

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.

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

The Honorable George L. Wood, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

| | | |
|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| A. | <u>ARGUMENT IN REPLY</u> | 1 |
| | 1. THE COURT VIOLATED LYNCH'S CONSTITUTIONAL RIGHT TO CONTROL HIS OWN DEFENSE BY INSTRUCTING THE JURY ON AN AFFIRMATIVE DEFENSE OVER HIS OBJECTION..... | 1 |
| | 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..... | 5 |
| | 3. THE COURT IMPOSED A NUMBER OF COMMUNITY CUSTODY CONDITIONS WITHOUT STATUTORY AUTHORITY..... | 6 |
| D. | <u>CONCLUSION</u> | 8 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| <u>Albin v. National Bank of Commerce of Seattle,</u> 60 Wn.2d 745, 375 P.2d 487 (1962)..... | 3 |
| <u>Columbia Park Golf Course, Inc. v. City of Kennewick,</u> 160 Wn. App. 66, 248 P.3d 1067 (2011)..... | 3 |
| <u>State v. Brown,</u> 132 Wn.2d 529, 940 P.2d 546 (1997)..... | 1 |
| <u>State v. Camara,</u> 113 Wn.2d 631, 781 P.2d 483 (1989)..... | 4 |
| <u>State v. Guloy,</u> 104 Wn.2d 412, 705 P.2d 1182 (1985)..... | 5 |
| <u>State v. Hughes,</u> 106 Wn.2d 176, 721 P.2d 902 (1986)..... | 3 |
| <u>State v. Kolesnik,</u> 146 Wn. App. 790, 192 P.3d 937 (2008)..... | 7 |
| <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)..... | 7, 8 |
| <u>State v. Rice,</u> 102 Wn.2d 120, 683 P.2d 199 (1984) | 5 |
| <u>State v. Schulze,</u> 116 Wn.2d 154, 804 P.2d 566 (1991)..... | 1 |

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

| | |
|----------------------------------|---|
| Former RCW 9.94A.700(4)(c)..... | 6 |
| Former RCW 9.94A.703(3)(d) | 8 |
| WPIC 42.02 | 2 |

A. ARGUMENT IN REPLY

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 State asserts the trial court never imposed an affirmative defense on Lynch, but rather simply "clarified any potential confusion the jury may have experienced regarding the legal sufficiency of the defense he present [sic] at trial." Brief of Respondent (BOR) at 17.

There is absolutely no reason to suppose a jury would be confused about the legal sufficiency of Lynch's defense in the absence of an affirmative defense instruction. Counsel's closing argument framed the issue of consent in terms of the State's failure to prove beyond a reasonable doubt that forcible compulsion occurred in relation to the rape count. 3RP 25-28. That argument is entirely proper. Without the affirmative defense instruction, the remaining instructions that were given encompass the defense theory of the case. See State v. Schulze, 116 Wn.2d 154, 168, 804 P.2d 566 (1991) (jury instructions are sufficient if, when viewed as a whole, they are adequate to explain the law and enable the parties to argue their theory of the case). There was no need for an affirmative defense instruction to avoid juror confusion regarding the legal propriety of the defense argument. 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.").

On the contrary, the presence of the affirmative defense instruction injected confusion into juror deliberation where none would have otherwise existed. From the jury's perspective, confusion arises only after considering an affirmative defense instruction that need not and should not have been given.

The State obliquely attempts to justify the affirmative defense instruction on the basis that defense counsel "proposed instructions that misstated the applicable law." BOR at 17 (citing CP 73). The State cites defense counsel's proposed "to convict" instruction for third degree rape as a lesser offense to second degree rape. CP 73. Contrary to the State's assertion, counsel's proposed instruction, taken directly from WPIC 42.02, was an entirely accurate statement of the law. Moreover, the court did not give counsel's proposed instruction to the jury because the evidence did not permit the jury to find only the lesser offense was committed. 2RP 154; 3RP 10-12. The State does not and cannot explain how a proposed instruction that was never given to the jury somehow justifies the affirmative defense instruction that was given to the jury.

The State elsewhere concedes the trial court erred in giving an affirmative defense instruction on consent in relation to the indecent liberties count because no evidence supported the instruction in relation to that count. BOR at 18. "[I]t is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) (citing Albin v. National Bank of Commerce of Seattle, 60 Wn.2d 745, 754, 375 P.2d 487 (1962) ("the giving of the instruction indicates to the jury that the court must have thought there was some evidence on the issue")). Washington courts consistently follow this rule. Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 90, 248 P.3d 1067 (2011) (citing Albin, 60 Wn.2d at 754).

The State nonetheless claims the error was harmless beyond a reasonable doubt as to *both* counts on the theory that the affirmative defense instruction did not come into play until the jury found the State proved each element of the crimes beyond a reasonable doubt. BOR at 18-19. It does not explain how reversal of the indecent liberties count can be avoided in light of the established precedent cited in the preceding paragraph.

The State's contention of harmlessness is flawed for additional reasons. First, the jury was *not* instructed that it needed to find the State

proved its case beyond a reasonable doubt before it could consider whether Lynch proved his affirmative defense. The court's instructions do not compel the sequence of deliberations presumed by the State.

Second, the State refuses to come to grips with the fact that proof of forcible compulsion and lack of consent are overlapping concepts. State v. Camara, 113 Wn.2d 631, 637, 640, 781 P.2d 483 (1989). It makes no sense to speak of the jury reaching one concept before the other comes into play. As a matter of irrefutable logic, they are in play at the same time.

The jury question expressing confusion over what was an element of the State's case versus what the defense needed to prove to secure acquittal only reinforces that point and fatally undermines the State's position. CP 47. The jury question is affirmative evidence in the record that calls into doubt whether the jury reached the affirmative defense issue only after holding the State to its burden of proving all the elements of the charged crimes.

The State claims the jury question "only concerned the jury's deliberation on indecent liberties, not second-degree rape." BOR at 18. Yet the question begins "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." CP 47. It cannot plausibly be maintained juror deliberations on the rape count were not affected by the presence of the affirmative defense instruction on consent in light of the jury question.

That being said, Lynch has no burden to prove this constitutional error was prejudicial. "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." State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). The State bears the burden. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State points to nothing in the record that affirmatively establishes the instructional error was harmless beyond a reasonable doubt. The presence of the jury question in the record only adds strength to the argument that the State cannot overcome the presumption of prejudice here.

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 State asserts "the heart" of Lynch's appeal is his argument that the requiring the defendant to disprove consent by way of an affirmative defense instruction unconstitutionally shifts the burden of proof. BOR at 12. The State has done so in an attempt to shift focus away from Lynch's

lead argument that the trial court's affirmative defense instruction prejudicially violated Lynch's constitutional right to control his own defense. That lead argument compels reversal regardless of whether an unconstitutional burden shift occurred here. The success of the lead argument is not dependent on the success of the burden shifting argument. The two arguments are analytically distinct.

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

The State concedes all but one of the challenged community custody conditions must be stricken or clarified. BOR at 20-26. The State, however, refuses to concede the requirement that Lynch provide copies of all prescriptions to the community corrections officer is invalid. BOR at 24-25. It claims this reporting requirement is proper because the court may require affirmative acts necessary to monitor compliance with other conditions, i.e., the prohibition against unlawful possession or use of controlled substances. BOR at 25.

That reasoning is specious. As a mandatory condition of community custody, former RCW 9.94A.700(4)(c) provides an "offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions." But requiring Lynch to report lawful prescription drug use does nothing to monitor any unlawful possession or

use of controlled substances. It only reveals the lawful use of prescription drugs. As such, the prescription reporting requirement is unnecessary to monitor compliance with the condition not to possess or consume controlled substances except pursuant to lawfully issued prescriptions.

This Court has affirmed the imposition of the prescription reporting requirement only where drug use was involved with the crime. State v. Motter, 139 Wn. App. 797, 805, 162 P.3d 1190 (2007), overruled on other grounds, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); State v. Kolesnik, 146 Wn. App. 790, 807, 192 P.3d 937 (2008). Such is not the case here. Drug use indisputably had nothing to do with the offenses for which Lynch was convicted.

The Motter court also noted the condition protected the offender 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 he lawfully takes in order to accurately assess urinalysis tests. Motter, 139 Wn. App. at 805. Even if that type of reasoning is valid, Lynch was not subject to urinalysis testing as a condition of community custody. He was therefore not in danger of being found in danger of violating community custody if he did not present his

prescriptions to his community corrections officer. See Brief of Appellant at 46-47. The "monitoring" rationale of Motter is inapplicable here.

The State is unable to explain how the imposition the prescription condition reasonably relates 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). This condition should be stricken.

D. CONCLUSION

For the reasons stated above and in the opening brief, Lynch requests that this Court reverse both convictions. In the event it declines to do so, then the challenged community custody conditions should be stricken.

DATED this 16th day of November 2011

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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| Appellant. |) | |

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 16TH DAY OF NOVEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEFFREY LYNCH
 DOC NO. 344620
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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF NOVEMBER, 2011.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

November 16, 2011 - 1:29 PM

Transmittal Letter

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