

NO. 47611-8-II

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

STATE OF WASHINGTON,  
Respondent,

v.

COREAN O. BARNES,  
Appellant.

BY   
DEPUTY

STATE OF WASHINGTON

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
FILED  
COURT OF APPEALS  
DIVISION II

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

Superior Court No. 08-1-00340-9

REPLY BRIEF TO PRP

COREAN O. BARNES  
PRO SE

CERTIFICATE OF SERVICE  
I certify that I mailed  
1 copies of Reply to PRP  
to J. Espinoza, H.S. PA  
& \_\_\_\_\_  
12/3/15 Date Signed 

COREAN O. BARNES  
Unit-H-5 / Cell-A-72  
Stafford Creek Corr.  
191 Constantine Way  
Aberdeen, WA. 98520

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A. ASSIGNMENT OF ERROR

The dismissal of the predicate offense Removed a key element that is needed to sustain the conviction for First Degree Burglary.

The Due Process and Equal Protection Clause of the Fourteenth Amendment Requires Reversal When one Crime Merges with the Other and There has been a Reversal of the Predicate Offense.

Issue Pertaining to Assignment of Error

Does the Reversal of the predicate offense and removal of a key element require dismissal of the First Degree Burglary?

Was Mr. Barnes' rights to Due Process and Equal Protection violated when the reversal of the charged crime required reversal of the merged convictions as well?

B. STATEMENT OF THE CASE

Mr. Barnes incorporates by reference the facts set forth in his opening and Personal Restraint Petition Briefs.

The Dismissal of The Predicate Offense Removed a Key Element That is Needed To Sustain The Conviction For First Degree Burglary.

The Due Process Clause of the Fourteenth Amendment and Article I sec. 3 requires the prosecution to prove beyond a reasonable doubt every element of a crime charged. U.S.Const.Amend. XIV; RCWA Const. Art. 1 sec. 3. "Criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt." In Re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068 25 L.Ed.2d 368 (1970). "If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required." In Re Martinez, 171 Wn.2d 354, 256 p.3d 277 (2011).

In order to prove First Degree Burglary as defined in RCW 9A.52.020 the State must prove all three elements. (1) Enter or Remain Unlawfully in a dwelling (2) With the Intent to commit a crime (3) Be Armed with a Deadly Weapon and/or Assault Any Person. In this case it was alleged that Mr. Barnes Entered and Remained Unlawfully in the home of Mr. Johnson; With the intent to commit a crime and that he Assaulted "Raped" a person. That person being Ms. Christina Russell.

In light of rulings in Coristine and Lynch Mr. Barnes' convictions for second degree rape were reversed and subsequently dismissed by the State, After Mr. Barnes was resentenced for the First Degree Burglary and the Unlawful Imprisonment. Mr. Barnes' Appellate Counsel presented to this Honorable Court a Insufficiency of the Evidence argument in regards to the Burglary Count pertaining to the first element. Likewise Mr. Barnes' Statement of Additional Grounds argued for the second element however at no point did either of them bring

up the Assault element of the burglary until the reversal of the predicate offenses.

The Reversal and dismissal of the Rape convictions removed the Assault element that would have been used to sustain the Burglary count. Broadly speaking, the "assaults" alleged were the now dismissed rapes. And with the rapes being dismissed the burglary conviction must also be dismissed since the rapes is one of the elements that the burglary relied upon.

The Respondents argument that the instruction for the Burglary required the State to prove that Mr. Barnes committed Assault, not Rape is without merit. The State did not Charge a separate Assault the now dismissed Rapes were in fact the Assault that the State needed to prove Burglary. The Respondent's argue that re-litigation on this issue is not warranted however under RAP Rule 2.5 (C)(2) A prior Appellate Court Decision may at the instance of a party, review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. See Folsom v. County of Spokane, 111 Wash.2d 256, 759 p.2d 1196 (1988); Roberson v. Perez, 119 Wash. App. 928, 83 p.3d 1026 (2004).

Furtnermore, the legal documents that Mr. Barnes has presented to this Honorable Court not only establish that Mr. Barnes legally lived at 121 Victoria View but that also Mr. Barnes pursuant to Washington State's Landlord-Tenant Laws could not be evicted by Mr. Johnson. Moreso, Mr. Johnson's own statement to the police officer stated that Mr. Barnes moved in with the permission of the landlord/owner. The Respondents

seem to argue that it is possible that Mr. Barnes fail to change his address while neglecting to mention that Mr. Barnes did not start living with Mr. Johnson until 2008 after those cases were already in the court. Conveniently, the Respondents fail to address the fact that Mr. Barnes also provided two Judgment and Sentences from Clallam County Superior Court with the current cause number for this matter that shows that that court had 121 Victoria View as Mr. Barnes' Last Known Address as well. (See Exhibit Attached) These documents could not be produced before trial as they were from this current case and matter.

Even if the faulty consent instruction did not apply in this case the Respondents still fail to show why dismissal is not warranted when a key element is no longer there i.e. the Assault. This issue was never presented to this Honorable Court until the reversal occurred due to the faulty consent instruction. Mr. Barnes was denied his right to a fair trial and as such reversal is required. The trial court gave the Consent instruction over Mr. Barnes' objection. This Consent instruction applied to all counts not just the Rapes.

In short Consent was an element of all of the charges and as such by giving that instruction it violated Mr. Barnes' constitutional rights, this makes Mr. Barnes actually innocent of the crime of Burglary, even moreso, that Mr. Barnes should not have probably been even charged with First Degree Burglary. See RCWA 59.20.073 (5),(6). "Legislative intent is deprived first and foremost from the language of the statute. When words in statute are clear and unequivocal, courts must apply statute as written." State v. Michielli, 132 Wn.2d 229 937 p.2d 587 (1997).

The Due Process and Equal Protection Clause of The Fourteenth Amendment Requires Reversal When One Crime Merges With The Other And There Has Been A Reversal Of The Predicate Offense.

To be guilty of Unlawful Imprisonment Mr. Barnes must have knowledge of every fact necessary to constitute a "Restraint." A restraint that is merely incidental to the commission of another crime does not constitute kidnapping and probably does not constitute Unlawful Imprisonment. State v. Warfield, 103 Wn.App. 152, 5 p.3d 1280, 1283 (2000). RCW 9A.40.040(1). The presence of a means of escape may help to defeat a prosecution for Unlawful Imprisonment. State v. Phuong, 299 p.3d 37 (2013); State v. Thomas, 71 Wash.App. 634, 643, 861 p.2d 492 (1993).

The Respondent's is correct that testimony in Mr. Barnes' trial was that he Unlawfully Imprisoned Ms. Russell however evidence and the State own brief in Mr. Barnes' second appeal states otherwise. The Respondents argued in there brief "That it does not believe that the " Hostage Holder" exception applies to these facts." See Exhibit Attached. A "Hostage Holder" is someone that commits the crime of Unlawful Imprisonment however with the reversal of the predicate offense and in light of the ruling on the faulty consent instruction the crime of Unlawful Imprisonment cannot stand. Jury instructions are considered the case law at the time they are given and as such a misapplication of that law cannot be construed as harmless error when it's of constitutional magnitude. "Guilt or Innocence, of accused as to a particular crime should be determined solely on the basis of evidence relevant to that crime." U.S. v. Goodwin, 492 F.2d 1141 (1974).



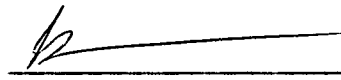
CONCLUSION

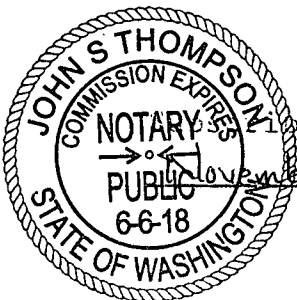
The Respondent's argument that "A jury could find that Mr. Barnes committed assault without finding Mr. Barnes committed Rape is without merit and as such cannot be given much weight. Mr. Barnes was not charged with a separate assault, and the State did not provide an alternative assault to the alleged Rapes. As presented and argued the Rapes were in fact the assault that is needed to sustain the burglary conviction. The State cannot have it both ways. They presented to the jury that the Rapes were the Assaults but now they are presenting to this Honorable Court that the alleged Rapes that has been dismissed was not needed to prove the assaults. This argument not only lacks merit but it does nothing but confuse the facts that is before this Honorable Court.

The Respondents no longer has the three elements that is needed to prove first degree burglary and as such Mr. Barnes is being unlawfully restrained.

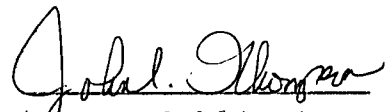
It is Respectfully Requested of this Honorable Court to Vacate Mr. Barnes' Convictions for Burglary and Unlawful imprisonment and Remand back to the trial court for a new Trial and / or Dismissal with Prejudice.

Corean Barnes declare that the above is true and correct on this 12<sup>th</sup> day of November, 2015 at Stafford Creek Corr. Cntr.

  
\_\_\_\_\_  
Corean Barnes-317817



Subscribed and Sworn to before me this 12 day of November, 2015

  
\_\_\_\_\_  
Notary Public in and for  
the State of Washington  
My Comm. Expires \_\_\_\_\_

EXHIBITS IN SUPPORT OF GROUNDS

NO. 13

A person commits the crime of BURGLARY IN THE FIRST DEGREE when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person assaults any person.

NO. 14

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

- (1) That on or about August 15, 2008, the Defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building, the Defendant assaulted a person; and
- (4) That the 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.

NO. 17

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

VI. IDENTIFICATION OF THE DEFENDANT

If no SID, complete a separate Applicant card (form FD-258) for State Patrol

SID No.	WA22113507	Date of Birth	11/12/1982
FBI No.	8209KB0	Date of Arrest	08/19/2008
DOL No. (for traffic convictions)		Local ID No. (pick one):	<input checked="" type="checkbox"/> WA0050000 (CCSO) <input type="checkbox"/> WA0050100 (PAPD) <input type="checkbox"/> WA0050200 (Forks PD) <input type="checkbox"/> WA0050300 (Sequim PD) <input type="checkbox"/> WAWSP8000 (WSP)
		OCA	08-08578
PCN No.	966012871	Other	DOC No. 317817
Alias name, DOB:	a/k/a Corgano Barnes, Cantrell Barnes, Lonney M. Barnes, Roosevelt Barnes, Roosevelt Times, Gerard Barnes, Lonnie Barnes, Kontrall Lear		
	5'11", 228 lbs., brown eyes, black hair		
LKA:	121 Victoria View, Sequim, Washington 98382		

Race:	Ethnicity:	Sex:
<input type="checkbox"/> Asian/Pacific Islander	<input checked="" type="checkbox"/> Black/African-American	<input checked="" type="checkbox"/> Male
<input type="checkbox"/> Caucasian	<input type="checkbox"/> Native American	<input type="checkbox"/> Female
<input type="checkbox"/> Other: _____	<input checked="" type="checkbox"/> Non-Hispanic	

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court: Deanna Gores, Deputy Clerk. Dated: 6-25, 2009  
DEFENDANT'S SIGNATURE: KA



**VI. IDENTIFICATION OF THE DEFENDANT**

(If no SID complete a separate Applicant card (form FD-258) for State Patrol)

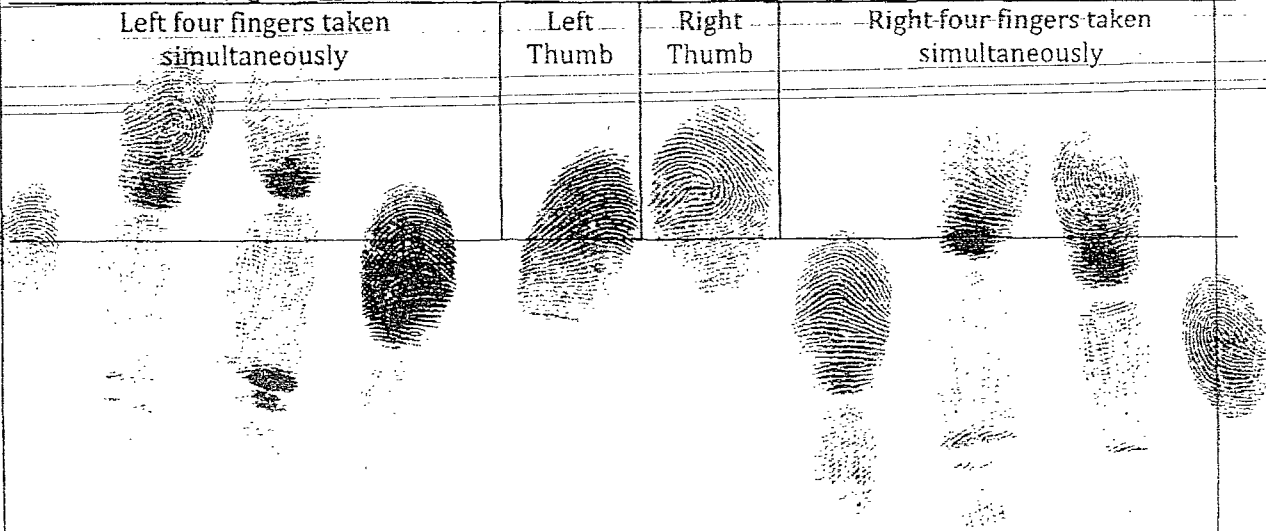
SID No.	<u>WA22113507</u>	Date of Birth	<u>11/12/1982</u>
FBI No.	<u>8209KB0</u>	Local ID No. (pick one):	<input checked="" type="checkbox"/> WA0050000 (CCSO) <input type="checkbox"/> WA0050100 (PAPD) <input type="checkbox"/> WA0050200 (Forks PD) <input type="checkbox"/> WA0050300 (Sequim PD) <input type="checkbox"/> WAWSP8000 (WSP)
PCN No.	<u>966012871</u>	OCA	<u>08-08578</u>
Alias name,			
DOB:	<u>a/k/a Corgano Barnes, Cantrell Barnes, Lonney M. Barnes, Roosevelt Barnes, Roosevelt Times, Gerard Barnes, Lonnie Barnes, Kentrall Lear. DOB: 11/12/1982, 5'11", 228 lbs., brown eyes, black hair</u>		
LKA:	<u>121 Victoria View, Sequim, Washington 98382</u>		

<b>Race:</b>	<input type="checkbox"/> Asian/Pacific Islander	<input checked="" type="checkbox"/> Black/African-American	<input type="checkbox"/> Caucasian	<b>Ethnicity:</b>	<input type="checkbox"/> Hispanic	<b>Sex:</b>	<input checked="" type="checkbox"/> Male
	<input type="checkbox"/> Native American	<input type="checkbox"/> Other: _____			<input checked="" type="checkbox"/> Non-Hispanic		<input type="checkbox"/> Female

**Fingerprints:** I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court: \_\_\_\_\_, Deputy Clerk. Dated: \_\_\_\_\_, 2015

The defendant's signature: 



## Narrative Report

RUN DATE: 8/20/2008

Page 4

INVESTIGATION CONT'D:

Deputy Yarnes arrived at our location to transport Barnes to jail. After being placed in the back of Deputy Yarnes' vehicle Barnes indicated that he wanted an attorney.

Barnes left with Deputy Yarnes to be booked. Detective Sampson and I then contacted Kenneth Johnson, the renter of the residence located at 121 Victoria View. Mr. Johnson indicated to me that he had no knowledge that Barnes was inside his residence on Friday (15<sup>th</sup>). He said that if this were the case Barnes did not have permission to be inside the house, adding that he would be willing to provide a statement and file a complaint. Mr. Johnson then invited us into the house to allow for his interview.

VICTIM INTERVIEW – KENNETH JOHNSON, 08/19/2008, 1340 HOURS, 121 VICTORIA VIEW STREET, SEQUIM, WASHINGTON:

Mr. Johnson said that on July 4<sup>th</sup> (2008) Barnes was released from jail in Kitsap County and he (Barnes) contacted him in need of a place to stay. Johnson said that he spoke with his (Johnson's) landlord and received permission to allow Barnes to move in to the residence where he (Johnson) resides with his wife and child. Barnes moved in with the understanding that he was to pay rent of \$300.00 a month.

Johnson said that last month Barnes paid him \$200.00 for rent and then told him that he could no longer afford to pay and that he was going to move out. Johnson said that he offered to lower the rent for Barnes if he needed to stay. Johnson said that Barnes still could not afford to pay the rent so he told him (Barnes) that he needed to leave. Johnson said that he told Barnes that he hoped he was not offended by this, that they could still be friends, but this was a business relationship and he had a family to take care of and he was not going to have someone in the house that could not afford the bills.

Johnson said that about two weeks ago Barnes moved out of the residence taking some of his (Barnes') belongings and leaving some behind. Johnson said that he spoke with Barnes about a week ago and told him that he needed to get the rest of his (Barnes) stuff out of the house. Johnson said that Barnes was supposed to have someone come over two days ago and get it, but they did not show.

Johnson said that he arrived home today to find Barnes and his (Barnes') female friend inside the house. Johnson said that he confronted Barnes and asked why he was in the house. Johnson said that Barnes told him that he was there to get his stuff. Johnson said that he asked Barnes why he hadn't called first and Barnes commented that he thought it would be all right.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Written and signed in Clallam County.

Detective: Date: 8/20/08Supervisor Approval: SAAR

Date: \_\_\_\_\_



West's Revised Code of Washington Annotated Title 59. Landlord and Tenant (Refs & Annos) Chapter 59.04. Tenancies (Refs & Annos)
--

West's RCWA 59.04.020

59.04.020. Tenancy from month to month--Termination

Currentness

When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of thirty days or more, preceding the end of any of said months or periods, given by either party to the other.

**Credits**

[Code 1881 § 2054; 1867 p 101 § 2; RRS § 10619. Prior: 1866 p 78 § 1.]

Notes of Decisions (16)

West's RCWA 59.04.020, WA ST 59.04.020

Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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- (a) Filing a complaint with any federal, state, county, or municipal governmental authority relating to any alleged violation by the landlord of an applicable statute, regulation, or ordinance;
  
- (b) Requesting the landlord to comply with the provision of this chapter or other applicable statute, regulation, or ordinance of the state, county, or municipality;
  
- (c) Filing suit against the landlord for any reason;
  
- (d) Participation or membership in any homeowners association or group;
  
- (6) Charge to any tenant a utility fee in excess of actual utility costs or intentionally cause termination or interruption of any tenant's utility services, including water, heat, electricity, or gas, except when an interruption of a reasonable duration is required to make necessary repairs;
  
- (7) Remove or exclude a tenant from the premises unless this chapter is complied with or the exclusion or removal is under an appropriate court order; or
  
- (8) Prevent the entry or require the removal of a mobile home, manufactured home, or park model for the sole reason that the mobile home has reached a certain age. Nothing in this subsection shall limit a landlords' right to exclude or expel a mobile home, manufactured home, or park model for any other reason, including but not limited to, failure to comply with fire, safety, and other provisions of local ordinances and state laws relating to mobile homes, manufactured homes, and park models, as long as the action conforms to this chapter or any other relevant statutory provision.

**Credits**

[2012 c 213 § 2, eff. June 7, 2012; 2003 c 127 § 2, eff. July 27, 2003; 1999 c 359 § 6; 1993 c 66 § 16; 1987 c 253 § 1; 1984 c 58 § 2; 1981 c 304 § 19; 1980 c 152 § 5; 1979 ex.s. c 186 § 5; 1977 ex.s. c 279 § 7.]

<(Formerly Mobile Home Landlord-Tenant Act)>

Notes of Decisions (6)


West's RCWA 59.20.070, WA ST 59.20.070

Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

West's Revised Code of Washington Annotated Title 59. Landlord and Tenant (Refs & Annos) Chapter 59.20. Manufactured/Mobile Home Landlord-Tenant Act (Refs & Annos)
---

West's RCWA 59.20.070

59.20.070. Prohibited acts by landlord

Effective: June 7, 2012

Currentness

A landlord shall not:

(1) Deny any tenant the right to sell such tenant's mobile home, manufactured home, or park model within a park, or prohibit, in any manner, any tenant from posting on the tenant's manufactured/mobile home or park model, or on the rented mobile home lot, a commercially reasonable "for sale" sign or any similar sign designed to advertise the sale of the manufactured/mobile home or park model. In addition, a landlord shall not require the removal of the mobile home, manufactured home, or park model from the park because of the sale thereof. Requirements for the transfer of the rental agreement are in RCW 59.20.073. Nothing in this subsection prohibits a landlord from enforcing reasonable rules or restrictions regarding the placement of "for sale" signs on the tenant's manufactured/mobile home or park model, or on the rented mobile home lot, if (a) the main purpose of the rules or restrictions is to protect the safety of park tenants or residents and (b) the rules or restrictions comply with RCW 59.20.045. The landlord may restrict the number of "for sale" signs on the lot to two and may restrict the size of the signs to conform to those in common use by home sale businesses;

(2) Restrict the tenant's freedom of choice in purchasing goods or services but may reserve the right to approve or disapprove any exterior structural improvements on a mobile home space: PROVIDED, That door-to-door solicitation in the mobile home park may be restricted in the rental agreement. Door-to-door solicitation does not include public officials or candidates for public office meeting or distributing information to tenants in accordance with subsection (3) or (4) of this section;

(3) Prohibit the distribution of information or meetings by tenants of the mobile home park to discuss mobile home living and affairs, including political caucuses or forums for or speeches of public officials or candidates for public office, or meetings of organizations that represent the interest of tenants in the park, held in a tenant's home or any of the park community or recreation halls if these halls are open for the use of the tenants, conducted at reasonable times and in an orderly manner on the premises, nor penalize any tenant for participation in such activities;

(4) Prohibit a public official or candidate for public office from meeting with or distributing information to tenants in their individual mobile homes, manufactured homes, or park models, nor penalize any tenant for participating in these meetings or receiving this information;

(5) Evict a tenant, terminate a rental agreement, decline to renew a rental agreement, increase rental or other tenant obligations, decrease services, or modify park rules in retaliation for any of the following actions on the part of a tenant taken in good faith:

West's Revised Code of Washington Annotated Title 59. Landlord and Tenant (Refs & Annos) Chapter 59.18. Residential Landlord-Tenant Act (Refs & Annos)
--

West's RCWA 59.18.200

59.18.200. Tenancy from month to month or for rental period--Termination--  
Armed Forces exception--Exclusion of children--Conversion to condominium--Notice

Effective: August 1, 2008

Currentness

(1)(a) When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of twenty days or more, preceding the end of any of the months or periods of tenancy, given by either party to the other.

(b) Any tenant who is a member of the armed forces, including the national guard and armed forces reserves, or that tenant's spouse or dependant, may terminate a rental agreement with less than twenty days' notice if the tenant receives reassignment or deployment orders that do not allow a twenty-day notice.

(2)(a) Whenever a landlord plans to change to a policy of excluding children, the landlord shall give a written notice to a tenant at least ninety days before termination of the tenancy to effectuate such change in policy. Such ninety-day notice shall be in lieu of the notice required by subsection (1) of this section. However, if after giving the ninety-day notice the change in policy is delayed, the notice requirements of subsection (1) of this section shall apply unless waived by the tenant.

(b) Whenever a landlord plans to change any apartment or apartments to a condominium form of ownership, the landlord shall provide a written notice to a tenant at least one hundred twenty days before termination of the tenancy, in compliance with RCW 64.34.440(1), to effectuate such change. The one hundred twenty-day notice is in lieu of the notice required in subsection (1) of this section. However, if after providing the one hundred twenty-day notice the change to a condominium form of ownership is delayed, the notice requirements in subsection (1) of this section apply unless waived by the tenant.

**Credits**

[2008 c 113 § 4, eff. Aug. 1, 2008; 2003 c 7 § 1, eff. March 24, 2003; 1979 ex.s. c 70 § 1; 1973 1st ex.s. c 207 § 20.]

**Notes of Decisions (9)**

West's RCWA 59.18.200, WA ST 59.18.200

Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

NO. 23

To convict the Defendant of the crime of UNLAWFUL IMPRISONMENT as charged in Count IV, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 15, 2008, the Defendant restrained the movements of Christina Russell, in a manner that substantially interfered with her liberty;

(2) That such restraint was

(a) without Christina Russell's consent or

(b) accomplished by physical force, intimidation, or deception, and

(3) That such restraint was without legal authority;

(4) That, with regard to elements (1), (2), and (3), the Defendant acted knowingly;

and

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

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), and (2)(b), have been proved beyond a reasonable doubt, then it

will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not

~~be unanimous as to which of alternatives (2)(a), or (2)(b), has been proved beyond a reason-~~

able doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

her will at the camper, penetrated against her will at Mr. Johnson's residence, and held at the Mr. Johnson's residence for the purpose of sexual assault.

~~Mr. Barnes alleges the trial court incorrectly applied the "hostage holder" exception to the recording. The State cannot find any such ruling. In any event, this deputy of the State does not believe the "hostage holder" exception applies to these facts. The statute permits law enforcement to record communications with a hostage holder. Even though the jury found that Mr. Barnes unlawfully imprisoned C.R., the recording was not made during a hostage situation.~~

## ISSUE TWO

~~When the facts of the case show that the victim was dragged from her car to a camper and penetrated and then dragged from a couch to a bed, screaming all the time that she did not want to have sex with Mr. Barnes, did the trial court err when it refused to give an instruction about third degree rape.~~

There is simply nothing in the record that would support an instruction for third degree rape, i.e., that C.R. simply did not consent to sexual intercourse.

*Standard of Review:* A defendant is entitled to a jury instruction

1 to be able to make those kinds of distinctions as  
2 well.

3 THE COURT: Would you agree that if consent  
4 is raised as a defense, that it is an affirmative  
5 defense to a charge of rape in the second degree?

6 MR. GASNICK: We agree that that's how the law  
7 is currently structured and we disagree that that is  
8 good law.

9 THE COURT: Okay. Is your client offering a  
10 consent instruction?

11 MR. GASNICK: Um, Your Honor has the  
12 instructions that we are proposing. We are not -- we  
13 are not -- we would not be offering a consent  
14 instruction that included an affirmative defense.  
15 That included a burden that included placing the  
16 burden of proof on the Defendant.

17 THE COURT: Okay.

18 MS. LUNDWALL: I think --

19 THE COURT: Ms. Lundwall?

20 MS. LUNDWALL: My suggestion is I think I may  
21 have brought it up earlier, that we just specify as  
22 to the consent being an affirmative defense that it  
23 applies only to count 2, and we can use the normal  
24 consent definition and specify that it applies to  
25 the definition of assault and unlawful imprisonment

1 I did give the lesser included on burglary in  
2 the first degree. What I did in instruction number  
3 16 is I had that as to the crime of assault which  
4 consent is a defense, again -- actually it's an  
5 element, lack of consent is an element, and I have  
6 added the language that says the State has the  
7 burden of proof to prove the lack of consent beyond  
8 a reasonable doubt in the definition of assault. And  
9 again, I gave the lesser included of trespass in the  
10 first degree on that one the -- I think the other

11 instructions are all fairly traditional. I did --

12 MR. GASNICK: Absence of consent is also an  
13 element in unlawful imprisonment.

14 THE COURT: It is, but it also spells out in  
15 the to convict that the State must prove the absence  
16 of consent, so that clearly can be argued that

17 that's an element, that the State has to prove that  
18 there was no consent.

19 I gave the Petrich instruction on unlawful  
20 imprisonment and the concluding instruction. So  
21 that's how we got to where I got on these. So I  
22 don't know if the parties want to comment at all at  
23 this point?

24 MS. LUNDWALL: I was able to find case law  
25 that says criminal trespass is a lesser included.



1 I think the tape is basically a third source of  
2 evidence, and if the jury were so inclined to  
3 believe they had sufficient evidence to basically  
4 disbelieve what the 2 people had said and reach some  
5 sort of middle ground, so I think the rape 3  
6 instruction would be appropriate -- as well as lack  
7 of injury. So I think rape 3 would be appropriate  
8 on both Count 1 and 2.

9 Object to the lack of instruction that mere  
10 penetration without more, it's not physical force  
11 that overcomes resistance, especially given the lack  
12 of a rape 3 instruction. I don't know that that's  
13 clear.

14 I'd object to instruction number 12, forcing  
15 consent instruction on us when it's not requested  
16 and the evidence regarding consent basically would  
17 be relevant as to whether or not there was forcible  
18 compulsion.

19 Additionally, I know the Court has said they  
20 took some precautions since it's pretty much an  
21 element of all of the charges here, but I think  
22 frankly it's going to be extremely confusing to a  
23 jury when what happened, who's (sic) burden it is,  
24 and who has to prove consent when.

25 So, I'd object to instruction number 12.

1 I object to the lack of an instruction  
 2 defining what consent is. And I object to a lack of  
 3 instruction basically indicating forcible compulsion  
 4 can't be based solely on a subjective reaction to  
 5 particular conduct and requires something else.

6 THE COURT: Okay. Ms. Lundwall, as to the  
 7 naming Ms. Russell?

8 MS. LUNDWALL: We -- well, at this point we've  
 9 always used initials when we've dealt with person's  
 10 name in sex cases. It does not seem to be  
 11 inflammatory or prejudicial. I am aware of no case  
 12 law that says that at this point she is actually  
 13 mistakenly named in the PC affidavit. We move the  
 14 Court to redact her name and would replace it with  
 15 her initials.

16 MR. STALKER: Well, to keep doing that then, to  
 17 not give any special weight, I ask we replace all  
 18 references of the Defendant with CB.

19 MS. LUNDWALL: The Defendant is actually not  
 20 in -- considered inflammatory named, I'm the  
 21 Plaintiff, he's the Defendant.

22 THE COURT: Well, I will take a look at that  
 23 issue. As to the issue of defining forcible  
 24 compulsion, it appeared that definition applies  
 25 primarily when you give the rape in the third degree

1 instruction.

2           Again, I don't think the jury is going to have  
3 any difficulty in determining that forcible  
4 compulsion which overcomes resistance -- I mean, you  
5 can -- I suppose if you were hyper-technical you  
6 could argue that's from the mere physical standpoint  
7 being more than the laws of physics.

8           MR. STALKER: I was going to mention for  
9 example as resistance --

10           THE COURT: I don't think the jury's going to

11 be confused by that at all. The instruction might  
12 actually confuse them more, especially in light of  
13 some of the other counts, frankly. I'm not going to  
14 give that. I don't think it's necessary. And just  
15 as I didn't give the State sort of explanation of  
16 what a body part is, it would include a finger, I

17 don't think it's necessary. I don't think the

18 jury's going to be troubled. I think each of you  
19 will have, frankly with these instructions, an  
20 opportunity to argue fully your theory of the case.

21           I'm going to look at the initials issue and I  
22 will correct the concluding instruction.

23           MR. GASNICK: And Your Honor, there was one  
24 other issue that the Defense wished to raise by way  
25 of exception. On the burden shifting of the consent

1 ~~under the rape 2 statute, I'll incorporate by~~  
2 reference the briefing that has been submitted to  
3 the Court already, but, uh, just in addition to that  
4 I would note that the particular charges in this  
5 case, um, Mr. Stalker's referenced the confusion  
6 that they generate -- that's generated. I think  
7 also highlights the fundamental problems with the  
8 existing case law.

9           We now have a circumstance where for the rape  
10 2 we have instructions that there's a burden on the  
11 Defendant to prove consent by a preponderance of the  
12 evidence for the -- for a burglary one where the --  
13 this alleged rape 2 is in essence the assault  
14 element of the burglary one. The State has to prove  
15 the absence of consent. So what this -- so it's  
16 entirely possible given these weird -- these  
17 contradictory, frankly, burdens of proof and  
18 reference consent that a jury under this set of  
19 instructions can say, um, that a person -- that the  
20 Defendant didn't meet his burden of proof regarding  
21 consent on the rape 2 therefore he's guilty of that,  
22 but the State didn't meet its burden regarding lack  
23 of consent on the burglary one and acquit him of  
24 that. And what I will -- I certainly don't have a  
25 problem with my client getting acquitted of a

1 burglary, that would certainly be an inconsistent  
2 verdict possibility of which exists by virtue of  
3 these inconsistent standards. And that's fundamental  
4 and core to the problem that's generated by this  
5 burden shifting which is a large part of why we  
6 contend it to be unconstitutional.

7 THE COURT: Okay. And I do understand that,  
8 however, the explanation which you just gave in  
9 2 minutes could be one given to the jury and  
10 explained very carefully, how they need to rule on  
11 them, certainly can be argued to them. If we end up  
12 with inconsistent verdict it may mean the jury did  
13 not understand. Certainly the argument can be made  
14 to them and if they carefully read the instructions,  
15 I think it's clear who has the burden on particular  
16 issues. Case law seems to be very clear if the

17 Defendant raises the issue of consent on a rape  
18 charge, the Court is required to instruct the jury  
19 on what the proper burden is in that case. That's  
20 -- there was some hint from Division 2 that they  
21 didn't like that burden but if they were compelled  
22 to follow the Supreme Court's law as well as  
23 certainly I'm in no better position than Division 2.

24 MR. GASNICK: We're not disputing that's what  
25 the case law maintains.

1 that would be appropriately applied for the offender  
2 score. And again, I calculate a 4. Last time we  
3 got a 3, I'm not sure what was different.

4 MR. STALKER: I think my understanding in  
5 looking at the record last time is the Court  
6 determined that the unlawful imprisonment was the  
7 same course of conduct as the rest of -- the State  
8 argued then as it did in this case that basically  
9 the entire series of events was the unlawful  
10 imprisonment. I think on that basis the Court  
11 correctly concluded it was the same course of  
12 conduct.

13 THE COURT: Ms. Lundwall, do you want to argue  
14 that issue?

15 MS. LUNDWALL: I'm not going to argue that  
16 issue. It would basically -- the unlawful...

~~17 --imprisonment would merge with one or both of the~~  
18 rapes under the circumstances.

19 THE COURT: Okay.

20 MS. LUNDWALL: There was the issue of  
21 basically there was a long time ago and I believe it  
22 was a possession of stolen property that went into  
23 diversion that I don't think was ever revoked that  
24 -- and I am not even sure what to do with that at  
25 that particular point.