SUPREME COURT NO. 87882-0
COA NO. 41749-9-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY LYNCH,

Petitioner.

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 12 AM 11:46
STATE OF WASHINGTON
BY
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George L. Wood, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jeffrey Lynch, the appellant below, asks this Court to review the following Court of Appeals decision, referred to in Section B.

B. COURT OF APPEALS DECISION

Lynch requests review of the decision in State v. Lynch, Court of Appeals No. 41749-9-II (slip op. filed August 9, 2012), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Where the defense theory of the case is that the State failed to prove the "forcible compulsion" element of the second degree rape charge, did the trial court violate the defendant's right to control his own defense in instructing the jury on an affirmative defense of consent over the defendant's objection?

2. When the accused in a criminal case properly raises a defense that negates an element of the charged crime, does due process require the prosecution to disprove that defense?

3. Whether reversal of the rape conviction is required because jury instructions did not make the relevant legal standard on burden of proof manifestly clear, including the requirement that the jury must consider defense evidence of consent in relation to whether the State proved the element of forcible compulsion?

D. STATEMENT OF THE CASE

The State charged Lynch with one count of second degree rape and one count of indecent liberties. CP 84-85. Consistent with his testimony, Lynch's defense to the rape charge was that the complaining witness consented to sexual intercourse and, as a result, the State could not prove the "forcible compulsion" element of the crime beyond a reasonable doubt. 2RP 102-06; 3RP 25-28, 36-37. His defense to the indecent liberties charge was that the contact forming the basis for that charge never happened. 2RP 113; 3RP 27-28, 36-37. Over defense objection, the trial court granted the State's request to instruct the jury on the affirmative defense of consent for both counts. 2RP 155; 3RP 4-10; CP 66 (Instruction 16).

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.

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. 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.

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 defense objection. CP 39-44, 45-46. The court denied the motion. 4RP 4-16; CP 24-26.

On appeal, Lynch argued both convictions must be reversed because the trial court violated Lynch's right to control his own defense in instructing the jury on an affirmative defense on consent over his objection. Brief of Appellant (BOA) at 10-33; Reply Brief (RB) at 1-5. Lynch further argued the affirmative defense instruction unconstitutionally shifted the burden of proof and the instructions did not make the law manifestly clear to the jury. BOA at 33-38.

The Court of Appeals reversed the indecent liberties conviction, reasoning it is error to instruct the jury on an affirmative defense where

there is no evidence to support the defense. Slip op. at 11-12. The Court of Appeals affirmed the rape conviction, holding the trial court did not err in instructing the jury on the affirmative defense of consent in relation to the rape charge because Lynch supplied the factual predicate for the instruction. Slip op. at 10. The Court of Appeals further held the affirmative defense instruction on consent did not shift the burden of proof. Slip op. at 7. Lynch seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER A CRIMINAL DEFENDANT HAS A RIGHT TO CONTROL HIS OWN DEFENSE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT.

The trial judge instructed the jury on the affirmative defense of consent over Lynch's objection. Every competent defendant has a constitutional right under the Sixth Amendment to the United States Constitution to broadly control his own defense. State v. Jones, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (citing Faretta v. California, 422 U.S. 806, 836, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); North Carolina v. Alford, 400 U.S. 25, 33, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979)). As part of the constitutional right to control one's defense, neither the State nor the trial court may compel a

defendant to raise or rely on an affirmative defense. Jones, 99 Wn.2d at 740; State v. McSorley, 128 Wn. App. 598, 605, 116 P.3d 431 (2005).

In State v. Coristine (No. 86145-5), this Court granted review of the issue of whether a trial court could lawfully impose an affirmative defense upon a defendant who objected to the defense. Lynch's case presents the same basic issue. Review is appropriate because this case presents a significant question of constitutional law under RAP 13.4 (b)(3), as demonstrated by this Court's decision to review the issue in Coristine.

In affirming Lynch's rape conviction, the Court of Appeals relied on the reasoning found in Division Three's Coristine decision. Slip op. at 10 (citing State v. Coristine, 161 Wn. App. 945, 252 P.3d 403, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011)). Specifically, the Court of Appeals reasoned a trial court does not violate a defendant's right to control his own defense by instructing the jury on an affirmative defense over the defendant's objection where the defendant provides evidence to support an affirmative defense instruction. Slip op. at 10 (citing Coristine, 161 Wn. App. at 951).

That reasoning is infirm. Jones and McSorley establish Lynch has the right to control his own defense and the trial court cannot impose an affirmative defense on an unwilling defendant. 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 or the prosecution, has the power to control the defense presented to the jury. The court cannot hijack a defendant's trial strategy by forcing him to assume an unwanted burden of proof.

Neither McSorley nor Jones held the right to control one's defense disappears if a defendant presents evidence that could be used to support an affirmative defense. Review is warranted because the Court of Appeals decision conflicts with Jones and McSorley. RAP 13.4(b)(1), (2).

The Court of Appeals opined Lynch raised the affirmative defense of consent in testifying his accuser consented to the sexual intercourse. Slip op. at 10. This is untrue. "An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so." State v. Fry, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). Lynch did not admit he committed the criminal act of rape. Lynch's defense to the rape charge was that the State failed to prove the forcible compulsion element beyond a reasonable doubt because evidence of consent undermined that element. 3RP 4-5, 25-28, 31, 36-37. His defense theory was not that he proved consent by a preponderance of the evidence. The defense did not want to be saddled with the burden of proving anything. The trial court foisted that defense upon Lynch through the unwanted instruction presenting an

affirmative defense to the jury. This was error. 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.

2. WHETHER THE AFFIRMATIVE DEFENSE INSTRUCTION ON CONSENT VIOLATED DUE PROCESS BY UNCONSTITUTIONALLY SHIFTING THE BURDEN OF PROOF IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

This Court has held a jury instruction that places the burden of proving consent on the defendant in a rape case where forcible compulsion is an element of the crime does not unconstitutionally shift the burden of proof onto the defendant. State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989); see also State v. Gregory, 158 Wn.2d 759, 802-04, 147 P.3d 1201 (2006) (reaffirming Camara). The time has come to re-examine this precedent and overturn it.

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); U.S. Const. amend XIV; Wash. Const. Art. I, § 3. Regardless of legislative intent as expressed through statute, imposing a burden of proof on criminal defendants must pass constitutional requirements. This Court has held on a number of occasions

that 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).

Notwithstanding this precedent, the Court in Camara held due process permits requiring a defendant to prove consent in a rape case, even though it is the "conceptual opposite" of the element of forcible compulsion. Camara, 113 Wn.2d at 637, 639. Camara acknowledged proof of consent negates proof of forcible compulsion. Camara, 113 Wn.2d at 640. 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 (Instruction 10) ("Forcible compulsion means physical force that overcomes resistance."); RCW 9A.44.010(6). It is in this sense that proof of consent negates the element of forcible compulsion. Camara nonetheless concluded "assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense 'negates' an element of a crime." Camara, 113 Wn.2d at 639-40.

Since deciding Camara, however, this Court has continued to rely on the "negates" analysis 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 logic driving such application is simple and irrefutable: where a defense negates an element of the charged crime, the prosecution necessarily cannot prove that element beyond a reasonable doubt without disproving the defense. The prosecution is relieved of its burden to establish every element beyond a reasonable doubt if it need not disprove a defense that negates an element of the charged crime. This Court has never explained why the defense of consent in a rape by forcible compulsion case should be the lone exception to the constitutional rule that the accused cannot be required to prove an affirmative defense that negates an element of the State's case.

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 an Ohio

statute requiring the defendant to prove self-defense by a preponderance of the evidence did not violate due process where it tended but did not necessarily shift the burden of disproving any element of the state's case to the defendant. Martin, 480 U.S. at 233-34. Martin expressly and pointedly 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.

The United States Supreme Court subsequently reaffirmed use of the "negates" analysis in 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 continuing use of the "negates" analysis confirms it is the correct analysis in determining whether the burden of proof has unconstitutionally shifted.

In any event, consent necessarily negates a fact — forcible compulsion — that the State must prove beyond a reasonable doubt. Martin does not apply to this scenario because the defense in Martin did not necessarily negate an element. Martin, 480 U.S. at 234. Evidence of consent in this case does more than just "tend" to disprove an element of the crime: it necessarily negates the element of forcible compulsion. 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.

Since Martin was decided, the majority of federal circuits hold or affirm the principle that due process requires the prosecution to disprove any properly raised defense that negates an element of the crime.[1]

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[1] See, e.g., United States v. Moore, 651 F.3d 30, 89 (D.C. Cir. 2011) ("[W]hen a defendant raises . . . a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove the defense."); United States v. Leahy, 473 F.3d 401, 403, 409 (1st Cir. 2007) ("we hold that where . . . proof of the justification defense does not negate an element of the charged crime, the burden of proof in connection with that defense rests with the defendant" but if a defense "negate[s] an element . . . the burden of disproving the defense would rest on the prosecution."), cert. denied, 552 U.S. 947, 128 S. Ct. 374, 169 L. Ed. 2d 259 (2007); United States v. Leal-Cruz, 431 F.3d 667, 671 (9th Cir. 2005) ("[W]e conclude that the Due Process Clause forbids shifting the burden of proof to the defendant on an issue only where establishing the defense would necessarily negate an element that the prosecution must prove beyond a reasonable doubt under Winship."); United States v. Brown, 367 F.3d 549, 556 (6th Cir. 2004) ("[I]f an affirmative defense bears a necessary relationship to an element of the charged offense, the

Numerous state courts after Martin likewise recognize a defendant may not be constitutionally saddled with proving an affirmative defense that negates an element of the prosecution's case.[2] These federal and state court decisions constitute red flags that Camara was wrongly decided.

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burden of proof does not shift to defendant."); United States v. Deleveaux, 205 F.3d 1292, 1298 (11th Cir. 2000) ("if a defendant asserts a defense that has the effect of negating any element of the offense, the prosecution must disprove that defense beyond a reasonable doubt."), cert. denied, 530 U.S. 1264, 120 S. Ct. 2724, 147 L. Ed. 2d 988 (2000); United States v. Unser, 165 F.3d 755, 764 (10th Cir. 1999) ("when evidence has been produced of a defense which, if accepted by the trier of fact, would negate an element of the offense, the government must bear the ultimate burden of persuasion on that element, including disproving the defense."), cert. denied, 528 U.S. 809, 120 S. Ct. 40, 145 L. Ed. 2d 36 (1999); Humanik v. Beyer, 871 F.2d 432, 440 (3d Cir. 1989) (requiring the defendant to prove an element-negating defense violates due process because it frees the prosecution of the burden of establishing each constituent element of the crime charged beyond a reasonable doubt), cert. denied, 493 U.S. 812, 110 S. Ct. 57, 107 L. Ed. 2d 25 (1989); United States v. Johnson, 968 F.2d 208, 213-14 (2d Cir. 1992) (distilling this principle from United states Supreme Court precedent: "To be valid, an affirmative defense may not, in operation, negate an element of the crime which the government is required to prove; otherwise, there would be too great a risk that a jury, by placing undue emphasis on the affirmative defense, might presume that the government had already met its burden of proof. Such a presumption would, without question, violate due process."), cert. denied, 506 U.S. 964, 113 S. Ct. 436, 121 L. Ed. 2d 355 (1992); United States v. Toney, 27 F.3d 1245, 1250-51 (7th Cir. 1994) ("if a substantive defense negates an essential element of a crime, the prosecution must disprove the defense beyond a reasonable doubt.").

[2] See, e.g., State v. Drej, 233 P.3d 476, 481 (Utah 2010) ("Under the federal constitution, the legislature may assign the burden of proof for an affirmative defense to a defendant so long as the defense does not negate an element of the offense. Put another way, the state must shoulder the burden of proof on all affirmative defenses that act to negate an element of the charged offense."); State v. Powdrill, 684 So. 2d 350, 355-56 (La.

Due respect for the principle of stare decisis is appropriate. But this Court, especially in recent years, has not shied away from striking down precedent upon thoughtful re-examination. See, e.g., State v. Nunez, 174 Wn.2d 707, __P.3d__, 2012 WL 2044377 at *1 (2012) (overruling State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010)); State v. Abdulle, 174 Wn.2d 411, 412, 275 P.3d 1113 (2012) (overruling State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968)); State v. Siers, 174 Wn.2d 269, 271, 276, 274 P.3d 358 (2012) (overruling majority position in State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009)); State v. Barber, 170 Wn.2d 854, 856, 248 P.3d 494 (2011) (overruling State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988)).

This Court should grant review and do the same here. Camara is an anomaly. It is incorrect and inconsistent with this Court's other

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1996) (due process forbids requiring a defendant to prove any defense that "negates an essential element of the offense as defined by the legislature"); Barone v. State, 109 Nev. 778, 780, 858 P.2d 27 (Nev. 1993) (because self-defense negates the unlawfulness element of battery with a deadly weapon, requiring defendant to prove he acted in self-defense would violate due process by shifting the burden to the defendant of disproving an element of the charged offense); State v. Hage, 595 N.W.2d 200, 205 (Minn. 1999) (defendant cannot "be required to shoulder the burden of persuasion for her proffered defense when the mitigating circumstance or issue disproves or negates an element of the crime charged); State v. Baker, 154 Vt. 411, 414-15, 579 A.2d 479 (Vt. 1990) (where none of the necessity defense elements served to negate any of the elements of the crime that the State must prove, the State is not constitutionally required to bear the burden of disproving the necessity defense).

precedent on the issue of whether the defendant can be made to bear the burden of proving a defense that negates an element of the charged crime. Camara is also harmful because "where the defendant is required to prove the critical fact in dispute, [the result] is to increase further the likelihood of an erroneous . . . conviction." Mullaney v. Wilbur, 421 U.S. 684, 701, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); see also Winship, 397 U.S. at 363 (the reasonable doubt rule "is a prime instrument for reducing the risk of convictions resting on factual error."); Hankerson v. North Carolina, 432 U.S. 233, 242, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977) (Winship rule is "designed to diminish the probability that an innocent person would be convicted."). Review is warranted under RAP 13.4(b)(3).

3. WHETHER JURY INSTRUCTIONS FAILED TO MAKE THE LEGAL STANDARD CLEAR TO THE AVERAGE JUROR RAISES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The trial court here instructed the jury that the State bore the burden of proof on the elements of the crime and that Lynch bore the burden of proving consent. CP 47, 54, 57, 66. Contradictory and inconsistent instructions are inherently inadequate because they "create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner." Humanik, 871 F.2d at 442 (quoting Francis v. Franklin, 471 U.S. 307, 323 n.8, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985)).

When instruction telling the jury that the State has the burden of proving every element of the crime is coupled with one placing a burden on the defendant to prove an element-negating defense by a preponderance of the evidence, "the predictable result is more than merely confusion. In order to attribute some significance to the defendants' burden, a rational juror's only option is to conclude that the defendants' evidence concerning the subject matter of the 'affirmative defense' is to be considered only if the jury finds it persuasive, i.e., finds that the facts sought to be proved are more likely true than not true. It is clear from Martin that this is constitutionally impermissible." Humanik, 871 F.2d at 440-41.

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.

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 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 that permit 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 necessarily negates proof of forcible compulsion based on the evidence produced in Lynch's case. Confronted with that scenario, the jury expressed confusion over the burden of proof. CP 47. Lynch's case illustrates the infirmity of Camara.

Of additional relevance here, jury instructions are infirm when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990). Here, the trial court gave instruction on the State's burden of proof and Lynch's burden of proof, but did not clearly inform the jury that it could consider Lynch's evidence of consent with respect to the question of whether the State proved the rape was accomplished by forcible compulsion regardless of whether Lynch proved the affirmative defense of consent. CP 47, 54, 57, 66.

Even where it is constitutionally permissible to assign the burden of proof to the defendant on an issue relevant to both an affirmative defense and element of the crime, "the charge to the jury must make it clear that the jury can consider the defendants' evidence as it relates to the 'element of the crime' issue, which the government has the burden of proof beyond reasonable doubt, regardless of whether the jury believes the defendants' evidence more likely true than not true." Humanik, 871 F.2d at 440.

Jurors in Lynch's case were faced with what it expressly understood to be conflicting instructions on how to reconcile the respective burdens of proof. CP 47. In the absence of express instruction

directing otherwise, there is a reasonable possibility that jurors understood the instructions to preclude them from considering Lynch's evidence of consent on the issue of whether the State had met its burden of proving the element of forcible compulsion unless they first determined he had proven consent by a preponderance of the evidence. See Hicks v. United States, 707 A.2d 1301, 1303-04 (D.C. 1998) (reversible error occurred where trial court gave standard general instruction on government's burden of proof but did not inform jury that it could consider defendant's evidence of consent on question of whether government proved beyond a reasonable doubt that the act was accomplished by force) (citing Russell v. United States, 698 A.2d 1007, 1013 (D.C. 1997)). "[W]hen there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." Francis, 471 U.S. at 323 n.8.

The instructions here did not make the legal standard sufficiently clear. The instructions, when applied to the facts of this case, intractably muddied the issue of who properly bore the burden of proof and did not make it clear that Lynch's evidence of consent must be considered in relation to whether the State had proven the forcible compulsion element of the crime. This is a due process violation. U.S. Const. amend XIV; Wash. Const. Art. I, § 3. Review is warranted under RAP 13.4 (b)(3).

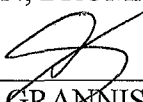
F. CONCLUSION

For the reasons stated above, Lynch respectfully requests that this Court grant review.

DATED this 10th day of September 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFREY THOMAS LYNCH, Appellant.	No. 41749-9-II UNPUBLISHED OPINION

VAN DEREN, J. — Jeffrey Thomas Lynch appeals his second degree rape and indecent liberties convictions, asserting that the trial court violated his constitutional right to control his defense by instructing the jury on the affirmative defense of consent over his objection. Lynch also contends that the trial court's affirmative defense instruction violated his due process rights by improperly shifting the burden of proof to him and confusing the jury. Lynch also appeals his sentence, asserting that the trial court did not have statutory authority to impose certain community custody conditions.[1] We affirm Lynch's second degree rape conviction but reverse the indecent liberties conviction because the trial court improperly gave an affirmative defense instruction and we remand to the trial court for further proceedings. Additionally, we accept the State's concessions and vacate portions of Lynch's sentence that impose community custody

[1] Lynch also challenges the sentence on his indecent liberties conviction, which challenge we do not address because we reverse that conviction and remand to the trial court.

conditions unrelated to his offense and remand for correction of the condition relating to possession of non-prescribed drugs.

FACTS

Lynch met TS through a Narcotics Anonymous (NA) support group in which they participated on the activities committee that planned drug-free and alcohol-free events for NA members. On May 9, 2009, TS; TS's two-year-old son; and two NA members, NS and HC,[2] went to Lynch's home to watch movies. The group drank coffee, talked, and listened to music; there were no drugs or alcohol present at the event. HC left Lynch's home before the group started a movie around 11:00 PM. Around this time, TS's son fell asleep and was put in Lynch's bed.

TS, NS, and Lynch sat on Lynch's couch and began watching a movie. TS and NS both fell asleep at the beginning of the movie. NS woke up sometime later and went to sleep in Lynch's bed, next to TS's son. Lynch and TS disagree on what happened next.

According to TS, she woke up on the couch and discovered that Lynch was on top of her with his hand down her pants and touching her pubic area. TS said that she grabbed Lynch's wrist and told him, "[N]o, uh uh," but Lynch forced his hand down her pants harder. Report of Proceedings (RP) (Oct. 26, 2010) at 36. TS further testified that after she attempted to remove Lynch's hand two or three times, Lynch forced his hand down harder and digitally penetrated her vagina. TS stated that she did not cry out because she knew her son was nearby. TS then "check[ed] out" and tried to fall asleep while Lynch continued to digitally penetrate her for 30 to 45 minutes. RP (Oct. 26, 2010) 18.

[2] We use initials to refer to NA members to preserve their anonymity.

TS woke up a short time later when Lynch again put his hand down her pants and digitally penetrated her vagina. Lynch had his penis exposed and took TS's hand and placed it on his penis. TS removed her hand, but Lynch put it back. TS "froze," and Lynch eventually "got up and smoked a cigarette in the doorway." RP (Oct. 26, 2010) at 20. TS then went back to sleep.

According to Lynch, he woke up on the couch with his head on TS's shoulder. Lynch began rubbing TS's thigh and she "woke up[, looked at him] and just kind of brushed it off." RP (Oct. 26, 2010) at 101. He lay there for awhile and started rubbing TS's thigh again "and at this point she was awake, she was looking in [Lynch's] eyes[,] and [he] was looking at her." RP (Oct. 26, 2010) at 101. Lynch and TS began mutually kissing each other. Lynch began rubbing TS's private area over her clothing. TS began moaning and continued to kiss him. After 10 minutes, he "stuck [his] hand inside her pants and moved down through her pubic area and started rubbing the inside of her thighs and [private] area." RP (Oct. 26, 2010) at 104. Lynch admitted that he digitally penetrated TS's vagina but that TS continued to kiss him and "was looking right into [his] eyes the whole time." RP (Oct. 26, 2010) at 105. He had his hand down TS's pants for about 10 minutes until she "[h]ad an orgasm." RP (Oct. 26, 2010) at 106. At that point, he "pulled [his] hand out and looked at her and kissed her and she smiled and that was it." RP (Oct. 26, 2010) at 106. He then went to sleep on the floor. Lynch denied putting his hand back inside TS's pants a second time and denied exposing his penis to TS at anytime.

At approximately 6:00 AM, TS woke up, left Lynch's home with her son, and drove to her home. NS woke up later and walked to TS's home. At TS's home, NS found TS curled up in bed and noticed that TS had been crying. She asked TS what was wrong, but TS did not tell her

why she was upset. The following day, TS told NS that she had been sexually assaulted. TS reported the incident to the police three weeks later.

Following the incident, TS received three text messages from Lynch that TS later forwarded to the police. In his text messages, Lynch apologized for ruining his friendship with TS but he did not admit committing a sexual assault. At trial, Lynch testified that he intended the text messages as an apology for "cross[ing] the line of a friendship by bringing sex into the friendship." RP (Oct. 26, 2010) at 137.

On June 10, 2009, police officers recorded a telephone conversation between TS and Lynch. During the recorded conversation, Lynch admitted that TS had pushed his hand away once, but he denied that she had pushed his hand away multiple times or that he was rough with her. Lynch also denied waking TS up a second time and denied putting TS's hand on his penis. Lynch agreed that what happened was wrong but indicated that he "thought it was mutual [but he] obviously misread it." Ex. 5 at 6.

Port Angeles Police Corporal Bruce Knight interviewed Lynch. During the recorded interview, Lynch admitted that he started rubbing TS's private area over her pants and that he was not sure whether she was awake. At trial, Lynch stated that he was nervous during the police interview and he denied touching TS's private area before she was awake. During the recorded interview, Lynch maintained that the sexual activity was mutual and he denied exposing his penis to her.

The trial court's "to convict" instruction for second degree rape stated:

> To convict the Defendant of the crime of RAPE IN THE SECOND DEGREE as charged in Count I, each of the following three 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 [TS];

> (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, if, 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.

Clerk's Papers (CP) at 57.

The trial court's "to convict" instruction for indecent liberties stated:

> 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 [TS] 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 [TS] 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, if, 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 at 62.

The trial court also gave a jury instruction defining forcible compulsion, stating, "Forcible compulsion means physical force that overcomes resistance." CP at 60. Over Lynch's objection, the trial court gave jury instruction 16 on the affirmative defense of consent that stated:

> 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 at 66.

During its deliberations, the jury submitted the following question to the trial court:

> It seems contradictory re: burden of proof law. (1) State needs to prove beyond reasonable doubt re: 2nd degree rape charge ([page] 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?
> [Pages] 11, 12, 13, 16[.]
>
> Do we assume indecent liberties occur[r]ed unless the evidence shows us otherwise?

CP at 47.

After discussing the jury question with the State and defense counsel, the trial court provided the following response:

> The [S]tate 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[ruction] 16 is by a preponderance of the evidence and that burden of proof is limited to consent only.

CP at 47.

The jury returned verdicts finding Lynch guilty of second degree rape and indecent liberties. Lynch unsuccessfully moved for a new trial asserting that the trial court erred by providing the jury with the affirmative defense instruction over his objection.

The trial court sentenced Lynch to a minimum term of 90 months on the second degree rape conviction and a minimum term of 74 months on the indecent liberties conviction. The trial court also imposed several community custody conditions, including (1) prohibiting Lynch from possessing or using non-prescribed drugs and drug paraphernalia, (2) prohibiting Lynch from possessing alcohol and entering places where alcohol is the chief item for sale, (3) requiring

Lynch to provide copies of all prescriptions to his community corrections officer within 72 hours, and (4) requiring Lynch to pay for the victim's counseling costs. Lynch timely appeals his convictions, his sentence, and some of his community custody conditions.[3]

ANALYSIS

I. AFFIRMATIVE DEFENSE INSTRUCTION

A. Due Process

Lynch first contends that instruction 16, the trial court's affirmative defense jury instruction, violated his due process rights by improperly shifting the burden of proof to Lynch to show consensual sexual contact and by failing to make the law clear to the jury. Lynch acknowledges that our Supreme Court rejected this argument in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006) and *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), but he asserts that *Gregory* and *Camara* were incorrectly decided. Lynch thus raises his due process argument here to preserve it for our Supreme Court's review. We hold that under *Gregory* and *Camara*, the trial court's affirmative defense instruction did not unconstitutionally shift the burden of proof to Lynch and did not fail to make the law clear to the jury. *Gregory* and *Camara* control the present analysis and we hold that Lynch's due process rights were not violated by the trial court's affirmative defense consent instruction.

B. Lynch's Right To Control His Defense

Lynch next contends that the trial court violated his constitutional right to control his defense by instructing the jury on the affirmative defense of consent over his objection. Because the consent instruction was consistent with Lynch's defense to second degree rape, which

[3] Because we reverse Lynch's indecent liberties conviction, we do not address his argument that the trial court's sentence exceeded the standard range when it imposed a 74-month minimum term on that conviction.

defense Lynch voluntarily chose to pursue at trial, we hold that the trial court's consent instruction did not violate Lynch's constitutional right to present a defense as it related to his second degree rape conviction. But the trial court erred by giving a consent instruction on the indecent liberties charge and, because the error was not harmless, we reverse Lynch's indecent liberties conviction.

We review an alleged error of law in jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). 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). Neither the State nor the trial court may compel a defendant to raise or rely on an affirmative defense. *State v. McSorley*, 128 Wn. App. 598, 605, 116 P.3d 431 (2005). When considered as a whole, jury instructions are sufficient if they allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law. *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011). A trial court errs when it gives a jury instruction the evidence does not support. *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). We assume that a jury instruction the evidence does not support is prejudicial unless it affirmatively appears to be harmless. *State v. Soper*, 135 Wn. App. 89, 102, 143 P.3d 335 (2006).

In *Jones*, the State charged the defendant with second degree assault while armed with a firearm. 99 Wn.2d at 737. The trial court found that Jones was competent to stand trial but granted the State's motion to enter a plea of not guilty by reason of insanity (NGI) over Jones's objection. *Jones*, 99 Wn.2d at 739. The jury returned a verdict finding that Jones was insane when he committed the charged crime and committed him to Western State Hospital. *Jones*, 99 Wn.2d at 738-39. Our Supreme Court reversed Jones's conviction and commitment, holding that

the trial court violated Jones's right to control his defense by entering the NGI plea over his objection. *Jones*, 99 Wn.2d at 747.

In holding that "a defendant has a *constitutional* right to at least broadly control his own defense," the *Jones* court relied on a United State Supreme Court case, *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), which held that a defendant has the right to self-representation under the federal constitution's Sixth Amendment. 99 Wn.2d at 740. The *Jones* court reasoned, "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.'" 99 Wn.2d at 740 (citations omitted) (quoting *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979), *aff'd*, 667 F.2d 362 (1981)). The *Jones* court further reasoned, "A defendant who is not guilty because of insanity is no more blameless than a defendant who has a valid alibi defense or who acted in legitimate self-defense. Yet courts do not impose these other defenses on unwilling defendants." 99 Wn.2d at 743.

In *McSorley*, the State charged the defendant with child luring. 128 Wn. App. at 600. At trial, McSorley testified that he twice drove by the alleged victim's bus stop on the way to a medical appointment but otherwise denied the State's allegations. *McSorley*, 128 Wn. App. at 603. McSorley objected to the State's proposed affirmative defense instruction, asserting that the instruction violated his right to control his defense and claiming that the instruction would confuse the jury by "imposing on him the burden of proving facts not in issue." *McSorley*, 128 Wn. App. at 603. Following *Jones*, we held that the trial court violated McSorley's constitutional right to control his defense by instructing the jury on the child luring affirmative defense over the McSorley's objection. *McSorley*, 128 Wn. App. at 605.

1. Second Degree Rape

Lynch asserts that *Jones* and *McSorley* require reversal of his second degree rape conviction because the trial court compelled him to rely on an affirmative defense over his objection. But Lynch reads *Jones* and *McSorley* too broadly and, unlike in *Jones* and *McSorley*, here Lynch argued that he and TS had consensual sexual contact, evidence that supported the challenged jury instruction as it related to his second degree rape charge. Thus, the trial court did not compel Lynch to rely on a defense over his objection but, rather, provided the jury with a complete and accurate statement of the law regarding a defense that Lynch raised at trial.

Division Three of our court recognized this distinction in *State v. Coristine*, 161 Wn. App. 945, 951, 252 P.3d 403, *review granted*, 172 Wn.2d 1014 (2011),[4] where it held that the trial court did not violate the defendant's right to control his defense when it provided a "'reasonable belief'" instruction over the defendant's objection because the defendant provided evidence to support that instruction. Like *Coristine*, Lynch "supplied the factual predicate for the [consent instruction] but did not want the legal implications of that factual predicate." 161 Wn. App. at 951. But where, as here, a criminal defendant chooses to present evidence supporting a defense to a charged crime, a trial court does not violate the defendant's right to control his or her defense by providing the jury with instructions that accurately state the law regarding the defense. Accordingly, the trial court did not err in giving the affirmative defense instruction relating to consent and Lynch's claim fails with regard to his second degree rape conviction.

[4] Our Supreme Court heard oral arguments on Coristine's appeal on June 26, 2012.

2. Indecent Liberties

Lynch did not, however, present any evidence supporting a consent instruction on the indecent liberties charge. Instead, he relied on a general denial, asserting that he did not expose his penis to TS and that he did not cause TS to have sexual contact with him. Accordingly, the trial court erred by instructing the jury on the affirmative defense of consent as it related to the indecent liberties charge.

In its briefing, the State conceded that the trial court erred by giving a consent instruction relating to the indecent liberties charge but it asserted that the error was harmless because "the challenged instruction did not come into play until the jury first found the State had proved each element of second-degree rape and indecent liberties."[5] Br. of Respondent at 18. We accept the

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[5] At oral argument, the State withdrew its concession and asserted that the trial court properly gave a consent instruction on the indecent liberties charge because the evidence at trial supported the instruction. Wash. Court of Appeals, *State v. Lynch*, No. 41749-9-II, oral argument (May 18, 2012), at 12 min, 50 sec. (on file with court). Specifically, the State argued that Lynch's admitted conduct when he first digitally penetrated TS formed the basis for the indecent liberties charge. But the record clearly indicates that the State relied on Lynch's conduct after TS awoke to find him penetrating her a second time and placing her hand on his exposed penis to form the basis of the indecent liberties charge. And Lynch clearly denied having committed this conduct:

> [Defense counsel:] Did you hear [TS] testify that after the first incident when you put your hand down her pants, she awoke again to find you on top of her with your hand down her pants?
> [Lynch:] I heard her say that, yes.
> [Defense counsel:] Did that happen?
> [Lynch:] Absolutely not, I was asleep on the floor.
> [Defense counsel:] And did you ever during May 9th or 10th, did you ever have your penis outside your pants?
> [Lynch:] No.
> [Defense counsel]: Did you ever – did [TS] ever touch your penis on May 9th or 10th?
> [Lynch:] Absolutely not.
> [Defense counsel]: Did you do anything to try to force her to touch your penis?
> [Lynch:] No.

RP (Oct. 26, 2010) at 113.

State's concession but hold that the error was not harmless. Accordingly, we reverse Lynch's indecent liberties conviction.

Here, the jury clearly expressed confusion over the trial court's instructions when it asked, "Does the defendant bear the burden of proving that indecent liberties did not occur?" and "Do we assume indecent liberties occurred unless evidence shows us otherwise?" CP at 47. The jury's questions strongly suggest that it believed it could not acquit Lynch of indecent liberties unless he presented convincing evidence of TS's consent to indecent liberties, which evidence Lynch was neither required to produce nor could he produce in light of his general denial of the indecent liberties charge.

The trial court's response that "[t]he defendant's burden of proof as stated in Inst[ruction] 16 is by a preponderance of the evidence and that burden of proof is limited to consent only" did not alleviate the jury's confusion as to the indecent liberties charge because it merely emphasized a burden of proof that Lynch did not bear. CP at 47. Accordingly, we cannot "'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error'" and we reverse Lynch's indecent liberties conviction and remand to the trial court. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

II. COMMUNITY CUSTODY CONDITIONS

Lynch also contends that the trial court lacked statutory authority to impose several community custody conditions. The State concedes error on all but one of his challenges, which concessions we accept.

With regard to the order that Lynch must provide his prescriptions to his community corrections officer to monitor compliance with the mandatory condition that prohibits him from

possessing or consuming controlled substances under former RCW 9.94A.700(4)(c) (2003),[6] the State argues that we should affirm the condition. Because the imposed condition was not shown to be related to Lynch's offense, we vacate this condition along with the others raised and remand for the trial court to correct the conditions as necessary or to strike them from the judgment and sentence. We only briefly address each of Lynch's challenges.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A trial court may only impose a sentence that is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). We review de novo whether a trial court exceeded its statutory authority in imposing a condition of community custody. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The statute applicable to Lynch's sentence for his second degree rape conviction, former RCW 9.94A.712(6)(a)(i) (2006),[7] provides:

> Unless a condition is waived by the court, the conditions of community custody shall include those provided for in [former] RCW 9.94A.700(4). The conditions may also include those provided for in [former] RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.

And former RCW 9.94A.700(4) provides in relevant part:

> Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:
>
> . . . .
>
> (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions[.]

[6] Former RCW 9.94A.700 was recodified as RCW 9.94B.050, effective August 1, 2009. LAWS OF 2008, ch. 231, § 56.

[7] Former RCW 9.94A.712 was recodified as RCW 9.94B.507, effective August 1, 2009. LAWS OF 2008, ch. 231, § 56.

Former RCW 9.94A.700(5) provides in relevant part:

> As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:
>
> . . . .
>
> (d) The offender shall not consume alcohol; or
> (e) The offender shall comply with any crime-related prohibitions.

A. Prohibition on Alcohol Possession

Lynch contends that the trial court lacked statutory authority to impose a community custody condition prohibiting him from possessing alcohol or entering places where alcohol is the chief item of sale.[8] The State concedes that the trial court erred in ordering this condition of community custody.

Although former RCW 9.94A.700(5)(d) expressly authorizes a trial court to prohibit the consumption of alcohol as a community custody condition regardless of whether alcohol contributed to the offense, a trial court may not prohibit an offender from possessing alcohol or entering places where alcohol is the chief item of sale absent evidence that alcohol contributed to the offense. *State v. McKee*, 141 Wn. App. 22, 34, 167 P.3d 575 (2007). Here, there was no evidence that alcohol contributed to Lynch's offense. Accordingly, we accept the State's concession and remand to the trial court to remove this community custody condition.

B. Prohibition on Non-prescribed Drugs

Lynch also contends that the trial court lacked statutory authority to impose a community custody condition prohibiting him from possessing or consuming non-prescribed drugs. Lynch acknowledges that the trial court was required under former RCW 9.94A.700(4)(c) to order a community custody condition prohibiting Lynch from possessing or consuming controlled

[8] Lynch does not contend that the trial court erred by imposing a community custody condition prohibiting him from *consuming* alcohol under former RCW 9.94A.700(5)(d).

substances, but he argues that the trial court exceeded its statutory authority by prohibiting the possession or consumptions of non-prescribed drugs. The State concedes that the trial court erred in ordering this condition of community custody. Because the trial court's prohibition on non-prescribed drugs may encompass items that are not controlled substances—such as aspirin and other over-the-counter drugs—we accept the State's concession and remand to the trial court to modify this community custody condition to include only non-prescribed controlled substances.

C. Possession of Drug Paraphernalia

Next, Lynch contends that the trial court lacked statutory authority to impose a community custody condition prohibiting him from possessing drug paraphernalia. The State concedes that the trial court erred in ordering this condition of community custody because the prohibition is not related to Lynch's crimes.

Former RCW 9.94A.700(5)(e) authorizes a trial court to prohibit an offender from possessing drug paraphernalia only where the conviction was related to drugs or substance abuse. *See State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). But here there was no evidence that drugs or substance abuse contributed to Lynch's offenses. Accordingly, we accept the State's concession and remand to the trial court to strike this community custody condition.

D. Providing Copies of Prescribed Medications to Community Corrections Officer

Next, Lynch contends that the trial court lacked statutory authority to impose a community custody condition requiring him to provide copies of prescribed medications to his community corrections officer. We agree.

Former RCW 9.94A.712(6)(a)(i) authorizes a trial court to order an offender to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of

reoffending, or the safety of the community." Here, there was no evidence that Lynch's use of non-prescribed medications contributed to his offense and, thus, the trial court lacked authority to order Lynch to perform the affirmative act of providing copies of his prescribed medications to his community corrections officer under this provision. The State concedes that former RCW 9.94A.712(6)(a)(i) does not authorize the trial court's imposition of this challenged community custody condition, but it argues that such a condition was authorized under former RCW 9.94A.030(13) (2008), the provision defining "crime related prohibition."

Former RCW 9.94A.030(13) defined "crime related prohibition" as

> an order of a court prohibiting conduct that directly relates to the 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. *However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.*

(Emphasis added.)

The State asserts that the trial court was authorized to require Lynch to provide his prescriptions to his community corrections officer to monitor compliance with the mandatory condition that prohibits him from possessing or consuming controlled substances under former RCW 9.94A.700(4)(c). The State does not cite any case holding that the "crime-related prohibition" definition provision allows a trial court to order affirmative conduct to monitor compliance with a community custody condition that is not crime-related.

In interpreting a statutory provision, we look to the "ordinary meaning of the language at issue, as well as . . . the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Former RCW 9.94A.030(13)'s provision authorizing a trial court to impose affirmative

conduct to monitor compliance with the order of a court does not expressly require nor prohibit the trial court from ordering affirmative conduct to monitor compliance with a community custody condition that is not crime-related. But because this language authorizing affirmative conduct is found within a provision defining "crime-related prohibition" as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted," we hold that former RCW 9.94A.030(13) authorizes a trial court to impose affirmative conduct only when necessary to monitor compliance with a crime-related prohibition.

Additionally, if we were to accept the State's argument, former RCW 9.94A.712(6)(a)(i)'s provision authorizing a trial court to order "affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community" would be "'superfluous, void, or insignificant'" because the trial court could order affirmative conduct, whether related or unrelated to the circumstances of the offense, under former RCW 9.94A.030(13). *State v. Pannell*, 173 Wn.2d 222, 230, 267 P.3d 349 (2011) (quoting *Grp. Health Coop. of Puget Sound v. King County Med. Soc'y*, 39 Wn.2d 586, 637, 237 P.2d 737 (1951)). Accordingly we remand to the trial court to remove this community custody condition.

E. Payment of Victim's Counseling Costs

Lynch also contends that the trial court lacked statutory authority to impose a community custody condition requiring him to pay TS's counseling costs. The State concedes that the trial court erred in ordering this community custody condition. Although a trial court may order an offender to pay the victim's counseling costs under a provision of the restitution statute, RCW 9.94A.753(3), it does not have statutory authority to impose payment of a victim's counseling costs as a condition of community custody. *See* former RCW 9.94A.712(5), (6)(a)(i); former

RCW 9.94A.700(4), (5). Accordingly, we accept the State's concession and remand to the trial court to remove this community custody condition.

We hold that the trial court did not err in giving an affirmative defense jury instruction on the second degree rape charge and we, therefore, affirm Lynch's second degree rape conviction; but we hold that the evidence did not support giving an affirmative defense instruction on the indecent liberties charge and we, therefore, reverse Lynch's indecent liberties conviction and remand to the trial court for further proceedings. We also remand to the trial court for correction of or striking or removing community custody conditions as set forth in this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Van Deren, J.
VAN DEREN, J.

We concur:

Quinn-Brintnall, P.J.
QUINN-BRINTNALL, J.

PENOYAR, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. JEFFREY LYNCH, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 41749-9-II

DECLARATION OF SERVICE

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

THAT ON THE 10TH DAY OF SEPTTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEWIS SCHRAWYER
CLALLAM COUNTY PROSECUTOR'S OFFICE
223 E. 4TH STREET, SUITE 11
PORT ANGELES, WA 98362

[X] JEFFREY LYNCH
DOC NO. 344620
CLALLAM BAY CORRECTIONS CENTRER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 SEP 10 PM 4: 04

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF SEPTEMBER, 2012.

x Patrick Mayovsky

Kevin & Rebecca Harris
231 Cougar Ridge Road
Port Townsend, WA 98368
360.990.2923
harriskevint@gmail.com

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 12 AM 11:45
STATE OF WASHINGTON
BY DEPUTY

WASHINGTON STATE COURT OF APPEALS
DIVISION 2

KEVIN T. HARRIS and REBECCA S. HARRIS, husband and wife, Plaintiffs, v. Verity Credit Union, NW Trustee Services, Inc. Defendants.	Case # D2 438577 Re: Jefferson County 12-2-00092-1 **MOTION FOR EXTENSION OF TIME TO PAY FILING FEE**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 SEP 10 PM 4:47

Kevin Harris and Rebecca Harris, plaintiffs, OBJECTING to the Clerk's Motion to Dismiss for failure to pay the filing fee and MOVING the court to extend the time required for the payment of the filing fee from September 10 2012 until September 24, 2012. The reason for the request is that the parties have reached a settlement agreement and the extension of time will allow the parties to prepare, review and sign the appropriate documents dismissing all actions between the parties before the court.

KEVIN HARRIS, PRO SE
19056 Harris Ave. NE
Suquamish, WA 98292
360.990.2923
harriskevint@gmail.com

A settlement between the parties will serve to prevent any further resources of the court being consumed in this matter.

Dated this 10th Day of September 2012.

/s/ Kevin Harris /s/

Kevin Harris, Plaintiff
–Pro Se
19056 Harris Ave. NE
Suquamish, WA 98292
360.990.2923
harriskevint@gmail.com

CERTIFICATE OF SERVICE

I, Kevin Harris, declare that I am over 18 years of age and certify that on this date I served a true and correct copy of the MOTION FOR EXTENSION OF TIME TO PAY FILING FEE, on the following parties in the above-referenced action by the method indicated below:

NW Trustee Services	by mail	
c/o Heidi Buck, Attorney for the Defendant	in person	
Routh Crabtree and Olsen	by email	x
13555 SE 36TH Street,	facsimile	
Suite 300		
Bellevue, WA 98006	messenger	
P: 425-586-1900	overnight courier	
F: 425-586-1997		
VERITY CREDIT UNION	by mail	
c/o Heidi Buck, Attorney for the Defendant	in person	
Routh Crabtree and Olsen	by email	x
13555 SE 36TH Street,	facsimile	
Suite 300		
Bellevue, WA 98006	messenger	
P: 425.458.2121	overnight courier	
F: 425.458.2131		

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 SEP 10 PM 4:17

Dated on this 10TH day of September 2012.

/s/ Kevin Harris /s/

Kevin Harris

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FILED
COURT OF APPEALS
DIVISION II
2012 SEP 12 AM 11:46
STATE OF WASHINGTON
BY
DEPUTY

WASHINGTON STATE COURT OF APPEALS

DIVISION 2

Kevin T. Harris, and Rebecca S. Harris, husband and wife, Plaintiffs. v. Verity Credit Union, NW Trustee Services, Inc. Defendant.	Case # D2 438577 Re: Jefferson County 12-2-00092-1 **DECLARATION OF KEVIN HARRIS IN SUPPORT OF APPELANTS MOTION TO EXTEND TIME TO PAY FILING FEE**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 SEP 10 P 4:47

I Kevin T. Harris being over the age of 18 of sound mind and competent to testify in this matter based on personal knowledge declare under penalty of perjury the following in support of the plaintiffs motion to shorten time:

The parties to this matter have reached a settlement agreement which involves the agreed dismissal of this matter before the court. The parties need more time to prepare the documents, review the documents and sign the documents. If the court grants the extension, the parties should have this entire matter resolved and the case dismissed on or before September 24, 2012.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Dated this 10th Day of September, 2012.

/s/ Kevin Harris /s/

Kevin Harris, Pro Se

19056 NE Harris Ave.

Suquamish, WA 98292

KEVIN HARRIS, PRO SE
19056 NE Harris Ave.
Suquamish, WA 98292
360.990.2923
harriskevint@gmail.com

CERTIFICATE OF SERVICE

I, Kevin Harris, declare that I am over 18 years of age and certify that on this date I served a true and correct copy of the DECLARATION OF KEVIN HARRIS IN SUPPORT OF MOTION TO EXTEND TIME TO PAY FILING FEE, on the following parties in the above-referenced action by the method indicated below:

NW Trustee Services c/o Heidi Buck, Attorney for the Defendant Routh Crabtree and Olsen 13555 SE 36TH Street, Suite 300 Bellevue, WA 98006 P: 425-586-1900 F: 425-586-1997	by mail in person by email facsimile messenger overnight courier	 x
VERITY CREDIT UNION c/o Heidi Buck, Attorney for the Defendant Routh Crabtree and Olsen 13555 SE 36TH Street, Suite 300 Bellevue, WA 98006 P: 425.458.2121 F: 425.458.2131	by mail in person by email facsimile messenger overnight courier	 x

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 SEP 10 PM 4:17

Dated on this 10TH day of September 2012.

/s/ Kevin Harris /s/

Kevin Harris

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