol present during NA activities and none was present on the night in question. 2RP

13, 56. There was no evidence Lynch drank alcohol in association with the events in question.

c. The Condition Requiring Lynch To Provide Copies Of All Prescriptions To The Community Corrections Officer Must Be Stricken.

As a condition of community custody, the court ordered Lynch to "provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours." CP 13. Appendix "F" contained the same condition. CP 22. The court lacked authority to impose it.

Under former RCW 9.94A.703(3)(d), the trial court may order the defendant to "perform affirmative conduct *reasonably related* to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." (emphasis added). This language necessarily permits the court to examine the factual context of the crime before imposing an affirmative condition.

Thus, a trial court has statutory authority to order Lynch to provide copies of prescriptions to the community corrections officer (CCO) if the circumstances of the crime involve drug prescriptions, use of prescribed drugs or, more generally, the use of drugs. No such evidence appears in this record. This prescription requirement does not reasonably relate to the risk of reoffense or safety of the community because the record does not show Lynch used drugs, let alone that use of any drug presented a

danger to others. Cf. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and conviction for delivering marijuana).

In Motter, a condition requiring notification "when a controlled substance or legend drug has been medically prescribed" was deemed proper. Motter, 139 Wn. App. at 805. The court reasoned it "relates to Motter's risk of reoffending and the community's safety because Motter admits that his drug abuse led him to commit crimes." Id. at 805; see also State v. Kolesnik, 146 Wn. App. 790, 807, 192 P.3d 937 (2008) (affirming same condition, reasoning "the rationale for this crime-related prohibition relates to Kolesnik's risk of reoffending and community safety because Kolesnik's commission of the crime was facilitated by a combination of his substance abuse and antisocial personality disorder."). There is no such evidence of drug use in Lynch's case and therefore the condition is not reasonably related.

The Motter court also noted the condition at issue there protected Motter from being found in violation of his community custody conditions for taking a lawful prescription drug because the Department of Corrections needed to know which drugs Motter lawfully takes in order to accurately assess his urinalysis tests. Motter, 139 Wn. App. at 805. There

is no such justification in Lynch's case. Lynch was not subject to urinalysis testing as a condition of community custody and therefore not in danger of being found in danger of violating community custody if he did not present his prescriptions to his CCO.

The bottom line, though, is that the court simply lacks authority to impose the condition if it condition does not reasonably relate to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. Former RCW 9.94A.703(3)(d). The condition must be stricken as unauthorized by statute, regardless of whether the condition could otherwise be said to protect an offender in some sense.

It must be noted, however, that there is something distinctly perverse about justifying a community custody condition by claiming the condition operates to the benefit of the defendant. A term of community custody constitutes punishment because it "imposes significant restrictions on a defendant's constitutional freedoms." State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405 (1996). The failure to comply with a condition of community custody subjects the offender to burdensome sanctions and serious loss of liberty. See, e.g., RCW 9.95.425 (setting forth possible sanctions for sex offender supervision violations); RCW 9.95.435(1) and (2) (released offender may be forced to serve remaining portion of sentence in more restrictive confinement; sanctions including 60 days

confinement for each violation); RCW 9.94A.631(1) (offender may be arrested without warrant for any violation of community custody).

The mere existence of a community custody condition exposes an offender to legal liability. An offender such as Lynch could be confined for failing to provide prescriptions to the CCO even when those prescriptions themselves are entirely lawful. In that circumstance, the offender is not being protected from anything. He is being punished for no reason other than a community custody condition required him to perform an affirmative act that had nothing to do with the offense at issue.

d. The Condition Requiring Lynch To Pay Counseling Costs Must Be Stricken.

As a condition of community custody, the court ordered "You shall pay the cost of counseling to the victim which is required as a result of your crime or crimes." CP 13, 23. Former RCW 9.94A.703 authorized the court to impose numerous conditions on Lynch's community custody. But it did not authorize the court to require Lynch to pay the costs of counseling for the victim as a condition of community custody.

Such costs can only be imposed as part of a restitution order under RCW 9.94A.753(3). No restitution was imposed. 4RP 29 (2/1/11). The Sentencing Reform Act does not authorize the court to impose restitution

for counseling expenses as a condition of community custody under these circumstances.

Numerous statutory and constitutional safeguards surround the legitimate imposition of restitution. See In re Pers. Restraint of Sappenfield, 92 Wn. App. 729, 742, 964 P.2d 1204 (1998) (due process requires notice and a hearing before the court may imposed the obligation to pay restitution); State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004) (State has the burden of establishing, by preponderance of evidence, causal connection between restitution requested and crime), aff'd, 155 Wn.2d 272, 119 P.3d 350 (2005); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (due process requires defendant have opportunity to rebut evidence presented at restitution hearing and evidence must be reasonably reliable); RCW 9.94A.030(41) (restitution must be for specific sum).

The trial court cannot circumvent those safeguards by ordering counseling costs as a condition of community custody. Allowing the court to impose such costs as a condition of community custody would render the restitution statute superfluous. See Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

Moreover, "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). If the condition is left to stand as part of the judgment and sentence, the community corrections officer ultimately tasked with abiding by the judgment and sentence when Lynch's community custody term begins will be laboring under a misapprehension of what is required. The condition related to counseling costs should be stricken.

D. CONCLUSION

For the reasons stated, Lynch requests that this court reverse the convictions. In the event it declines to do so, then the challenged community custody conditions should be stricken.

DATED this 29th day of July 2011

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

State &
Tamara Stone

Plaintiff(s),

vs.

Jeffrey Lynch

Defendant(s).

NO. 09-1-00253-0

INQUIRY FROM THE JURY
AND COURT'S RESPONSE

FILED
CLALLAM COUNTY
2010 OCT 27 PM 3:52
BARBARA D. [unclear]

JURY INQUIRY: It seems contradictory re: burden of proof law.

(1) State needs to prove beyond reasonable doubt re: 52nd degree rape charge (pg. 4) (2) The defendant has the burden of proof re: that the sexual intercourse or sexual contact was consensual.

Does the defendant bear the burden of proving that indecent liberties did not occur?

[Signature]
PRESIDING JUROR

pg. 11, 12, 13, 16

Do we assume indecent liberties occurred unless evidence shows us otherwise?

DATE AND TIME RECEIVED: 12:15 10/27/10 GT

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD)

The state has the burden of proving each of the elements of each crime beyond a reasonable doubt.

The defendant's burden of proof as stated in Inst. 116 is by a preponderance of the evidence and that burden of proof is limited to consent only.

[Signature]
JUDGE

DATE AND TIME RETURNED TO JURY: 1:40pm 10/27/10

DO NOT DESTROY
SAVE - MUST BE FILED

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
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State Jeffrey Lynch

No. 41749-9-II

Certificate of Service by Mail

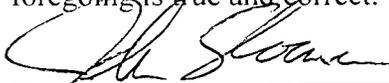
On July 29, 2011, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Brian Wendt, DPA
Clallam County Prosecutor's Office
223 E 4th St, Ste 11
Port Angeles WA 98362-3000

Jeffery Lynch 344620
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Containing a copy of the brief of appellant, re Jeffrey Lynch.
Cause No. 41749-9-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch

7-29-11
Date
Done in Seattle, Washington

FILED
COURT OF APPEALS
DIVISION II
11 AUG - 1 AM 10:00
STATE OF WASHINGTON
BY DEPUTY