

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
COURT OF APPEALS DIVISION II  
DEPUTY

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent

v.

COREAN BARNES,

Appellant

---

CLALLAM COUNTY SUPERIOR COURT No. 08-1-00340-9

THE HONORABLE JUDGE KENNETH WILLIAMS

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STATEMENT OF ADDITIONAL GROUNDS

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FACTS RELATED TO THE CASE

Corean Barnes and Christina Russell met in 2007 and began dating which lasted about 10 months between 2007 and 2008. In August 2009 Mr. Russell gave Mr. Barnes a ride to Kitsap County. According to Ms. Russell, Mr. Barnes made threats to her while in Kitsap County, however, those supposed threats were never substantiated. After returning from Kitsap County Ms. Russell and Mr. Barnes went back to his residence, Mr. Johnson's home, where Ms. Russell agreed to give Mr. Barnes another ride on August 15, 2008 to Port Townsend.

Prior to picking Mr. Barnes up that day Ms. Russell went to a local Wal-Mart and purchased a digital recorder, turned it on and proceeded to pick up Mr. Barnes. Ms. Russell immediately started recording Mr. Barnes without his consent or knowledge as well as without Judicial Authority thus Violating the Privacy Act. During the interaction that day you can hear Mr. Barnes playing and talking with his intimate partner about private matters, some of which were sexual in nature. The conversations and interactions all occurred in private settings. Mr. Barnes did not know he was being recorded by Ms. Russell and he interacted with her as they normally did with each other for the last 10 months. While in a private vehicle Mr. Barnes talked sexual and used some coarse language but it was Non-threatening and would not have been considered as such in the course of their relationship.

After initially dropping Mr. Barnes off, Ms. Russell recorded herself saying that she was making the recording to provide to the police as well as she wished Mr. Barnes would rape her, that way she could get on tape and he could be arrested. RP. 247. After picking Mr. Barnes back up Ms. Russell took him back to Sequim and they ended up at Mr. Johnson's home where Mr. Barnes rented a room.

Mr. Barnes entered the home first, leaving Ms. Russell in the car, after a few minutes Ms. Russell entered the home of her own free will. Mr. Barnes and Ms. Russell began talking and kissing, They then engaged in sexual relations that was ended by Ms. Russell after 1-2 minutes. RP. 224-229, 258. Before leaving the house Ms. Russell turned the recorder off, still neglecting to inform Mr. Barnes that she recorded him. After listening to the recorder over the weekend to see what was on there, Ms. Russell then contacted HEALTHY FAMILIES who then directed her to an advocate and told her to go to the hospital where she made

an officail complaint. RP. 235. This occured on August 18, 2008. On August 19, 2008 Mr. Barnes was arrested at Mr. Johnsons home where he was doing laundry.

The State charged Mr. Barnes with two counts of Sexual Assault in the Second Degree; Burglary in the First Degree, and one count of Unlawful Imprisonment. Mr. Barnes was sentenced to 126 months to Life. Mr. Barnes timely Appealed.

The burglary charge stems from Mr. Johnson telling the arresting officer that Mr. Barnes did not have permission to be in his home an August 15, 2008, the day of the incident, even though Mr. Barnes's belongings were in the house and the arresting officer came to the house on August 19, 2008 in search of Mr. Barnes. The only thing the State could provide to support an alledged burglary was Mr. Johnsons statement even though Mr. Barnes was doing laundry when Mr. Johnson came home on August 19, 2008 and Mr. Johnson did not put him out or alert the authorities. Also Mr. Johnson left the door unlocked so Mr. Barnes could come and go as he pleased even if Mr. Johnson was not home.

I. DID THE TRIAL COURT ABUSE ITS DISCRETION BY ALLOWING IN A RECORDING THAT VIOLATED MR. BARNES" RIGHTS UNDER THE PRIVACY ACT FOR THE PURPOSE OF CONTEXT ?      SEE EXHIBIT A, B, C,

The Fourteenth Amendment to the U.S. Constitution provides that "No state shall deprive a person of life, liberty or property without the due process of law; nor shall any person be deprived within it's jurisdiction the equal protection of the law." U.S.C.A. Const. Amend. XIV; Art.1 Sec.3 Wash. Const.; Art.1 Sec.7 Wash. Const. provides that "No person shall be disturbed in his private affairs or his home invaded without tha authority of law." Wash.Const. Art.1 Sec.7 RCW 9.93 The Washington State Privacy Act generally provides 'That itis unlawful for any Private Individual or Government Agency to Intercept or Record by any Electronic device, Any Private Conversation or Any Private Communications without first obtaining tha consent of All participants in the Communication." Ferguson BK.12 §2901.

In the present case before this Honorable Court Mr. Barnes' Right to Due Process was Violated when the trial court Abused its Discretion and Allowed an

Illegal Redacted Recording to be played in front of the jury for the purposes of context, thus violating this court's prior ruling as well as violating Mr. Barnes' Right to Equal Protection as well as Privacy. The recording, done by Mr. Barnes' intimate partner, Ms. Russell, should have been suppressed by the trial court because it was a violation of Washington's All-Party Consent requirement thus implementing RCW 9.73.030; 9.73.040; 9.93; Art.1 Sec.7; Art.1 Sec.3 U.S.C.A Const. Amend.XIV. "If any textual ambiguity about the meaning of statute lingers, it ought to be resolved in favor of giving effect to the Legislature's Intent of the Statute." *State v. Christensen*, 153 Wn.2d 186, 102 P.3d 789(2004). "To permit the State to introduce evidence exclusively and directly flowing from a Privacy Act violation would render any Privacy Protection illusory and meaningless." *State v. Morgan*, 32 Wn.App. 764, 768, 650 P.2d 228(1982); *State v. Fjermestad*, 114 Wn. 2d 828, 835-36, 791 P.2d 897(1990). A violation of the Privacy Act occurs when (1) A private communication transmitted by a device (2) Is intercepted by use of (3) A device designed to record and/or transmit (4) without the consent of all of the parties to the communication. The High Courts have described the term "Private" as used in the Privacy Act (RCW 9.73) is given its discretionary definition. "Private" means belonging to one's self, secret, intended only for persons involved (A conversation), holding a confidential relationship to something, A secret message, a private communication, not open or in public. *State v. Christensen*, 153 Wn.2d 186, 102 P.3d 789(2004). "The Court must apply statute as written when words in statute are clear and unequivocal." *State v. Michielli*, 132 Wn.2d 229, 937, P.2d 587(1997).

In the case before this Honorable court it is undisputed that Mr. Barnes' Rights to Privacy was violated by Ms. Russell as well as the trial court. The trial court further violated Mr. Barnes' rights by allowing in portions of the recording for context purposes when this Honorable court in its' last decision said that was not proper RP. 78-79. Washington Privacy Statute "Is one of the most restrictive in the Nation." ; The legislation intended in enacting the Privacy Act to exclude testimony as to the fact that the illegal recording was made, It also bars perception of those who made the recording as well as the recording itself. *State v. Townsend*, 147 Wn.2d 666, 673. 57 P.3d 255(2002); *State v. Cramer*, 35 Wash.App. 462, 667, P.2d 143(1983); *Schonaur v. DCR Entertainment Inc.* 79 Wash. 808, 905 P.2d 392(1992)

To further purpose of the Privacy Act is to protect the privacy of individuals by prohibiting public dissemination of Illegally obtained information or recorded as well as the testimony as to the contents of that recording. State V. Cramer, 35 Wash.App. 462, 667 P.2d 143(1983); State V. Henderson, 16 Wash.App. 526, 557 P.2d 346(1976). In the case where evidence has been obtained in violation of the law and a timely objection to the use of such has been made then prosecuting authority may not use it for its own benefit, State V. Robbins, 224, P.2d 345, 37 Wash. 2d 431(1950); City of Tacoma V. Houston, 177 P.2d 886, 27 Wash.2d 215(1947); State V. Buckley, 258 P.1030, 145 Wash. 87(1927); State V. Wanrow, 88 Wn.2d 221, 559 P.2d 548(1977). "Trial court did not err in refusing to admit unconsented tape recording allegedly between defendants wife and lover, which defendant offered to show his state of mind at the time he mutilated and disfigured her face; Constitution does not override RCW A9.73.030 making Illegally obtained information inadmissible in any Criminal or Civil Case. "State V. Baird, 83 Wn. App. 477, 922 P.2d 157(1996); "Evidence gained from Illegal Activity "MUST" be suppressed. State V. Suet, 675 P.2d 36 Wash.App. 377(1984).

It is undisputed that Mr. Barnes was recorded without his Judicial Authority. Ms. Russells' primary goal was to get me on tape so she could get me arrested. RP.247. The trial court redacted a recording that was 3½ hours long to a mere 35 minutes and by that happening the prosecutor was able to manipulate and mislead the jury as to what happened as well as the trial court ingored this courts ruling and allowing portions of the recording in for purposes of context despite defense councl's objection. The State also conceded on the record that a section of the transcript (a listening aid for the jury) was inaccurate and that, that was not what Mr. Barnes said RP. 88-90. Where consent by all parties is needed pusuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the conversation or communication, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted; Provided that if the conversation is to be recorded that said announcement shall also be recorded RCW 9.73.030(3); "Evidence obtained in violation of the Washington Privacy Act, Which bars the recording of transmitted Private Communications without the consent of All Participants, is inadmissible for any purpose including Impeachment." State V. Townsend, 105 Was.App. 622, 20 P.2d 1027(2001); State V. Faford, 128 Wash. 2d 476, 910 P.2d 447(1996);



See Also Smith V. Aufderheide, C.A. 9 Wash. 371 Fed. Appx. 825. WL 1141523(2010); Johnson V. Hawe, C.A. 9 Wash. 388 F.3d 676. 125 S.ct. 2294, 544 U.S. 1048(2004); State V. Mankin, 158 Wash. App. 111, 241 P.3d 421(2010). Determining whether given matter is "Private" for purposes of statute prohibiting intercepting or recording private communications, requires fact specific inquiry, but where pertinent facts underlying cause of action are undisputed, determination is one of Law. State V. Flora, 68 Wash. App. 802, 845 P.2d 1355(1992); Unlike the Federal Statute and the Fourth Amendment, The State Privacy Act does protect an individual whose conversation is recorded without his or her knowledge or consent. It is necessary therefore, to determine whether this statutory guarantee requires the exclusion of the testimony of a conversation participant who engaged in an Illegal Recording as well as the recording itself. State V. Williams, 94 Wn. 2d 531, 617 P.2d 1012(1980) The language and the history of RCW 9.73 make it clear the legislature's primary purpose in enacting these statutes was the protection of the privacy of individuals from public dissemination, even in the course of a public trial, of Illegally obtained information. Williams, 94 W. 2d at 543; State V. Wanrow, 88 Wash. 2d 221, 233, 559 P.2d 548, 555(1977).

In the present case before this Honorable court Mr. Barnes was entitled to his privacy with his intimate partner Ms. Russell. The Trial Court abused its discretion and allowed in recordings that should have been suppressed in its entirety, by the trial court not following the Legislatives' intent Mr. Barnes' rights under the Privacy Act RCW 9.73.030; Art.1 Sec.7 of Wash.Const.; Art.1 Sec.3; and the Fourteenth Amendment (Equal protection of the law) was violated; by allowing a portion of the Illegal recording in for the purpose of context was a violation of this courts previous ruling RP.78-79. Moreover reversal is required only "where there is any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict." State V. Guloy, 104 Wn. 2d 412, 426, 705, P.2d 1182(1983) SEE EXHIBIT A

It is asked of this Honorable Court to Reverse and Remand back to the trial court for a New Trial and/or Dismissal with Prejudice.

II. DID THE STATE FAIL TO PROVE THAT MR. BARNES "ENTERED THE DWELLING WITH AN INTENT TO COMMIT A CRIME AGAINST A PERSON OR PROPERTY THERE OF"? SEE EXHIBIT A, B, C,

The Due Process Clause requires the prosecutor to prove beyond a reasonable doubt every element of a crime charged. U.S.C.A Const. Amend.14 In order to prove First Degree Burglary RCW 9A.52.020 on the basis of an assault committed therein, the state had to show that the defendant (1) Entered or remained unlawfully in a dwelling (2) with an intent to commit a crime against a person or property therein and (3) Assault someone. State V. Dow, 162 Wash.App. 324, 253 P.3d 476(2011); In re Winship, 397 U.S. 358, 364, 368(1970).

Under the "Essential Elements" rule a charging document must allege facts supporting every element of the offence, in addition to adequately identifying the crime charged. U.S.C.A. Const. Amend.6; Wa. Const. Art.1 Sec. 22. Merely reciting the Statutory Elements of the charged crime may not be sufficient to satisfy the "Essential Elements" rule which requires a charging document to allege facts supporting every element of the offence. State V. Leach, 113 Wash. 2d, 679, 689, 782, P.2d 552(1989); State V. Greathouse, 113Wash. App. 889, 56 P.3d 569(2002). The stat has the burden of proving each element of the crime charged beyond a reasonable doubt. State V. Kjorsvik, 117 Wash. 2d 93, 101, 812, P.2d 861 (1991).

In the case before this Honorable Court the state Fails to meet its burden of first degree burglary. Mr. Barnes lived at the dwelling for more than a month, all of his belongings were at the house, as well as Mr. Johnson wrote Mr. Barnes a letter asking him "What do you want me to do with your stuff?" RP.314-315. Mr.Barnes paid Mr. Johnson to live there, in a verbal agreement Mr. Barnes could come and go as he pleased. By all of Mr. Barnes' belongings being there it would give the indication that Mr. Barnes entered the dwelling lawfully. RP. 306-316. It is also being brought to this courts attention that Mr. Barnes did not enter the dwelling with an intent to commit a crime against a person or property therin; According to testimony Mr. Barnes told Ms. Russell she could come in if she wanted to, getting out of the vehicle and leaving her outside in the car. Ms. Russell was never forced to come inside the house, nothing was taken from the home and there was no forced entry into the home.

On a challenge of the Sufficiency of the Evidence the Appellate Court decides whether after viewing evidence in the light most favorable to the state, any rational trier of fact could have found all the Essential Elements of the crime beyond a Reasonable Doubt. The state has the burden of proving each element of the crime charged beyond a reasonable doubt. City of Seattle V. Gellin, 112 Wash. 2d 58, 62, 768 P.2d 470(1989)

The element at issue in this case, in addition to the one presented by Appellate Counsel, is the "Intent to commit a crime against a person or property therein." Ms. Russell testified she came inside the home after Mr. Barnes of her own free will not forced. RP.250-258. This hardly meets the "Essential Element" of "Intent to commit a crime against a person or property therein." When its clear Ms. Russell did not initially come inside the house, nor may conviction be based on intent to commit a crime against someone outside the building. State V. Devitts, 152 Wn.App. 907, 912, 218, P.3d 647(2007); State V. Sandoval, 123 Wash.App. 194 P.3d 323(2004)

The state failed to meet its burden beyond a reasonable doubt that Mr. Barnes committed First Degree Burglary where the elements of a criminal trespass may have been met not Burglary. RP.563-SEE EXHIBIT B

It is asked of this Honorable Court to reverse and remand back to the Trial Court for Dismissal of the Burglary charge with prejudice and/or in the alternative remand back to the Trial Court for new trial.

III. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN  
IT ALLOWED THE STATE TO INTRODUCE PRIOR BAD ACTS  
AS WELL AS HEARSAY TESTIMONY?      SEE EXHIBIT A, B, C,

Evidence of other wrongs, crimes, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. E.R. 404(B)

Before admitting evidence of other crimes, wrongs, or acts, a trial court must (1) Find by a preponderance of the evidence that the misconduct occurred, (2) Identify the purpose for which the evidence is sought to be introduced, (3) Determine whether the evidence is relevant to prove an element of the crime charged, and (4) Weigh the probative value against the prejudicial effect. State V. Foxhoven, 161 Wash. 2d 168, 163 P.3d 786(2007); State V. Mezquia, 129 Wash. App. 118, P.3d 378(2005); State V. Thach, 126 Wash.App. 297, 106 P.3d 782(2005) State V. Trickler, 106 Wash.App. 727, 25 P.3d 445(2001). The rules of evidence governing admission of evidence of other crimes, wrongs, or acts is not designed to deprive state of relevant evidence necessary to establish an essential element of its case, but rather to prevent state from suggesting that a defendant is guilty because he or she is a criminal type person who would be likely to commit the crime charged. State V. Russell, 154 Wash.App. 775, 225 P.3d 478(2010) Even when extraneous offense evidence is admissible, the trial court retains discretion to preclude it if it is irrelevant to prove an element of the crime charged or if the prejudicial effect substantially outweighs the probative value. A trial court's evidentiary ruling is an abuse of discretion only if it is manifestly unreasonable or based upon untangable grounds or reasons.

In the present case before this Honorable Court the trial court abused its discretion and violated Mr. Barnes rights under E.R. 404(B) when it allowed the state to introduce in front of a jury Mr. Barnes's No-contact violation with former girlfriend, as well as hearsay statements solicited by the state from Ms. Russell's direct testimony RP.202-203, RP.139-144. The trial court allowed prejudicial character evidence that had nothing to do with the case and was not

relevant to prove an element of the crime charged. Because it was not addressed previously by this High Court the state assumed that it was admissible regardless of its prejudicial effect.

In determining whether evidence of other crimes, wrongs, or acts is admissible under E.R.404(B) A trial court must undertake the following analysis on the record. (1) Identify the purpose for which evidence is sought to be admitted; (2) Determine whether under E.R.402 the evidence is relevant to the purpose; and (3) Decide whether under E.R. 403 the danger of unfair prejudice substantially outweighs its probative value. State V. Lough, 70 Wash.App. 302, 853 p.2d 920(1993) A courts ruling on other - Acts evidence is reviewed for an Abuse of discretion; In close cases, the balance must be tipped in favor of the defendant. State V. Wilson, 144 Wash.App. 166, 181 P.3d 887(2008). Where evidence of prior crimes, wrongs, or acts is admissible for a proper purpose, the party against whom the evidence is admitted is entitled, upon request, to a limiting instruction informing the jury that the evidence is only to be used for the proper purpose and not for the purpose of proving the character of a person in order to show that the person acted in conforming with that character. State V. Gresham, 2012 WL 19664(2012); State V. Fuller, 2012 WL 3206883(2012). The Appellate Court also review the decision of whether a statement is so prejudicial as to require a mistrial for abuse of discretion. State V. Weber, 99 Wash. 2d 158, 166, 659 p.2d 1102(1983); State V. Bashaw, 169 Wash. 2d 133, 140, 234 p.3d 195(2010).

Guilt or innocence of accused as to particular crime should be determined solely on basis of evidence relevant to that crime. A jury should not be permitted to convict accused because it believes him to be a person of bad character or because of notion that , since he committed some other similar crime, he must also have committed the crime for which he is on trial . U.S. V. Goodwin, 492 F.2d 1141(1974).

Mr. Barnes had a Sixth Amendment right to a "Fair trial by a panel of impartial, indifferent jurors, even if only one juror is unduly biased or prejudiced or improperly influenced. then Mr. Barnes was denied his Sixth Amendment right to an impartial panel. "The circumstantial use of character evidence is generally discouraged because it carries serious risk of prejudice, confusion and delay." Michelson V. United States, 335 U.S. 469, 476(1948). It is further

acknowledged that an out-of-court statement is hearsay when offered to prove the truth of the matter asserted, even if it was made by someone who is now an in-court witness, I.E. even if it was made by someone who is presently under oath, observable by the trier of fact, and subject to cross-examination. E.R.801(C). State V. Sua, 115 Wash.App. 29, 60 P.3d 1234(2003); U.S.C.A. Amend.VI.

The trial court Abused its disscetion when it allowed hearsay statements in front of the jury that were not to be used to prove the truth of the matter asserted this clearly violating Rules of Evidence, E.R.801. SEE EXHIBIT C

It is respectfully requested of this Honorable Court to Reverse and Remand Mr. Barnes conviction back to the trial court foe a Disssmissal with Prejudice and/or in the alternative Remand back for a new trial.

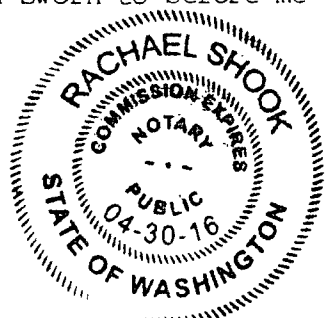
CONCLUSION

For the foregoing reasons, it is respectfully requested of this Honorable Court to reverse his convictions to be dismissed with prejudice and/or remand back to the trial court for a new trial.

I Corean Barnes declare under penalty of perjury that the foregoing is true and correct being done this 30<sup>th</sup> day of May, 2013 at Airway heights Corrections Center.

Corean Barnes  
Corean Barnes 317817  
pro se  
P.O. Box 2049  
Airway Heights, Wa. 99001

Subscribed and sworn to before me this 30<sup>th</sup> day of May, 2013.



Rachael Shook  
Notary for the State  
of Washington.  
My commission expires 4/30/16.

EXHIBIT A FOR ARGUMENT I.

1 THE COURT: Until he says well, you are going  
2 to have sex with me, I ain't asking you I'm telling  
3 you. That sounds like a threat to me, and the  
4 context of that is in the she's willing to crash the  
5 car not to have sex with him and he says that's not  
6 going to matter.

7 MR. STALKER: Well, he seems to be proposing  
8 an agreement there that the agreement is I'll never  
9 see you again if we have sex one more time and they  
10 come back to that several times.

11 THE COURT: And I understand that's the  
12 defense, but I think another interpretation is that  
13 that's a threat.

14 MR. STALKER: All right. Well, um, I was  
15 really interested in the part where Ms. Russel was  
16 threatening Mr. Barnes. I don't think all the rest  
17 of that is relevant. I don't think it's a threat,  
18 so, you know, if that's how the Court's viewing it I  
19 don't think any of that should come in then.

20 THE COURT: Ms. Lundwall?

21 MS. LUNDWALL: Well.--

22 THE COURT: Let me put it this way, to the  
23 extent that that comes out in the State's case in  
24 chief and Mr. Barnes's defense is it's consensual,  
25 then it appears all that comes right back in



1 rebuttal, clearly he was put on notice she did not  
2 want to have sex with him one more time --

3 MR. STALKER: The analysis, Your Honor, seems  
4 to me to be if something's recorded in violation of  
5 RCW 9.73.030, then it's not admissible, period,  
6 whether in rebuttal or not.

7 And I believe there's a case even that says if  
8 it's an illegal recording of a private conversation  
9 a witness can not even -- if they are the ones  
10 performing illegal recording, they can not even  
11 testify as to what was said during that. The basis  
12 of that is privacy.

13 I don't -- I don't think that rebuttal would  
14 necessarily open anything up. I think either it's a  
15 threat and it might be allowed or it's not.

16 I guess -- I mean, as we previously addressed,  
17 there's some issues where there may be relevancy  
18 objections where it's more prejudicial than  
19 probative, and maybe at that point the door could be  
20 opened. But if it's not a threat and it just is  
21 private conversation, I don't think it can come in  
22 under any circumstances by Ms. Russel.

23 THE COURT: Well, I think it is as I ruled  
24 before, the context of this really can't be totally  
25 ignored. Words have meaning in context, and

1 different meanings depending on the context.

2 I will allow this. I believe it's a threat.  
3 You're not going to win this, you might as well give  
4 up. Mr. Barnes says no, it sounds like a threat, I  
5 don't want to do something who's threatening you,  
6 you're saying that, and he says well you just  
7 threatened me. So it appears to me all of that,  
8 frankly -- threats perhaps each way, well --

9 MR. STALKER: Okay, if the Court's letting  
10 that all in anyway then I guess maybe we should  
11 start on page 40 with whatever happened to Jade, why  
12 didn't you just, like, stay with her.

13 THE COURT: That's my thought, you start there  
14 and then go through that whole thing to page 42  
15 after she says I will not do that consensually. So  
16 Ms. Lundwall, from that point forward your thoughts?

17 MS. LUNDWALL: I would argue again that the  
18 point where he says if you try to seek the help of  
19 basically the court system to protect yourself I'm  
20 going to bring in people to lie against you and  
21 people will get mad at you, that sounds to me like a  
22 definite threat, and explained the mind set of where  
23 she's at is relevant to consent, it is a definite  
24 threat that I would argue would be admissible  
25 pursuant to the statute, and I'm arguing that that

1 should come in.

2 THE COURT: Mr. Stalker?

3 MR. STALKER: Well, my interpretation is she  
4 is suggesting that if he does not get out of her  
5 life completely she'll pursue criminal charges, and  
6 he's saying I've never done anything like that, and  
7 you'll look like a liar and a fool and people will  
8 be upset with you, and I don't think that is a  
9 threat.

10 THE COURT: All right. I don't see it as a  
11 threat that would invade the restrictions of the  
12 privacy act in this circumstance. The context is  
13 such that it appears to me it's not the kind of  
14 threat that would fall within the exception.

15 MR. STALKER: So the parts admitted will be  
16 page 40, starting with whatever happened to Jade,  
17 why don't you just, like, stay with her - through  
18 the top of page 42, in the last admissible line  
19 would be I will not do that consensually?

20 THE COURT: Yes.

21 MR. STALKER: Okay.

22 THE COURT: And then 43?

23 MS. LUNDWALL: Um, she goes in the middle of  
24 the page, I don't want to have anything to do with  
25 you. I definitely don't want to have sex with you

1 out a little or something -- a little bit, she says  
2 no because he's been wrong about all of it. And then  
3 he says it looks like you are about to start crying  
4 and she says no.

5 There's no actual crying involved and then  
6 they get into a talk of her medication.

7 That's not a threat, it seems like Mr. Barnes  
8 is trying to -- I guess kind of do a fortune teller  
9 thing except he's not very good at it, and I don't  
10 really see that as being a threat.

11 MS. LUNDWALL: Well, towards the bottom, the  
12 second to the last line, you're making it sound like  
13 I don't know, like, stuff you are going to do  
14 something --

15 MR. STALKER: Where is that?

16 MS. LUNDWALL: Last line from the bottom on  
17 page 49.

18 MR. STALKER: Well, she says you're going to  
19 do something, he says no. Um, that seems pretty  
20 clearly not a threat.

21 THE COURT: All right. Ms. Lundwall, any  
22 further rebuttal as to 48?

23 MS. LUNDWALL: 49, no.

24 THE COURT: I am going to take out 48 and 49.  
25 Again, I don't think they're direct threats that the

1 statute would contemplate.

2 50 looks like it's probably out as well.

3 MS. LUNDWALL: Going on to 51, and I'm not  
4 going to argue on that. She talks about getting  
5 involved with her prior boyfriend and the Defendant  
6 says well, he was stupid, he put his hands on you to  
7 instill fear in you. Me, I don't have to put hands  
8 on you to instill fear, although I'm letting you  
9 know -- she tells him I'm pretty scared, and then  
10 she says you don't have to be but he goes on to say  
11 I'm just letting you know I'm capable of doing --  
12 like I said, don't underestimate people, you know,  
13 it turns out bad, very bad underestimating is  
14 something that would not be very smart comprehend --

15 MR. STALKER: Comprende.

16 MS. LUNDWALL: -- and then it goes straight  
17 into the I love you enough to kill you.

18 So she's telling -- he starts out by bragging  
19 that he knows how to scare her without even laying  
20 hands on her. She tells him flat out I am scared.  
21 And then although he does a disqualifer, you don't  
22 need to be, then goes straight into underestimating  
23 me would be a very bad situation and goes straight  
24 into the I love you enough to kill you.

25 THE COURT: Mr. Stalker?

1           MR. STALKER: Well, that's not actually what  
2 he says. I did listen to this. I got to this point  
3 and it's interesting (sic) and it's specifically  
4 mentioned in the appellate transcript and I'm trying  
5 to get to that point right now to play it although I  
6 don't have speakers and my computer is not  
7 particularly loud. It's muted right now. But Mr.  
8 Barnes does not say I don't have to put hands on you  
9 to instill fear, what he says is me I'm not trying  
10 to instill fear in you. And I'm not sure why that  
11 was mistranscribed, there's several minor  
12 mistranscriptions, that was the only one that I  
13 found that significantly changed the meaning of what  
14 was said.

15           MS. LUNDWALL: Well, if the Court wants to  
16 pass up the CD I could try to play it now to see  
17 what it actually says. I have speakers set up so if  
18 you want to --

19           THE COURT: It's clearly not what it says in  
20 the transcript but I didn't hear the rest of it very  
21 clear.

22           MR. STALKER: He said -- did you hear that  
23 first before the Court -- yeah --

24           THE COURT: --

25           MR. STALKER: It might, we could hear it over

1 here maybe.

2 MS. LUNDWALL: I actually heard Mr. Stalker's  
3 translation of it so that -- that would not be a  
4 threat.

5 THE COURT: All right.

6 MS. LUNDWALL: But I would say going down to  
7 I'm just letting you know what I'm capable of doing,  
8 I mean, I'm not saying I would ever do anything but  
9 just don't underestimate people, that is segue ways  
10 directly into the I love you enough to kill you  
11 which definitely is a threat.

12 THE COURT: Mr. Stalker, so the middle of page  
13 51 on down?

14 MR. STALKER: Well, I mean what we have is --  
15 I think the context is fairly different here because  
16 he's not saying I don't -- you know, a few seconds  
17 ago he didn't just say I don't have to put hands on  
18 you to instill fear in you, he's saying I'm not  
19 trying to instill fear in you. And he says don't  
20 underestimate people -- you know, I don't know  
21 exactly what he means by that but it seems to me  
22 that there is pretty clearly no threat there  
23 considering he just said I'm not trying to scare  
24 you.

25 THE COURT: Well, except that if you then go

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In light of the narrow construction we afford the threats exception coupled with the guidance on what actually constitutes a threat under the statute, the trial court erred in admitting the entire recording here. Admitting certain statements that otherwise do not fall under one of the Act's exceptions, simply to add context is not proper. The trial court should have conducted a more detailed analysis of the recording before admitting those selected portions that met the threats exception to the Privacy Act. Thus, Barnes's argument prevails.

#### B. Hostage Holder Exception

The State also argues that the hostage holder exception authorizes the admission of statements Barnes made in the commission of the rapes. Any communications "which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation." RCW 9.73.030(2)(d). RCW 70.85.100 defines a "hostage holder" as someone who commits unlawful imprisonment under RCW 9A.40.040.

A plain reading of this hostage holder exception clearly authorizes the admission of the portion of the recording during the period of unlawful imprisonment. But the trial court again erred in admitting the entire recording instead of limiting the admission of the recording to statements subject to the statutory exceptions. Barnes's argument prevails.<sup>FN4</sup>

FN4. The State also suggests that the Privacy Act is inapplicable to sounds of an event. Barnes does not dispute this argument and there is sufficient authority for this proposition. See *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975). Thus, on remand the trial court may consider whether certain sounds do not fall under the Privacy Act's protections.

#### C. Reasonable Expectation of Privacy

The State also claims the Privacy Act was not violated because Barnes did not have a reasonable expectation that the conversation was private. Privacy Act protections only apply to private communications or conversations. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). "A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." *Christensen*, 153 Wn.2d at 193. "Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party." *Christensen*, 153 Wn.2d at 193. There is nothing to suggest Barnes did not intend for the conversation to be private. Most of the conversation occurred in a car and related to personal matters between Barnes and Russell. The State's argument here is without merit.

#### D. Harmless Error

\*4 Finally, the State argues that even if the trial court erred in admitting the conversation in violation of the Privacy Act, any error was harmless. "Failure to suppress evidence obtained in violation of the privacy act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Porter*, 98 Wn.App. 631, 638, 990 P.2d 460 (1999). There can be little question that the erroneous admission of the entire recording materially affected the outcome. The recording included offensive language and presented Barnes in an exceedingly poor light and unduly prejudicial manner. The error was not harmless.<sup>FN5</sup>

FN5. Because we reverse on Barnes's Privacy Act claims, we do not reach his ineffective assistance of counsel claims.



EXHIBIT B FOR ARGUMENT II.

1 first degree. In this case now we have a guilty  
2 conviction of finding for sexual motivation. I  
3 think the first thing we need to address is how that  
4 is going to determine his offender score.

5 Under the burglary anti-merge statute, the  
6 Court does have the discretion to treat that as a  
7 separate offense, which would add an additional 3  
8 points to his score. Because that would be  
9 classified as a sex crime with the finding of sexual  
10 motivation. So, also it's the State's position that  
11 there's an additional victim as opposed to Ms.  
12 Russell, the victim of the rape, because it did not  
13 occur in her residence. If it had it would be have  
14 been elevated to a rape first instead of rape  
15 second. It occurred in the home of Tiny Johnson and  
16 the case law I have been able to look at, it appears  
17 part of the legislative motive for having the  
18 anti-merger statute for burglary is that there's  
19 also invading someone's home act, to invade their  
20 privacy. So in this case it was not even Ms.  
21 Russell's home who was invaded, it was a separate  
22 party, and we would argue also for that reason it  
23 should be treated as a separate offense.

24 THE COURT: Mr. Stalker, do you want to argue  
25 that issue?

1           MR. STALKER: Well, Your Honor, um, I think  
2 that the State's reliance on the anti-merger statute  
3 is misplaced. Unfortunately the case law I have  
4 been able to research did indicate if there is an  
5 additional burglary victim in the burglary it would  
6 not be considered the same course of conduct. So for  
7 that reason, I don't actually dispute the State's  
8 conclusion, although I think I guess -- I would  
9 dispute the method once they get there, but that's  
10 not really relevant.

11           THE COURT: Well, I have taken a look  
12 9.94A.589, that describes same criminal conduct,  
13 means 2 or more crimes that require the same  
14 criminal intent are committed at the same time and  
15 place and involve the same victim.

16           Certainly the genesis of the burglary charge  
17 involved the same criminal intent. I guess the  
18 distinction might be the entering a building which  
19 was one of the elements of that, you might argue,  
20 was different. You might argue that the home owner  
21 was the victim of that burglary, although certainly  
22 was the victim of a trespass as opposed to a  
23 burglary. The burglary relates to the actions of Ms.  
24 Russell, so I'm going to find same criminal conduct  
25 and if I do have discretion I'm going to find that

EXHIBIT C FOR ARGUMENT III.

1 charged, then we have this muddiness that can be at  
2 least I would submit significantly alleviated by the  
3 articulation of an election.

4 If they -- if the State chose not to  
5 articulate that election, then any deepened  
6 muddiness that we encounter as this trial  
7 progresses, well, the Defense's position is real  
8 clear as to where that is attributable.

9 THE COURT: Well, like I said, we may need to  
10 address that later.

11 I have the State's motions in limine, why  
12 don't we start there.

13 First one is in some respects indicates that  
14 the Court's prior rulings regarding criminal  
15 convictions, 404(b) evidence, rape shield evidence  
16 and prior domestic violence history are still in  
17 affect. Ms. Lundwall, do you want to argue that one?

18 MS. LUNDWALL: Well, this was -- we had  
19 extensive litigation back in January and February of  
20 2009 regarding these particular issues.

21 Notice that some of the issues that the  
22 Defense has raised, such as precluding mention of  
23 attending a DV class, I was not going into it  
24 because I had assumed it was still a long standing  
25 order.

1           Just to readdress it, the Court did make the  
2 ruling that there were some instances of 404(b) that  
3 the Court found -- actually its probative value  
4 outweighed the prejudicial affect going to the  
5 victim's state of mind, one of which she knew he had  
6 violated a protection order and he made comments he  
7 wanted to set all women on fire with gasoline. As a  
8 result of it, that he had talked about cutting the  
9 throat of a woman who he had been borrowing a car  
10 from and she wouldn't let him any more.

11           There were a few rulings that the Court found  
12 regarding knowledge of some mental health history,  
13 and also the Defendant had access to a gun. The  
14 Court precluded it. So I was not going to go into  
15 it. But my understanding is those rulings were  
16 still in effect, they were not challenged when they  
17 went up on appeal.

18           There was a part excluding that the victim had  
19 an abortion or had been -- had an affair when she  
20 was married, the Court ruled under the rape shield  
21 that that was not going to go presented to the jury.

22           There was Kenneth Johnson, he is a registered  
23 sex offender from a juvenile conviction, the Court  
24 ruled that that was not going to be presented to the  
25 jury.

1           There was also a 1996 taking of a motor  
2 vehicle, I believe it was a juvenile conviction, and  
3 the Court ruled that that was not going to be --  
4 that was not principal for impeachment evidence.

5           And I believe also what -- I can look through  
6 the transcript, but there had been discussion about  
7 the victim being involved in a domestic violence  
8 relationship with someone separate out of Colorado,  
9 and the State was given leave to present evidence of  
10 that just to go to her state of mind and how she  
11 would react in this particular case.

12           THE COURT: Mr. Stalker, response?

13           MR. STALKER: Well, Your Honor, I was handed  
14 this about 10 or 15 minutes ago, so I did not have a  
15 chance to go look at the authority as far as what is  
16 up for consideration in retrial, as far as previous  
17 rulings on motion in limine. So I'm at a bit of a  
18 disadvantage there.

19           I guess I would say that some of the issues  
20 being raised in mind are constitutional magnitude so  
21 I think they need to be considered anyway.

22           As far as some of the things the State is  
23 saying, I was not intending of bringing up any  
24 history of Mr. Johnson. I did independently review  
25 that, it's very old. I don't think it's admissible.

1           There was a long list of things there. In  
2 reviewing the transcripts, it does appear the Court  
3 allowed 2 incidents of statements by Mr. Barnes that  
4 go to let hearsay in for the state of mind of Ms.  
5 Russell, the comment about pouring gasoline on  
6 people and watching them burn and slitting a throat  
7 and watching the dust pour out I did definitely see  
8 in the transcript. Obviously I was not here last  
9 time and another attorney handled that, it appeared  
10 that the Court initially allowed evidence of the  
11 violation of a no contact order in, but then changed  
12 its mind and decided not to allow that in. So that  
13 is the impression I got.

14           But again, I was not present, Your Honor was,  
15 so he probably has a better recollection than that.  
16 This is just the impression I got from reading the  
17 transcript.

18           Let's see, with regard to the incidents in  
19 Colorado, I do know those were discussed. I know  
20 initially the State did bring a motion in limine to  
21 preclude those. I guess the Defense wanted to bring  
22 them in and then those positions got somewhat  
23 reversed as there was argument of over that. So I  
24 was a little unclear as it -- to exactly how that  
25 happened. I didn't spend as much time on the



1 pretrial transcript as I did on the actual trial  
2 transcript. And I do have something regarding those,  
3 so I guess we can go over those when we get to the  
4 Defense motions.

5 I know the State mentioned a couple other  
6 things, but there's a laundry list and I didn't  
7 write them all down.

8 THE COURT: All right, Ms. Lundwall any  
9 rebuttal?

10 MS. LUNDWALL: Well, there's also State v.  
11 Grant, 83 Wn. App. 98, it's a 1996 case. In that  
12 case they were permitted to go into previous history  
13 between the defendant and the victim in that case,  
14 just so the dynamics of their relationship and to  
15 show basically why someone might minimize or deny  
16 the sequence (sic) of abuse. They said the Court  
17 indicated that was relevant and important to show  
18 her state of mind and reaction under certain  
19 circumstances.

20 In this case, this isn't even 404(b) evidence  
21 against the Defendant as an unrelated party, and we  
22 -- it is necessary to put in context her reactions  
23 through this particular case as issues of  
24 credibility.

25 THE COURT: Well, I'm going to reserve ruling

1 on these. These are sort of issues that questions  
2 whether -- the law of the case. The difficulty with  
3 many of these particular issues is that they're  
4 evidentiary issues and depends in large part as to  
5 their relevancy as to what evidence comes in or has  
6 not come in at the time they are broached. So to  
7 the extent this is evidence issues as opposed to  
8 those sorts of issues that can be determined without  
9 any evidence having been presented, I'd ask the  
10 parties to bring their objections in a timely basis  
11 and I will take a look at some of the cases and the  
12 like.

13 I would anticipate the Court would make the  
14 same ruling if the same kind of evidence comes in,  
15 but this being a new proceeding, evidentiary issues  
16 may well be looked at from a different point of  
17 view. It's not like we have a 3.6 ruling for  
18 example, that is the law of the case that will  
19 stand, or 3.5 ruling that is the law of the case  
20 that would stand. These are more issues directly  
21 related to the nature of the case at the time the  
22 argument is made. To the extent there's a request  
23 for motion in limine, that would be somewhat  
24 different, that would not preclude them from coming  
25 in, but would preclude them from being discussed

1 downtown Bremerton because he wanted to stop off at,  
2 um, a pawn shop there.

3 Q. What happened when he got to the pawn shop?

4 A. When we got to the pawn shop I was feeling  
5 pretty upset with him. We'd been kind of going back  
6 and forth arguing, he was not being very friendly  
7 towards me and I had had enough of it. I was fed up  
8 with it. So when he got out of the car, as he was  
9 getting out I was thinking I would just kind of  
10 ditch him there because I didn't want to have  
11 further conversation and I didn't want to warn him  
12 that I was going to leave him because he might  
13 convince me otherwise, and as he was getting out of  
14 the car, he must have sensed that I was feeling that  
15 way because he turned back and looked at me and said  
16 "if you leave me here I'm going to blow up your  
17 house and I'm going to blow up your car."

18 Q. What tone of voice did he use?

19 A. It was very serious. It was aggressive, and,  
20 um, it made me feel very uncomfortable.

21 Q. Did it sound like a joke?

22 A. No.

23 Q. Had he said things to you in the past that  
24 gave you pause for concern?

25 A. Yes. On 2 other situations that I remember, he

1 had gotten upset with an ex-girlfriend, um, over  
2 some kind of fight they were having. And he stated  
3 that -- in his anger at her, he stated he wished  
4 that he could get gasoline and pour it over all  
5 women and watch them burn.

6 Q. Did he say anything else that caused you pause  
7 for concern?

8 A. On a separate occasion he was talking about  
9 another lady that was his friend and he had been  
10 borrowing her car and she had refused to let him  
11 borrow her car any more and that made him very  
12 upset, and he was talking to me about it and he said  
13 in an angry manner, "I wish I could slit their  
14 throat and watch the dust pour out."

15 Q. Did you leave him there in Bremerton?

16 A. I did not.

17 Q. Okay. What happened on the ride back?

18 A. On the ride back I, um, just kind of went into  
19 myself, I didn't say much. Um, I kind of ignored  
20 anything he was saying to me. I just wanted to get  
21 him back home.

22 Q. Okay. What happened when you got him back  
23 home?

24 A. I dropped him off in Sequim at a gas station  
25 and I had decided that I didn't want to have any