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	No. 41749-9-II UNPUBLISHED OPINION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

[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.

State's concessions and vacate portions of Lynch's sentence that impose community custody 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

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

45 minutes. RP (Oct. 26, 2010) 18.

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

[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 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 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

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

consent and Lynch's claim fails with regard to his second degree rape conviction.

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

[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:
>
> . . . .

[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.

> (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions[.]
>
> 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

[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).

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 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.

We concur:

Quinn-Brintnall, J.

Penoyar, J.