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

STATE OF WASHINGTON
BY [Signature]
DEPUTY

In re the Personal Restraint of

COREAN OMARUS BARNES,

Petitioner.

REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF CLALLAM COUNTY
Superior Court No. 08-1-00340-9

BRIEF OF RESPONDENT

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED April 13, 2015, Port Orchard, WA [Signature]

Original filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF the ISSUES.....1

II. RESPONSE1

III. STATEMENT OF THE CASE.....1

IV. AUTHORITY FOR PETITIONER’S RESTRAINT5

V. ARGUMENT.....6

 A. BARNES’S CLAIM THAT THE TRIAL COURT ERRED IN GIVING A “CONSENT” INSTRUCTION FOR THE BURGLARY AND UNLAWFUL IMPRISONMENT COUNTS IS WITHOUT MERIT BECAUSE THE INSTRUCTION AT ISSUE DEALT ONLY WITH CONSENT REGARDING SEXUAL INTERCOURSE (WHICH WAS ONLY AN ELEMENT OF THE RAPE COUNTS) AND THUS THIS COURT PROPERLY DECIDED IN THE DIRECT APPEAL THAT THE APPROPRIATE REMEDY FOR THIS FAULTY INSTRUCTION WAS REVERSAL OF THE RAPE COUNTS.....8

 B. BARNES’S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL MUST FAIL BECAUSE BARNES HAS FAILED TO SHOW THAT HIS ATTORNEY’S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE WAS PREJUDICIAL.....12

VI. CONCLUSION.....13

TABLE OF AUTHORITIES
CASES

<i>In re Pers. Restraint of Benn,</i> 134 Wn. 2d 868, 952 P.2d 116 (1998).....	6
<i>In re Pers. Restraint of Cook,</i> 114 Wn. 2d 802, 792 P.2d 506 (1990).....	5
<i>In re Pers. Restraint of Dalluge,</i> 152 Wn. 2d 772, 100 P.3d 279 (2004).....	12
<i>In re Pers. Restraint of Dyer,</i> 143 Wn. 2d 384, 20 P.3d 907 (2001).....	7
<i>In re Pers. Restraint of Echeverria,</i> 141 Wn. 2d 323, 6 P.3d 573 (2000).....	6
<i>In re Pers. Restraint of Hews,</i> 99 Wn. 2d 80, 660 P.2d 263 (1983).....	7
<i>In re Pers. Restraint of Jeffries,</i> 114 Wn. 2d 485, 789 P.2d 731 (1990).....	9, 11
<i>In re Pers. Restraint of Maxfield,</i> 133 Wn. 2d 332, 945 P.2d 196 (1997).....	12
<i>In re Pers. Restraint of Orange,</i> 152 Wn. 2d 795, 100 P.3d 291 (2004).....	12
<i>In re Pers. Restraint of Spencer,</i> 152 Wn. App. 698, 218 P.3d 924 (2009).....	9
<i>In re Pers. Restraint of St. Pierre,</i> 118 Wn. 2d 321, 823 P.2d 492 (1992).....	6
<i>In re Pers. Restraint of Teddington,</i> 116 Wn. 2d 761, 808 P.2d 156 (1991).....	6
<i>In re Pers. Restraint of Williams,</i>	

111 Wn. 2d 353, 759 P.2d 436 (1988).....	6
<i>Keller v. City of Spokane,</i> 146 Wn. 2d 237, 44 P.3d 845 (2002).....	10
<i>Smith v. Robbins,</i> 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).....	12
<i>State v. Aguirre,</i> 168 Wn. 2d 350, 229 P.3d 669 (2010).....	10
<i>State v. Coristine,</i> 177 Wn. 2d 370, 300 P.3d 400 (2013).....	5
<i>State v. Lynch,</i> 178 Wn. 2d 487, 309 P.3d 482 (2013).....	5
<i>State v. W.R. Jr.,</i> 181 Wn. 2d 757, 336 P.3d 1134 (2014).....	5

STATUTES

RCW 9.94A.589	11
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Barnes's claim that the trial court erred in giving a "consent" instruction for the burglary and unlawful imprisonment counts is without merit when the instruction at issue dealt only with consent regarding sexual intercourse (which was only an element of the rape counts) and thus this Court properly decided in the direct appeal that the appropriate remedy for this faulty instruction was reversal of the rape counts?

2. Whether Barnes's claim of ineffective assistance of appellate counsel must fail when Barnes has failed to show that his attorney's performance was deficient and that the deficient performance was prejudicial?

II. RESPONSE

The State respectfully moves this court for an order dismissing the petition with prejudice because Barnes has failed to show that his restraint is unlawful.

III. STATEMENT OF THE CASE

This Court recently summarized the facts of the preset case as follows:

Corean Barnes and Christina Russell met in 2007 and dated between 2007 and 2008. They developed a sexual relationship. By August 2008, Russell decided that she did not want to have a further relationship with Barnes, but agreed to

drive Barnes on various errands. On August 15, Russell purchased a digital tape recorder and placed it in her purse in order to surreptitiously record her conversations with Barnes.

Later that day, Russell met Barnes at the house of Kenneth Johnson, who had rented a room to Barnes starting in July 2008.¹ According to Russell, Barnes began making unwanted sexual contact with her. Russell testified that Barnes reached through her car window, touched her breasts, and put his hand down her pants. She told him to stop and said she did not want to do that. Barnes then pulled Russell out of the car by her wrists and forcibly carried her to his nearby camper. Russell testified that after a struggle, Barnes put his hand down her pants and penetrated her vagina with his finger. During this time, Russell was trying to break free and was telling Barnes that she did not want to do this. Barnes admitted touching Russell's breasts over her shirt but denied the remainder of Russell's testimony.

Russell also described another incident later that day, after she picked up Barnes and drove him to Johnson's house. She and Barnes entered Johnson's house. Russell testified that they started kissing, but she decided she did not want to continue and attempted to pull away. Barnes then picked her up and carried her into a bedroom. As she attempted to get away, he closed the door and pushed her into a corner. Russell testified that she continued to struggle, but Barnes forced her pants down. Although she kept telling him no, he had intercourse with her before she broke away. Barnes testified that Russell was a willing participant in the intercourse until she decided to stop after about two minutes, at which time Barnes stopped as well.

¹ Mr Johnson also testified at trial that he had allowed Barnes to live at his residence in July, but that Barnes did not pay the full rent so Mr. Johnson told Barnes he was no longer allowed to come to the residence unless he first contacted Mr. Johnson and Mr. Johnson was present. RP 305-07. Mr. Johnson specifically testified that he told Barnes that he was not allowed to be at the residence unless Mr. Johnson was also present. RP 308. Finally, Mr. Johnson testified that he told these things to Barnes approximately two weeks before Mr. Johnson spoke to Detective Reyes on August 19th, thus the conversation must have taken place in the early part of August (and thus well before Barnes entered the residence on August 15th). RP 309-10.

Russell secretly recorded both incidents. She also recorded lengthy conversations with Barnes around the time of the incidents. Some of the statements involved Barnes's threats to harm Russell.

On August 19, Johnson arrived home to find Barnes inside his house. Johnson objected to him being there without permission and called the police.

The State charged Barnes with two counts of rape in the second degree by forcible compulsion (counts one and two), one count of burglary in the first degree with sexual motivation (count three), and one count of unlawful imprisonment (count four), and two counts of harassment (counts five and six).

See, State v Barnes, No. 44075-0-II (June 17, 2014)("Barnes II")(footnote added), attached as App. B.

2009 Trial and First Appeal

At a 2009 trial a jury convicted Barnes of two counts of second degree rape and one count of unlawful imprisonment, but was unable to reach a verdict on the burglary count. *See, State v Barnes*, No. 39479-1-II (September 28, 2010)("Barnes I"), attached as Appendix A.

Barnes appealed, challenging the trial court's admission of Russell's tape recordings, and this Court reversed holding that it was error to admit the entire transcript of the recordings and that "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." *State v*

Barnes, No. 39479-1-II (September 28, 2010)(“Barnes I”), attached as Appendix A.

2012 Trial

Following the reversal of his convictions, Barnes was tried again in 2012. At the 2012 trial a jury convicted Barnes of both counts of rape in the second degree, unlawful imprisonment, and first degree burglary with sexual motivation. At sentencing the trial court ruled that the second degree rape and first degree burglary convictions were the “same criminal conduct” and, therefore, merged for sentencing purposes. *See, State v Barnes*, No. 44075-0-II (June 17, 2014)(“Barnes II”), attached as Appendix B, citing RP at 563.

Direct Appeal Following 2012 Trial

Following the 2012 trial, Barnes again filed a direct appeal. At issue was a jury instruction that the trial court gave regarding consent. The trial court’s instruction stated as follows:

A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse, there are actual words or conduct indicating freely given agreement to have sexual intercourse.

The defendant has the burden of proving that sexual intercourse 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 as to a charge to which the

defense of consent is raised.

Appendix C.²

This Court held that the trial court erred when it gave this affirmative defense instruction over Barnes's objection, *citing State v. Coristine*, 177 Wn. 2d 370, 378, 300 P.3d 400 (2013) and *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013).³ This Court thus reversed the rape convictions but affirmed the unlawful imprisonment and burglary convictions. *State v. Barnes*, No. 44075-0-II (June 17, 2014) ("Barnes II"), attached as Appendix B.

Barnes then filed then filed the present petition on January 21, 2015.

IV. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of Barnes lies within the judgment and sentence entered by the Superior Court of the State of Washington for Clallam County, on October 16, 2012, in cause number 08-1-00340-9, upon Barnes conviction of Burglary in First Degree and Unlawful Imprisonment. Appendix D.

² This instruction can be found at CP 75 in *State v Barnes*, No. 44075-0-II. In order to facilitate resolution of the present petition the State hereby asks this court to incorporate the Clerk's Papers from the direct appeal into the record for this petition. In any event, the instruction has also been attached to this brief as Appendix C.

³ Shortly after this Court's decision in *Barnes*, the Washington Supreme Court issued its opinion in *State v. W.R.Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) which held that it was a due process violation to switch the burden of proof on the issue of consent to a criminal defendant.

V. ARGUMENT

A timely collateral attack should be entertained only if the petitioner makes a *prima facie* showing of prejudicial constitutional error. Only then will a petitioner “have established that the error is of the type that should be subject to full collateral review.” *In re Cook*, 114 Wn.2d 802, 811, 792 P.2d 506 (1990). It is fundamental in evaluating a personal restraint petition, that “[i]f a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed.” *In re Teddington*, 116 Wn.2d 761, 808 P.2d 156 (1991) (quoting *In re Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988)).

Even if the petition makes a *prima facie* showing of error, he is still not be entitled to relief unless he can show that the error “worked to his actual and substantial prejudice.” *Cook*, 114 Wn.2d at 511; *see also In re Echeverria*, 141 Wn.2d 323, 330, 6 P.3d 573 (2000). This standard requires him to show that, “*more likely than not*, his rights were actually and substantially prejudiced” by the claimed error.” *Cook*, 114 Wn.2d at 814 (emphasis supplied). There is no presumption of prejudice in a personal restraint proceeding. *In re St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992); *In re Benn*, 134 Wn.2d 868, 940, 952 P.2d 116 (1998). The petitioner must “show the error worked to her actual and substantial prejudice in order to prevail.” *St. Pierre*, 118 Wn.2d at 329; *Benn*, 134 Wn.2d at 940.

Reviewing courts have three options in evaluating personal restraint petitions:

- 1) If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
- 2) If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
- 3) If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing.

In re Hews, 99 Wn.2d 80, 88-89, 660 P.2d 263 (1983). To support a request for a reference hearing, the petitioner must state with particularity facts which, if proven, would entitle him to relief. *In re Dyer*, 143 Wn.2d 384, 397, 20 P.3d 907 (2001). If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *Dyer*, 143 Wn.2d at 397. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. *Dyer*, 143 Wn.2d at 397.

For the reasons outlined below, Barnes wholly fails to meet these standards. As such his petition should be dismissed.

A. BARNES’S CLAIM THAT THE TRIAL COURT ERRED IN GIVING A “CONSENT” INSTRUCTION FOR THE BURGLARY AND UNLAWFUL IMPRISONMENT COUNTS IS WITHOUT MERIT BECAUSE THE INSTRUCTION AT ISSUE DEALT ONLY WITH CONSENT REGARDING SEXUAL INTERCOURSE (WHICH WAS ONLY AN ELEMENT OF THE RAPE COUNTS) AND THUS THIS COURT PROPERLY DECIDED IN THE DIRECT APPEAL THAT THE APPROPRIATE REMEDY FOR THIS FAULTY INSTRUCTION WAS REVERSAL OF THE RAPE COUNTS.

In the present petition Barnes first argues that the trial court improperly switched the burden of proof by “providing a consent instruction for first degree burglary and unlawful imprisonment.” Brief in Support of PRP at iii. Specifically, Barnes claims that the trial court “gave an affirmative defense instruction for consent over the defense’s objection for not only the charge of Rape in the Second Degree but also for Burglary and Unlawful Imprisonment.” Brief in Support of PRP at 5. This claim, however, is without merit because the faulty consent instruction only applied to the rape counts, and this Court thus properly only overturned the rape counts in the direct appeal.⁴

⁴ Barnes also briefly appears to argue either that the evidence was insufficient to support the burglary conviction or that there is additional evidence that shows he was not guilty of this charge. Specifically, Barnes briefly claims that he could not be convicted of burglary because he was living at the residence in question and that the “Mr. Johnston also told the mother of his child that he got Mr. Barnes arrested for something he did not do.” Brief in Support of PRP at page 7. With respect to a possible claim that the evidence was

As outlined above, the consent instruction in the present case specifically stated that “a person is not guilty of **rape** if the sexual intercourse is consensual” and that “the defendant has the burden of proving that sexual intercourse was consensual.” Appendix C (emphasis added). Rape and sexual intercourse were terms that clearly only applied to the rape counts, as sexual intercourse (and rape) were not elements of the burglary or unlawful imprisonment counts. Barnes’ claim that the trial court gave a consent instruction for the burglary and unlawful imprisonment counts, therefore, is simply incorrect.

It is true that one of the elements of the crime of burglary in the first degree is that a defendant must have “assaulted” a person in the building (or

insufficient, this claim was already denied in the second direct appeal, where this Court held that the evidence was sufficient despite Barnes’s claim that the evidence was insufficient because he had access to the residence. *See, State v. Barnes*, 44075-0-II (June 17, 2014), attached as Appendix B. Barnes cursory claim in the present petition does not offer any argument why relitigation of this issue is warranted, and this Court should decline to do so. *See also, In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990)(“A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby”). In addition, Barnes’s claim that Mr. Johnson made an out of court statement to a third party does not constitute new evidence that would warrant a new trial. Rather, the PRP exhibit that includes this alleged statement is an email that is dated prior to commencement of the second trial. *See PRP Appendices* (Email from Leigh Hearon dated 9/9/2012). In order to show that he or she is entitled to a new proceeding based on new evidence, a petitioner must establish: “that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new proceeding.” *In re Pers. Restraint of Spencer*, 152 Wn. App. 698, 707, 218 P.3d 924 (2009). In the present case the allegation that Mr. Johnson may have made an out of court statement is not only hearsay, but it was also clearly known before trial (and thus was not newly discovered), and the evidence was merely impeaching. Thus this evidence simply does not warrant a new trial under Washington law.

in immediate flight therefrom) and it is further true that the jury was instructed that “an act is not an assault, if it is done with the consent of the person alleged to be assaulted.” The trial court, however, clearly instructed the jury that “As to the crime of assault, the State has the burden to prove the absence of consent beyond a reasonable doubt.” Appendix E.⁵

In short, there is simply nothing in the record that supports Barnes’s claim in the present petition that the jury was somehow informed that the defense had a burden of proving consent with respect to the burglary or the unlawful imprisonment counts. Barnes’s claim, therefore, is without merit.⁶

Stated another way, reversal of the burglary and unlawful imprisonment counts is not warranted in the present case because the faulty “consent” instruction caused no prejudice with respect to those counts. Under Washington law, even if an instruction may be misleading it will not require reversal unless prejudice is shown by the complaining party. *State v.*

⁵ This instruction can be found at CP 79 in *State v Barnes*, No. 44075-0-II.

⁶ As the issue of the faulty consent instruction was previously addressed in the direct appeal, this Court could also decline to address this issue at all, as Barnes has failed to show why relitigation of this issue is warranted. *See, In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990)(“A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby”). This Court previously addressed the consent instruction in the second direct appeal and determined that the appropriate remedy was reversal of the two rape counts. The present petition thus represents little more than Barnes’s attempt to have this Court relitigate this issue and apply a different remedy. As Barnes has failed to demonstrate why relitigation of this issue is warranted, this Court could simply decline to address this issue. Further, Barnes’s claim should be denied for the reasons outlined in this brief, even if this Court were to consider the issue on its merits.

Aguirre, 168 Wn.2d 350, 364, 229 P.3d 669 (2010), *citing Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). Here the faulty instruction clearly dealt with consent in the context of rape and sexual intercourse, which were not elements of burglary and unlawful imprisonment. Thus there simply was no prejudice caused by the consent instruction with respect to the burglary and unlawful imprisonment counts.⁷

Barnes next appears to claim that because: (1) the trial court found that some of the offenses were the “same criminal conduct;” and (2) this Court had found error and reversed the rape counts, that reversal of all of the counts was somehow required. Brief in Support of PRP at pages 1, 7.

A finding of “same criminal conduct” under RCW 9.94A.589, however, is purely a sentencing issue as the statute provides that if a trial court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. RCW 9.94A.589(1)(a). The statute does not provide, however, that the counts are treated the same for all purposes, nor does it in any way provide that reversal of one count somehow requires reversal of all counts. In short, the finding of same criminal conduct is irrelevant to the issue of whether an error that affects one count somehow requires reversal of all

⁷ Similarly, any error that occurred with the consent instruction was clearly harmless error with respect to the burglary and unlawful imprisonment counts.

counts. In any event, for the reasons outlined above the faulty “consent” instruction by its very terms only applied to the rape counts, thus this Court properly only reversed the rape counts in the direct appeal.

B. BARNES’S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL MUST FAIL BECAUSE BARNES HAS FAILED TO SHOW THAT HIS ATTORNEY’S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE WAS PREJUDICIAL.

Barnes next argues that his appellate counsel was ineffective for failing to argue that the trial court’s consent instruction improperly applied to the burglary and unlawful imprisonment charges. Brief in Support of PRP at pages iii, 8.

To establish ineffective assistance of appellate counsel, a petitioner must establish that (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the defendant. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Thus to prevail on an ineffective assistance of appellate counsel claim, a petitioner must show “that the legal issue which appellate counsel failed to raise had merit and that they were actually prejudiced by the failure to raise or adequately raise the issue.” *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772,

787, 100 P.3d 279 (2004), quoting *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997).

In the present case Barnes claims that his appellate counsel was ineffective for failing to raise a claim that the consent instruction applied to the burglary and unlawful imprisonment counts. See, Brief in Support of PRP at page 8. As outlined above, however, the “consent” instruction clearly only applied to the rape counts. Thus, Barnes cannot show either that his appellate counsel was ineffective or that he suffered any prejudice. His ineffective assistance claim, therefore, is clearly without merit.

VI. CONCLUSION

For the foregoing reasons, Barnes’s petition should be denied.

DATED April 10, 2015.

Respectfully submitted,

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Appendix A

157 Wash.App. 1076

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Corean Omarus BARNES, Appellant.

No. 39479-1-II. | Sept. 28, 2010. | As Amended on
Denial of Reconsideration Jan. 4, 2011.

West KeySummary

I Criminal Law

☞Electronic surveillance; telecommunications

Admitting rape defendant's recorded statements that did not fall under the threats exception to the Privacy Act was not proper. Defendant's reference to wanting to have sex with victim and statements that victim was an "amazing woman" were not threatening. West's RCWA 9.73.030(1), 9.73.030(2).

1 Cases that cite this headnote

Appeal from Clallam Superior Court; Honorable Kenneth Day Williams, J.

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UNPUBLISHED OPINION

WORSWICK, J.

*1 Corean Omarus Barnes appeals his convictions for two counts of second degree rape and one count of unlawful imprisonment. He argues that the trial court erred in admitting a recorded conversation between him and the victim under the "Privacy Act," chapter 9.73 RCW, and that trial counsel was ineffective for failing to seek a lesser included instruction for third degree rape.¹ He also raises several additional claims pro se in a Statement of Additional Grounds (SAG). We hold that the admission of recorded conversations violated the Privacy Act, and we reverse and remand for a new trial.

FACTS

Corean Barnes and Christina Russell began dating in the fall of 2007. On August 13, 2008, Russell told Barnes she wanted to end the relationship. Nonetheless, Russell agreed to drive Barnes from Sequim to Port Townsend for a meeting on August 15. Because Barnes had made recent threats to blow up Russell's house and car, she feared for her safety. She purchased a digital audio recorder so that she could secretly record any conversations she had with Barnes on August 15.

According to Russell, when she arrived at Barnes's house, he came to the car, tried to kiss her, and raped her. Russell said that Barnes then removed her from the car and took her inside the camper, where he again raped her. These events were recorded.

Barnes and Russell returned to Russell's car and drove to Port Townsend. During the drive, she repeatedly stated that she did not "want to do any more sexual things with him." Report of Proceedings (RP) (May 5, 2009) at 30. He told her that he would continue to bother her until they had sex one last time. He was angry, saying things like, "I'm so sick and tired of you simple-minded f* * *ing white f* * *ing female. Always trying to make it seem like somebody's actually gonna f* * *ing do something to your ass. Now you f* * *ing should be worried." Ex. 10 at 18. These conversations were also recorded.

After dropping Barnes off at his meeting in Port Townsend and while she was alone in the car, Russell made multiple narrative recordings describing what had happened to her.

After his meeting, Russell picked up Barnes and they returned to Sequim. During the drive, he made more sexual comments and again insisted that they have sex before their

relationship could end. He then made a series of threatening remarks, including that she should not underestimate him, that he would kill her cat, and that he would kill her because he loved her. Russell became very afraid at this point.

When they returned to Sequim they went to a friend's home and began kissing. According to Russell, when she began resisting his advances, he picked her up off the couch and carried her to a bedroom, and raped her there. The digital device recorded all of the events during the trip from Port Townsend to Sequim and also at the home in Sequim. Several days later, Russell went to a health care provider. The health care provider referred Russell to an advocate and Russell called the police.

*2 The State charged Barnes with two counts of second degree rape, one count of first degree burglary, and one count of unlawful imprisonment. Before trial, Barnes moved to suppress the contents of the digital recording as inadmissible hearsay, not the best evidence, and inadmissible under the Privacy Act. The trial court admitted all of the recording except for Russell's narratives. The trial court ruled that the recording of the conversations was admissible under the exception in RCW 9.73.030(2)(b) for unlawful threats of bodily harm. The trial court determined that other parts of the conversations provided "context." Clerk's Papers (CP) at 70-71. The trial court left open the possibility to challenge portions of the transcript on "other evidentiary rule reasons," which apparently did not occur.² CP at 70-71. In light of the trial court's ruling to admit excerpts of the recording, Barnes moved the trial court to admit the narrative portions of the recording under ER 106 for purposes of completeness. The State did not object and the trial court granted the request.

The trial court admitted the entire digital recording made by Russell on August 15 and played it for the jury. Russell also testified regarding the events surrounding the August 15 recording. Barnes testified that Russell consented to the sexual encounter in the bedroom.

A jury convicted Barnes of unlawful imprisonment and both counts of second degree rape. The jury did not reach a verdict on the burglary charge. Barnes appeals.

ANALYSIS

I. Privacy Act

Barnes first contends that the trial court erred in admitting

an illegally recorded conversation that did not fit within any of the Washington Privacy Act's exceptions. Barnes argues that the trial court erroneously admitted the entire recording, instead of limiting the admitted portion to clear threats.³ The State disagrees with that narrow supposition and counters that the entire recording, including any implied threats, is admissible because the recording is "replete with explicit and implicit threats to extort sex or inflict body harm." Br. of Resp't at 14-15.

The Privacy Act requires that all parties consent before a private conversation is recorded. RCW 9.73.030(1). The Privacy Act "puts a high value on the privacy of communications." *State v. Christensen*, 153 Wash.2d 186, 200, 102 P.3d 789 (2004). And except in limited circumstances, recordings made in violation of the Privacy Act are inadmissible in a criminal proceeding. RCW 9.73.050. Interpretation of a statute is a question of law that we review de novo. *Christensen*, 153 Wash.2d at 194, 102 P.3d 789. But we review the trial court's ultimate decision to admit or exclude evidence for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

A. Threats Exception

Recordings "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands ... may be recorded with the consent of one party to the conversation." RCW 9.73.030(2). Courts strictly construe this exception. See *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980). Our Supreme Court has defined "convey" in this context as " 'to impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance.' " *State v. Caliguri*, 99 Wash.2d 501, 507-08, 664 P.2d 466 (1983) (quoting Webster's Third New International Dictionary 499 (1971)).

3 A number of Barnes's recorded remarks that went before the jury did not convey threats, either directly or indirectly, and did not fall under the exceptions to the Privacy Act. For example, Barnes said, "A threesome is something to spice up the freaking sex life. It's not to compare you to a[sic] other girl. Because the girl after the threesome is done, you'll still be there, the other girl won't." Ex. 10 at 36. And, "Apparently there's a lot of things you don't make a commitment to. That's why you're divorced. That's why your f * *ing wetback f* * *ing over the border boyfriend is wherever the f* * * he at." Ex. 10

at 50. Or, "I am gonna miss the sex though cuz Lord knows it was f* * *ing. You know. Any man [would] be lucky to have you. Cuz you are truly an amazing woman. And I'll kick anybody else's ass that says differently." Ex. 10 at 64.

In light of the narrow construction we afford the threats exception, coupled with the broad definition of "convey" under *Calgari*, we hold the trial court abused its discretion by 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. Following defense counsel's objection to the admission of statements, 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.⁴

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 Wash.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 Wash.2d at 193, 102 P.3d 789. "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 Wash.2d at 193, 102 P.3d 789. 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 Wash.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.⁵

II. Sufficient Evidence

Barnes finally contends that insufficient evidence exists to sustain his second degree rape conviction. We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Bencivenga*. 137 Wash.2d 703, 706, 974 P.2d 832 (1999). A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences in favor of the State and most strongly against the defendant. *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. Both circumstantial evidence and direct evidence are equally reliable. *Bencivenga*, 137 Wash.2d at 711, 974 P.2d 832; *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

In order to convict Barnes of two counts of second degree

rape, the jury had to find beyond a reasonable doubt (1) that on or about August 15, 2008, he engaged in sexual intercourse with Russell; (2) that the sexual intercourse occurred by forcible compulsion; and (3) that the acts occurred in the state of Washington.

Russell testified in great detail regarding the events leading up to and surrounding the rapes in this case. The evidence is more than clear that on August 15, 2008, Barnes engaged in sexual intercourse with her against her will by force, all of which occurred in Sequim, Washington. Because we admit the truth of the State's evidence and all inferences that can reasonably be drawn from it in the State's favor, Barnes's argument fails.

Reversed and remanded for a new trial.

Footnotes

- 1 He also argues that the trial court's "knowledge" instruction created an impermissible mandatory presumption that denied him due process. The instruction used by the trial court has been updated in the 2008 amendments to the Washington Pattern Jury Instruction 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02, at 206-08 (3d ed.2008). On remand, the trial court is instructed to consider using the amended version.
- 2 The specific language of the trial court's memorandum opinion on the motion to suppress is as follows:
The request in this case is to suppress certain recordings made of private conversations between the Defendant and the alleged victim. The Court has been provided a transcript of the taped material.
RCW 9.73.030 makes it unlawful for "any individual ... to intercept or record private conversations by electronic devices."
RCW 9.73.030 (Subsection II) however, states that conversations which convey threats of extortion, blackmail, bodily harm or other unlawful requests or demands may be recorded with the consent of one party to the conversation.
To the extent that the Defendant is involved in these conversations it would appear that the conversations fall within the exemptions. Certainly parts of the conversation are likely not relevant except for purposes of context.
There are some long narratives which are contained at pages 32 through 36 which are not conversations with the Defendant. It would appear to the Court that those particular conversations would not fall within the ambit of the statute in that they are single party recordings. There may be individual portions of the transcript which should be excluded from testimony for other evidentiary rule reasons. In general however, the conversations between the defendant and the alleged victim appear to meet the exceptions requirement of the private recording act and therefore will not be suppressed by the Court.
CP at 70-71.
- 3 Barnes concedes to two overt threats: his statement that he planned to have sex with Russell whether she wanted to or not, and that he might kill her and her cat.
- 4 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 Wash.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.
- 5 Because we reverse on Barnes's Privacy Act claims, we do not reach his ineffective assistance of counsel claims.

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 pursuant to RCW 2.06.040, it is so ordered.

We concur: PENOYAR, C.J., and SCHINDLER, J.

Parallel Citations

2010 WL 3766574 (Wash.App. Div. 2)

Appendix B

181 Wash.App. 1035

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.

Corean BARNES, Appellant.

No. 44075-0-II. | June 17, 2014.

Appeal from Clallam Superior Court; Honorable Kenneth Day Williams, J.

Attorneys and Law Firms

Lise Ellner, Attorney at Law, Vashon, WA, for Appellant/Cross-Respondent.

Lewis M. Schrawyer, Attorney at Law, Port Angeles, WA, for Respondent/Cross-Appellant.

UNPUBLISHED OPINION

MAXA, J.

*1 Corean Barnes appeals his jury convictions for two counts of second degree rape, unlawful imprisonment, and first degree burglary with sexual motivation. We hold that the trial court violated Barnes's Sixth Amendment right by instructing the jury, over Barnes's objection, on an affirmative defense of consent to the rape charges. Therefore, we reverse Barnes's second degree rape convictions and remand for retrial. We also hold that: (1) Barnes did not provide a sufficient record or argument to allow us to address whether the trial court erred under the Privacy Act in admitting a redacted version of secret recordings; (2) Barnes's ineffective assistance of counsel claim fails because he cannot show that his counsel's failure to object to the recordings on ER 401, ER 402 and ER 403 grounds prejudiced him; (3) Barnes was not entitled to a jury instruction on the lesser included charge; and (4) the State presented sufficient evidence that Barnes unlawfully entered a third person's property to commit rape. And we reject Barnes's Statement of Additional Grounds (SAG) arguments. Accordingly, we affirm Barnes's convictions for unlawful imprisonment and first

degree burglary.

The State also cross-appeals, asserting that the trial court erred in ruling that the burglary and rape convictions were the same criminal conduct when calculating Barnes's offender score for sentencing purposes. Because we vacate Barnes's second degree rape convictions, we do not reach the State's arguments on cross-appeal.

FACTS

Rape and Burglary

Corean Barnes and Christina Russell met in 2007 and dated between 2007 and 2008. They developed a sexual relationship. By August 2008, Russell decided that she did not want to have a further relationship with Barnes, but agreed to drive Barnes on various errands. On August 15, Russell purchased a digital tape recorder and placed it in her purse in order to surreptitiously record her conversations with Barnes.

Later that day, Russell met Barnes at the house of Kenneth Johnson, who had rented a room to Barnes starting in July 2008. According to Russell, Barnes began making unwanted sexual contact with her. Russell testified that Barnes reached through her car window, touched her breasts, and put his hand down her pants. She told him to stop and said she did not want to do that. Barnes then pulled Russell out of the car by her wrists and forcibly carried her to his nearby camper. Russell testified that after a struggle, Barnes put his hand down her pants and penetrated her vagina with his finger. During this time, Russell was trying to break free and was telling Barnes that she did not want to do this. Barnes admitted touching Russell's breasts over her shirt but denied the remainder of Russell's testimony.

Russell also described another incident later that day, after she picked up Barnes and drove him to Johnson's house. She and Barnes entered Johnson's house. Russell testified that they started kissing, but she decided she did not want to continue and attempted to pull away. Barnes then picked her up and carried her into a bedroom. As she attempted to get away, he closed the door and pushed her into a corner. Russell testified that she continued to struggle, but Barnes forced her pants down. Although she kept telling him no, he had intercourse with her before she broke away. Barnes testified that Russell was a willing participant in the intercourse until she decided to stop after about two minutes, at which time Barnes stopped as well.

*2 Russell secretly recorded both incidents. She also

recorded lengthy conversations with Barnes around the time of the incidents. Some of the statements involved Barnes's threats to harm Russell.

On August 19, Johnson arrived home to find Barnes inside his house. Johnson objected to him being there without permission and called the police.

The State charged Barnes with two counts of rape in the second degree by forcible compulsion (counts one and two), one count of burglary in the first degree with sexual motivation (count three), and one count of unlawful imprisonment (count four), and two counts of harassment (counts five and six).

First Trial and Appeal

A jury convicted Barnes of two counts of second degree rape and one count of unlawful imprisonment.¹ *State v. Barnes*, noted at 157 Wn.App. 1076, 2010 WL 3766574, at *1 (unpublished). Barnes appealed, challenging the trial court's admission of Russell's tape recordings. *Barnes*, WL 3766574, at *2. The State argued that the entire transcript of Barnes's recorded statements were admissible under the threats and hostage holder exceptions to the Privacy Act. *Barnes*, WL 3766574, at *2. We reversed in an unpublished opinion, holding that it was error to admit the entire transcript of the recordings. *Barnes*, WL 3766574, at *3-4. We noted that a number of Barnes's recorded remarks did not fall under the threats exception. *Barnes*, WL 3766574, at *3. We stated conviction Similarly, we held that recordings made during the period of imprisonment were admissible under the hostage holder exception, but that it was error to admit the entire recording. *Barnes*, WL 3766574, at *3. Accordingly, we remanded for a new trial. *Barnes*, WL 3766574, at *4.

Second Trial

Before the second trial, the State and Barnes appeared at a hearing to redact portions of the recordings in order to comply with our decision. The trial court admitted portions of the recordings under both the threats exception and the unlawful requests or demands exception to the Privacy Act, RCW 9.73.030(2). The court played a redacted version of the recordings for the jury.

The trial court approved a jury instruction stating that a person is not guilty of rape if the sexual intercourse was consensual, and that Barnes had the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence. Barnes objected to this affirmative defense instruction, stating that it "for[ed a] consent instruction on

us when it's not requested." Report of Proceedings (RP) at 487. Barnes argued that this instruction placed a burden on him to prove consent, and that this burden shifting would confuse the jury. The trial court gave this instruction despite Barnes's objection.

*3 A jury convicted Barnes of both counts of rape in the second degree, unlawful imprisonment, and first degree burglary with sexual motivation. During sentencing, the trial court ruled that the second degree rape² and first degree burglary convictions were the "same criminal conduct" and, therefore, merged for sentencing purposes. RP at 563 The State objected.

Barnes appeals his convictions. The State cross-appeals the trial court's merging of the second degree rape and first degree burglary convictions for sentencing purposes.

ANALYSIS

A. AFFIRMATIVE DEFENSE INSTRUCTION

Barnes argues that the trial court violated his Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over his objections. Barnes asserts that the affirmative defense instruction improperly shifted the burden of proof to the defense to prove that the sexual intercourse was consensual in order to avoid a conviction for second degree rape. We agree based on our Supreme Court's decisions in *State v. Coristine*, 177 Wn.2d 370, 378, 300 P.3d 400 (2013) and *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). We reverse Barnes's convictions on both counts of second degree rape.

1. Defendant's Right to Control Defense

A criminal defendant has a right under the Sixth Amendment to the United States Constitution to control his or her own defense. *Lynch*, 178 Wn.2d at 491. "Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense." *Lynch*, 178 Wn.2d at 492 (quoting *Coristine*, 177 Wn.2d at 375). We review allegations of constitutional violations de novo. *Lynch*, 178 Wn.2d at 491.

In *Coristine*, the State charged the defendant with second degree rape, and was required to prove that the alleged victim lacked the capacity to consent to sexual intercourse because she was physically helpless or mentally incapacitated. 177 Wn.2d at 373 (citing RCW

9A.44.050(1)(b)). The defendant testified that the alleged victim initiated and willingly participated in the sexual intercourse. *Coristine*, 177 Wn.2d at 373–74. The State proposed an instruction on the statutory defense of reasonable belief, under which the defendant had the burden of proving that he reasonably believed the alleged victim was not mentally incapacitated or physically helpless. *Coristine*, 177 Wn.2d at 374. At trial, the defendant argued that his defense was that the State had failed to prove that the alleged victim was incapacitated. *Coristine*, 177 Wn.2d at 374. The trial court gave the affirmative defense instruction over the defendant's objection. *Coristine*, 177 Wn.2d at 374.

Our Supreme Court held that instructing a jury to consider an affirmative defense over the defendant's objection interferes with the defendant's Sixth Amendment right to control his or her defense. *Coristine*, 177 Wn.2d at 378. The court emphasized that the Sixth Amendment places the "important strategic decision" of whether to assert an affirmative defense "squarely in the hands of the defendant, not the prosecutor or the trial court." *Coristine*, 177 Wn.2d at 378. "Imposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges." *Coristine*, 177 Wn.2d at 377.

*4 In *Lynch*, the State charged the defendant with second degree rape based on the victim's allegation of forcible compulsion. 178 Wn.2d at 489. The defendant admitted that he had sexual contact with the alleged victim, but claimed that she consented to his conduct. *Lynch*, 178 Wn.2d at 490. The defendant objected to the State's proposed instruction on the affirmative defense of consent "on the grounds that he had the right to control his defense and because he did not want to bear the burden of proving consent." *Lynch*, 178 Wn.2d at 490. The defendant argued that he presented evidence of consent to create reasonable doubt as to whether the State had proved forcible compulsion. *Lynch*, 178 Wn.2d at 490. The trial court gave the affirmative defense instruction over the defendant's objection. *Lynch*, 178 Wn.2d at 490.

Our Supreme Court held that its decision in *Coristine* was dispositive. *Lynch*, 178 Wn.2d at 492. The court confirmed that giving an affirmative defense instruction over the defendant's objection violated the Sixth Amendment. *Lynch*, 178 Wn.2d at 492. The court stated that a defendant must be allowed to "cast doubt on an element of the State's case" without assuming the burden of proof. *Lynch*, 178 Wn.2d at 493. The court also rejected the State's argument that giving the affirmative defense instruction was justified because the defendant introduced evidence that the alleged victim consented. *Lynch*, 178 Wn.2d at 493–94.

Here, as in *Coristine* and *Lynch*, Barnes objected to instructing the jury on the affirmative defense of consent, which stated that Barnes had to prove by a preponderance of the evidence that his sexual intercourse with Russell was consensual. Barnes objected on the grounds that the instruction (1) would confuse the jury, (2) would relieve the State of proving every element beyond a reasonable doubt, and (3) would require him to pursue an affirmative defense of consent. And the record does not show that Barnes expressly argued an affirmative defense of consent. Instead, he argued that the State failed to meet its burden on either rape charge.

The facts here cannot be distinguished from *Coristine* and *Lynch*. As in *Lynch*, the fact that Barnes testified that Russell consented to sexual contact did not justify giving an affirmative defense instruction. *Lynch*, 178 Wn.2d at 494. Accordingly, we hold that the trial court erred when it instructed the jury on the affirmative defense of consent.

2. Harmless Error Analysis

We conduct a constitutional harmless error analysis to determine whether the trial court's violation of Barnes's Sixth Amendment rights warrants vacating his conviction. *Coristine*, 177 Wn.2d at 379–80. "[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." *Coristine*, 177 Wn.2d at 380.

Here, the State did not argue that giving the affirmative defense instruction over Barnes's objection was harmless beyond a reasonable doubt. In fact, the State does not even argue that the error was harmless. As a result, we hold that the State failed to prove that the error was not harmless beyond a reasonable doubt.

*5 We hold that the trial court violated Barnes's Sixth Amendment right to control his own defense by instructing the jury on an affirmative defense that Barnes did not want to pursue. Because the State has failed to meet its burden of proving this constitutional violation was not harmless beyond a reasonable doubt, we reverse both of Barnes's second degree rape convictions³ and remand for a new trial on those charges.

B. ADMISSIBILITY OF SECRET RECORDINGS

Barnes argues that Russell's secret recording of their conversations violated the Privacy Act, RCW 9.73.030, and therefore under RCW 9.73.050 the trial court erred in allowing the jury to listen to a redacted version of the

recordings. The State argues that the recordings were admissible under two exceptions listed in the Privacy Act. First, the Privacy Act exempts communications that “convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands.” RCW 9.73.030(2)(b). Second, it exempts communications by a hostage holder, RCW 9.73.030(2)(d), defined as someone who commits kidnapping or unlawful imprisonment. RCW 70.85.100(2)(a).

In Barnes’s first appeal, we stated that selected portions of the recordings may qualify for the threats exception. *Barnes*, WL 3766574, at *3. We also stated that, under the hostage holder exception, the trial court could admit the portion of the recording made during the period of unlawful imprisonment. *Barnes*, WL 3766574, at *3. As a result, at least some portions of the recordings are admissible. Barnes does not dispute this conclusion.

But Barnes did not provide sufficient argument to allow us to evaluate his claim that many of the portions of the recordings were inadmissible. He has made no attempt to designate which portions of the 22 minute redacted version of the recordings are admissible under the Privacy Act exceptions and which portions are inadmissible. The appellant has the burden of providing an adequate record on appeal. *State v. Tracy*, 158 Wn.2d 683, 691, 147 P.3d 559 (2006); RAP 9.2(b). We need not search for the applicable portions of the record in support of a party’s argument. *State v. Brousseau*, 172 Wn.2d 331, 353, 259 P.3d 209 (2011); RAP 10.3(a)(6) (a party must cite “references to relevant parts of the record”). Barnes’s failure to provide an adequate record precludes our review. *Stiles v. Kearney*, 168 Wn.App. 250, 259, 277 P.3d 9, review denied, 175 Wn.2d 1016, 287 P.3d 11 (2012). Here, because Barnes failed to designate which portions of the redacted version of the recordings he disputes as inadmissible, we are unable to address whether the trial court erred in admitting certain portions under the Privacy Act exceptions.

On remand, the trial court will be free to reevaluate the admissibility of particular portions of the redacted version of the recordings based on Barnes’s specific objections.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Barnes argues that he received ineffective assistance of counsel because his attorney failed to object to the redacted version of the recordings under ER 401, 402, or 403. We need not address this issue with regard to the second degree rape convictions because, on remand, Barnes’s counsel will have the opportunity to object to the recordings on grounds not asserted at trial. But we must consider

Barnes’s argument with respect to the wrongful imprisonment and first degree burglary convictions because ineffective assistance of counsel could require a new trial on those convictions. We hold that Barnes is not entitled to a reversal of those convictions based on ineffective assistance of counsel.

*6 To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel’s representation was deficient, and (2) the deficient representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011). The defendant’s failure to show either element ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), overruled on other grounds by *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that, except for counsel’s errors, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Even assuming Barnes is correct that defense counsel’s performance was deficient for not objecting to the redacted version of the recordings based on ER 401, ER 402, and ER 403, he must establish prejudice by showing that the trial court would have sustained these objections. *Grier*, 171 Wn.2d at 34. This is a difficult task: “The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). And a trial court has broad discretion in determining the admissibility of evidence under these rules. *State v. Dye*, 178 Wn.2d 541, 547–48, 309 P.3d 1192 (2013).

Barnes relies primarily on *State v. Briejer*, 172 Wn.App. 209, 289 P.3d 698 (2012), to argue that the recordings were not relevant res gestae evidence. But we need not address his res gestae argument because portions of the recordings are directly relevant. To prove second degree rape, the State had to prove that Barnes engaged in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). “Forcible compulsion” means physical force that overcomes resistance. RCW 9A.44.010(6). Russell’s statement on the recordings that Barnes hurt her wrist, supported by her testimony that Barnes grabbed her wrists to pull her out of the car and into the camper is relevant to show that during the first incident Barnes used physical force to overcome Russell’s

resistance to have sex. The same evidence may be admissible to show unlawful imprisonment. And Barnes's conversations with Russell demanding that she have sex with him, as well as Russell's objections, are relevant to the question of whether during either incident Barnes used forcible compulsion to get what he wanted.

Barnes argues that certain portions of the recordings are irrelevant and inadmissible under ER 402, but once again he has made no attempt to designate which portions of the 22 minute redacted version of the recordings are irrelevant. He makes only general references to the recordings. Similarly, Barnes has presented no argument that specific statements in the recordings are more prejudicial than probative under ER 403. He simply asserts, without analysis or argument, that the trial court would have excluded the recordings under ER 403. As a result, we cannot determine whether the trial court would have sustained relevancy or ER 403 objections to particular portions of the recordings.

*7 Because Barnes fails to show that any deficient performance by his trial counsel prejudiced him, we reject his ineffective assistance of counsel claim with respect to the unlawful imprisonment and first degree burglary convictions.

D. LESSER INCLUDED OFFENSE INSTRUCTION

The trial court instructed the jury on the crime of second degree rape. Barnes argues that the trial court erred in denying his request for a jury instruction on the lesser included offense of third degree rape. We disagree, and hold that the trial court properly refused to instruct the jury on third degree rape.

A person is guilty of third degree rape if he or she engages in sexual intercourse with another person without consent, "and such lack of consent was clearly expressed by the victim's words or conduct." RCW 9A.44.060(1)(a). A person is guilty of second degree rape when, under circumstances not constituting first degree rape, he or she engages in sexual intercourse with another person "[b]y forcible compulsion." RCW 9A.44.050(1)(a). "'Forcible compulsion' means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself." RCW 9A.44.010(6).

When the State charges a defendant with an offense "divided by inferior degrees of a crime, the jury may find the defendant not guilty of the charged offense, but guilty on any lesser degrees of the crime." *State v. Buzzell*, 148 Wn.App. 592, 602, 200 P.3d 287 (2009) (citing RCW

10.61.003, .006). A defendant is entitled to a jury instruction on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong); and (2) the evidence in the case supports an inference that the defendant committed the lesser crime to the exclusion of the greater crime (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); see *State v. Berlin*, 133 Wn.2d 541, 546-47, 947 P.2d 700 (1997). The court must view the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150(2000).

We review de novo the legal prong of a request for a jury instruction on a lesser included offense. *State v. LaPlant*, 157 Wn.App. 685, 687, 239 P.3d 366 (2010). But we review the factual prong of a request for a jury instruction on a lesser included offense for abuse of discretion. *LaPlant*, 157 Wn.App. at 687.

The State does not dispute that third degree rape is a lesser degree offense of second degree rape; its elements plainly satisfy the legal prong of the *Workman* test. But the State disputes the factual prong. Therefore, the question is whether the evidence supports a finding of third degree rape—i.e., that Barnes had nonconsensual sexual intercourse with Russell without forcible compulsion.

Regarding the first incident, Russell testified that Barnes used forcible compulsion to have nonconsensual sexual intercourse with her. Barnes denied that he had sexual intercourse with Russell at all during this incident. As a result, there is no evidence that would support a finding that in this incident they had sexual contact to which Russell did not consent but Barnes did not use force.

*8 Regarding the second incident, Russell again testified that Barnes used forcible compulsion to have nonconsensual sexual intercourse with her. Barnes testified that the sexual intercourse was consensual. Once again, there is no evidence that would support a finding that in this incident Russell did not consent but Barnes did not use force. Our Supreme Court has held that a defendant is not entitled to an instruction on a lesser offense where "a victim's testimony that she was physically overpowered negates any inference that sexual intercourse was nonconsensual but still unforced." *Buzzell*, 148 Wn.App. at 604. *Buzzell* applies here.

Russell testified that the sexual contact was through forcible compulsion. According to Barnes's testimony, there was no sexual intercourse in the first incident and the sexual intercourse was consensual in the second incident. Even taking all the evidence in the light most favorable to

Barnes, there is no evidence that Barnes made nonconsensual sexual contact without the use of physical force. Therefore, we hold that the trial court properly refused to give an instruction of rape in the third degree.

E. SUFFICIENT EVIDENCE OF BURGLARY

Barnes also argues that the State failed to prove the elements of first degree burglary with sexual motivation.⁴ The statute governing burglary provides that “A person ‘enters or remains unlawfully’ in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.” Former RCW 9A.52.010(3) (2008). Barnes disputes the State’s assertion that he “enter[ed] or remain[ed] unlawfully.” Br. of Appellant at 22. He contends that there was no evidence that his presence was unlawful. We hold that the State presented sufficient evidence of first degree burglary with sexual motivation.

Evidence is sufficient to support a conviction if, viewed “in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). When a defendant challenges the sufficiency of the evidence in a criminal case, the court draws all reasonable inferences from the evidence.. in favor of the State and ... most strongly against the defendant. *Kintz*, 169 Wn.2d at 551 A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Kintz*, 169 Wn.2d at 551

Beginning in early July 2008, Johnson rented a room to Barnes, but Barnes was unable to pay rent after the first month and stopped living with Johnson approximately in the “middle of August” 2008. RP at 306. When Barnes left, he “couldn’t take all of his things so [Johnson] allowed him to keep some of his things” at the house. RP at 307. Barnes no longer slept at Johnson’s house, but Johnson orally permitted him to come onto the property on the condition that Barnes would first contact Johnson, and that Johnson would be at home when Barnes arrived. At trial, Johnson testified that Barnes did not have permission to be in Johnson’s house on August 15, 2008, the date of Russell’s encounter with Barnes.

*9 Barnes claims that Johnson kept the doors to his house unlocked so that Barnes could enter when he needed to. But Johnson’s testimony contradicts Barnes’s assertion that Johnson permitted Barnes to enter the property on August 15. Johnson was clear that, after Barnes was unable to pay rent for August, Johnson placed conditions on Barnes’s entry onto the property.

Our analysis is whether, “viewing the evidence in the light

most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Kintz*, 169 Wn.2d at 551. And we “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. J.P.*, 130 Wn.App. 887, 891–92, 125 P.3d 215 (2005). Thus, even if Barnes’s testimony could support an alternate scenario in which he lawfully entered Johnson’s property, the jury had sufficient evidence to conclude that Johnson did not permit Barnes to enter and remain on his property on August 15, 2008. Consequently, we hold that sufficient evidence supports the first degree burglary conviction.

F. STATEMENT OF ADDITIONAL GROUNDS (SAG)

In his SAG, Barnes makes four additional arguments. First, he argues that the trial court violated his due process rights when it admitted the recording. Barnes bases his due process argument on his assertion that the trial court violated the Privacy Act when it admitted the recording. But as discussed above, Barnes did not provide sufficient argument to allow us to evaluate this claim. Barnes’s SAG also provides no specific designation of the allegedly inadmissible recorded statements. As a result, we need not address this issue.

Second, Barnes argues that the State failed to present sufficient evidence to prove that he entered Johnson’s property with the intent to commit a crime, one of the elements of first degree burglary. He claims that Russell voluntarily entered Johnson’s house, which negates the intent element. But Russell testified that, once inside Johnson’s house, Barnes forced her to have nonconsensual sex. Based on this evidence, a rational jury could find beyond a reasonable doubt that Barnes intended to commit a crime against Russell on the property. Therefore, we reject Barnes’s second argument.

Third, Barnes argues that the trial court abused its discretion when it allowed the State to introduce evidence of Barnes’s violation of a no-contact order against a former girlfriend. Barnes apparently refers to defense counsel’s statement, outside the presence of the jury: “[I]t appeared that the Court initially allowed evidence of the violation of a no contact order in, but then changed its mind and decided not to allow that in.” RP at 142. In this conversation, defense counsel was discussing the history of the trial court’s orders. There is no other evidence in the record that Barnes violated a no-contact order against a former girlfriend, nor any evidence that the jury heard this information. Thus, we reject Barnes’s unfounded argument.

*10 Fourth, **Barnes** argues that the trial court abused its discretion when it allowed the State to introduce Russell's statements regarding assaulting other women. **Barnes** apparently refers to Russell's testimony that, on one occasion, **Barnes** said that he wished he could pour gasoline "over all women and watch them burn" and, on another occasion, that he "wish[ed he] could slit [his former girlfriend's] throat and watch the dust pour out." RP at 203. But **Barnes** did not object to these statements at trial, thereby failing to preserve the issue for appeal. *State v. Embry*, 171 Wn.App. 714, 739, 287 P.3d 648 (2012), review denied, 177 Wn.2d 1005, 300 P.3d 416 (2013). To raise an error for the first time on appeal, a defendant must show a manifest error affecting a constitutional right. RAP 2.5(a)(3). Because **Barnes** fails to show that his claim falls within RAP 2.5(a)(3), we need not consider this issue.

criminal conduct for sentencing purposes. Because we vacate **Barnes's** second degree rape convictions, we need not reach the State's cross-appeal.

We reverse and remand for a new trial on both of **Barnes's** second degree rape convictions. We affirm **Barnes's** convictions for unlawful imprisonment and first degree burglary.

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 pursuant to RCW 2.06.040, it is so ordered.

We concur: BJORGEN, A.C.J., and LEE, J.

G. CROSS-APPEAL: SAME CRIMINAL CONDUCT

The State also appeals **Barnes's** sentence and argues that the trial court erred in ruling that the crimes of first degree burglary and second degree rape constituted the same

Parallel Citations

2014 WL 2795968 (Wash.App. Div. 2)

Footnotes

- 1 The jury in the first trial did not reach a verdict on the burglary charge.
- 2 The trial court did not specify which second degree rape conviction was the same criminal conduct as the first degree burglary. However, we fairly can assume that the trial court was referring to count two, which involved the rape in Johnson's house.
- 3 The trial court instructed the jury on the affirmative defense only for count 2, and the State argued that the instruction applied only to count 2. But the instruction's language was broad enough that its terms necessarily applied to both counts. Accordingly, we reverse on both counts.
- 4 Although Johnson called the police when he encountered Barnes at his residence on August 19, the State charged Barnes with first degree burglary for his entry onto the property on August 15, and the jury convicted Barnes of first degree burglary with a sexual motivation for his August 15 rape of Russell while on the property. Thus, this issue on appeal is limited to whether Barnes committed burglary on August 15, not August 19.

Appendix C

NO. 12

A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse, there are actual words or conduct indicating freely given agreement to have sexual intercourse.

The defendant has the burden of proving that sexual intercourse 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 as to a charge to which the defense of consent is raised.

Appendix D

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2012 OCT 16 A 10:39

09-9-00688-0

NO. 08-1-00340-9

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON, Plaintiff.
vs.
COREAN OMARUS BARNES 11/12/1982
Defendant. DOB
PCN: _____
SID: WA22113507
CCSO No. 08-08578

FELONY JUDGMENT AND SENTENCE

Prison
 RCW 9.94A.507 Prison Confinement
(Sex Offense and Kidnapping of a Minor)
(FJS)
 Clerk's Action Required, para 2.1, 4.1,
4.3a, 4.3b, 5.2, 5.3, 5.5 and 5.7
 Defendant Used Motor Vehicle
 Juvenile Decline Mandatory
 Discretionary

I. HEARING

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. FINDINGS

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon RETRIAL jury verdict (date) September 24, 2012:

Count	Crime	RCW (ty/subsection)	Class	Date of Crime
I	RAPE IN THE SECOND DEGREE - FORCIBLE COMPULSION # _____	9A.44.040(1)(a)	Class A	08/15/2008
II	RAPE IN THE SECOND DEGREE - FORCIBLE COMPULSION # _____	9A.44.050(1)(a)	Class A	08/15/2008
III	BURGLARY IN THE FIRST DEGREE WITH SEXUAL MOTIVATION # _____	9A.52.020	Class A	08/15/2008
IV	UNLAWFUL IMPRISONMENT # _____	9A.40.040 and 9A.40.010(1)	Class C	08/15/2008

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)
 Additional current offenses are attached in Appendix 2 1a.
 The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.
The jury returned a special verdict or the court made a special finding with regard to the following:

FELONY JUDGMENT AND SENTENCE (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9 94A.500, .505)
(WPF CR 84.0400 (7/2011))

3 cert copies - jail

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FAXED
10-16-12
ky

- 1 The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- 2 The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- 3 For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.
- 4 The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.839.
- 5 The offense was predatory as to Count _____. RCW 9.94A.836.
- 6 The victim was under 15 years of age at the time of the offense in Count _____. RCW 9.94A.837.
- 7 The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- 8 The defendant acted with **sexual motivation** in committing the offense in Count III. RCW 9.94A.835.
- 9 This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A 40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- 10 Count _____ **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- 11 The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- 12 Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. RCW 9.94A.833.
- 13 Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A. _____.
- 14 The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- 15 Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- 16 In Count _____ the defendant has been convicted of assaulting a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant

intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.

Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.

The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

In Count _____, Assault in the First Degree (RCW 9A.36.011) or Assault of a Child in the First Degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of five (5) years (RCW 9.94A.540).

Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589)

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

Crime	Cause Number	Court (county & state)	DV* Yes
1			
2			
3			

* DV: Domestic Violence was pled and proved

Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2 1b.

2.2 Criminal History (RCW 9.94A.525):

Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J adult, juvenile	Type of Crime	DV* Yes
1						
2						
3						
4						
5						

* DV: Domestic Violence was pled and proved.

Additional criminal history is attached in Appendix 2.2

The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

The prior convictions listed as number(s) _____, above, or in Appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).

The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data.

Count	Offender Score	Seriousness level	Standard range (not including enhancements)	Plus enhancements*	Total standard range (including enhancements)	Maximum term
1	3	XI	102-136 months			Life
2	3	XI	102-136 months			Life

FELONY JUDGMENT AND SENTENCE (JJS) (Prison)
 (Sex Offense and Kidnapping of a Minor Offense)
 (RCW 9.94A.500, 505)
 (WSP CR 84.0400 (7/2011))

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3	3	VI	31-41 months + 24 months	35-65 months	Life
4	8	III	1-3 months		5 years
5					
6					
7					

TOTAL ENHANCEMENTS to be served consecutively (RCW 9.94A.310(3)(e) and (4)(e)) _____ months

* (F) Firearm (D) Other deadly weapons, (V) VDCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12).

Additional current offense sentencing data is attached in Appendix 2.3.
 For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____

2.4 **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:
 below the standard range for Count(s) _____
 above the standard range for Count(s) _____
 The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.
 within the standard range for Count(s) _____ but served consecutively to Count(s) _____
 Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence

2.5 **Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
 The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.75.3): _____
 The defendant has the present means to pay costs of incarceration, RCW 9.94A.760.

III. JUDGMENT

3.1 The defendant is *guilty* of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
 3.2 The court *dismisses* Counts _____ in the charging document

IV. SENTENCE AND ORDER

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) Confinement. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Count IV _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____

The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon sexual motivation VUCSA in a protected zone

manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: _____

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

_____ but concurrently to any other felony cause not referred to in this judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

(b) Confinement. RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count I & II minimum term: 119 maximum term: Statutory Maximum

Count III minimum term: 2 WPPACs maximum term: Statutory Maximum

(c) Credit for Time Served. The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

(d) Work Ethic Program. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2); or

(2) the period imposed by the court, as follows:

Count(s) _____ 36 months Sex Offenses

Count(s) _____ 36 months for Serious Violent Offenses

Count(s) _____ 18 months for Violent Offenses

Count(s) IV 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(Sex offenses, only) For count(s) I, II, & III, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

- consume no alcohol.
- have no contact with: _____
- remain within outside of a specified geographical boundary, to wit: _____
- not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030.
- participate in the following crime-related treatment or counseling services: _____
- undergo an evaluation for treatment for domestic violence substance abuse mental health anger management, and fully comply with all recommended treatment.
- comply with the following crime-related prohibitions: _____
- Other conditions: _____

[X] 1. You shall comply with the statutory requirements of community placement, RCW 9.94A.120(8)(b)(c), and other conditions as set forth in Judgment and Sentence.

[X] 2. You shall report as directed to the Office of Community Corrections or the Court.

1 [X] 3. You shall notify the Superior Court Clerk and Office of Community Corrections prior to any change of address or employment

2 [X] 4. You shall pay monetary obligations as set forth in the Judgment and Sentence.

3 [] 5. You shall remain within prescribed geographical boundaries, as follows: _____

4 [] 6. You shall not contact or communicate with: _____

5 [] 7. You shall not have direct or indirect contact with the following specified class of individuals: _____

6 [] 8. You shall abstain from the use of alcohol and remain out of places where alcohol is the chief item of sale.

7 [X] 9. You shall abstain from the possession or use of ^{prescription} drugs unless prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours.

8 [X] 10. During term of community supervision, you shall submit to physical and/or psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections requirements.

9 [] 11. You shall undergo out-patient treatment as prescribed by the Court or the Office of Community Corrections as follows: _____

10 [X] 12. You shall undergo in-patient/out-patient sex offender treatment as set forth below or attached hereto and incorporated by reference: See Appendix "F"

11 [X] 13. Do not use or possess firearms.

12 [] 14. Do not drive a motor vehicle.

13 [X] 15. Refrain from further violations of the law.

14 [X] 16. You shall pay the cost of counseling to the victim which is required as a result of your crime or crimes.

15 [X] 17. Your residence and living arrangements shall be subject to the prior approval of DOC.

16 [X] 18. You must consent to allow home visits by the Department to monitor compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.

17 [X] 19. Other crime-related prohibitions as follows: Conditions set forth in PSI, attached & incorporated as Appendix "F"

18 Violations of these conditions will result in additional punishment.

19 (C) For sentences imposed under RCW 9.94A.507, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

20 Court Ordered Treatment. If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3a Legal Financial Obligations: The defendant shall pay to the clerk of this court:

1				
2	BASE	\$ 500.00	Victim assessment (\$500.00 for felony and	RCW 7.68.035
3	COLE		gross misdemeanor; \$250.00 for misde-	
4	PCV		meanor)	
5		\$	Domestic Violence assessment	RCW 10.99.080
6	CRC	\$	Court costs, including	RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
7			Criminal filing fee	\$ 200.00 FRC
8			Witness costs	\$ WFR
9			Sheriff's service fees	\$ 606.12 SFR/\$FS/SFW/WRF
10			Jury demand fee	\$ JFR
11			Extradition costs	\$ EXT
12			Other	\$
13	PUB	\$ 350.00	Fees for court appointed attorney	RCW 9.94A.760
14	WRF	\$	Court appointed defense expert and other defense costs	RCW 9.94A.760
15	FCM/ MTH	\$	Fine RCW 9A.20.021, [] VUCSA chapter 69.50	RCW 69.50.430
16			RCW, [] VUCSA additional fine deferred due to indigency RCW 69.50.430	
17	DEF/DFI /PCD	\$	Drug enforcement fund of _____	RCW 9.94A.760
18	NTF /			
19	SAD/SBI			
20	CL	\$	Crime lab fee [] suspended due to indigency	RCW 43.43.690
21		\$ 100.00	DNA collection fee [] not imposed due to hardship	RCW 43.43.7541
22		\$	Specialized forest products	RCW 76.48.140
23		\$	Other fine or costs for _____	
24			i.e., Interpreter costs (CIS)	Evaluations--court
25			ordered (EVA) Lab/blood test (BBS)	
26			Investigator services (INS)	Drug Court Program
27			(DCT) Meth lab clean-up (MTH)	
28	RFN/RIK	\$	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI, only, \$1000 maximum) payable to:	RCW 38.52.430
29			_____	
30			(address) _____	

(Name and address - address may be withheld and provided confidentially to Clerk of the Court's Office)

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& several

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\$ 247.51
\$

Restitution to:
Restitution to:
Restitution to:
Restitution to:
Statutory assessment.
Costs of:

C.R.
Drug enforcement fund of <u>Olympic Peninsula Narcotics Enforcement Team (OPNET)</u> County Code 118.000.010 Bars Code 351.50.01 <input type="checkbox"/> VUCSA chapter 69.50 RCW. <input type="checkbox"/> VUCSA additional fine deferred due to indigency
Clallam County Jail for medical treatment rendered while incarcerated in County Jail:
\$ pre- + post-conviction medical costs (RCW 70.48.130)
\$ Other costs:
\$
<input type="checkbox"/> hearing to be held _____, 20__ <input type="checkbox"/> with review every three months thereafter. Dept code 001.340.000 Bars Code 349.23.00.00.20

\$ TOTAL

RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
 shall be set by the prosecutor.
 is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____
 Restitution Schedule attached

<input type="checkbox"/> Restitution ordered above shall be paid jointly and severally with				
RIN	NAME of other defendant(s)	Cause Number	(Victim's name)	(Amount - \$)
				\$
				\$

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

FELONY JUDGMENT AND SENTENCE (EJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)
(WPE CR 84.0400 (7/2011))

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Port Angeles, Washington 98302-3015
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All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____ RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.3b) **Electronic Monitoring Reimbursement.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.4 **DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

HIV Testing The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 **No Contact.**

The defendant shall not have contact with C.R. (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within _____ (distance) of _____ (name of protected person(s))'s home/residence work place school (other location(s)) _____, OR

other location: _____ until _____ (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 **Other:** _____

1 4.7 **Off-Limits Order.** (Known drug trafficker), RCW 10.66.020. The following areas are off limits
2 to the defendant while under the supervision of the county jail or Department of Corrections:
3 _____
4 _____

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7 **V. NOTICES AND SIGNATURES**

8 5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this
9 judgment and Sentence, including but not limited to any personal restraint petition, state
10 habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion
11 for new trial or motion to arrest judgment, you must do so within one year of the final
12 judgment in this matter, except as provided for in RCW 10.73.100.
13 RCW 10.73.090.

14 5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain
15 under the court's jurisdiction and the supervision of the Department of Corrections for a
16 period up to 10 years from the date of sentence or release from confinement, whichever is
17 longer, to assure payment of all legal financial obligations unless the court extends the
18 criminal judgment an additional 10 years. If you committed your offense on or after July 1,
19 2000 the court shall retain jurisdiction over you, for the purpose of your compliance with
20 payment of the legal financial obligations, until you have completely satisfied your obligation,
21 regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5).
22 The clerk of the court has authority to collect unpaid legal financial obligations at any time
23 while you remain under the jurisdiction of the court for purposes of your legal financial
24 obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

25 5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of
26 payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or
27 the clerk of the court may issue a notice of payroll deduction without notice to you if you are
28 more than 30 days past due in monthly payments in an amount equal to or greater than the
29 amount payable for one month. RCW 9.94A.7602. Other income-withholding action under
30 RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

31 5.4 **Community Custody Violation.**

32 (a) If you are subject to a first or second violation hearing and DOC finds that you committed
33 the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW
34 9.94A.633

35 (b) If you have not completed your maximum term of total confinement and you are subject to
36 a third violation hearing and DOC finds that you committed the violation, DOC may return you
37 to a state correctional facility to serve up to the remaining portion of your sentence. RCW
38 9.94A.714.

39 5.5 **Firearms.** You may not own, use or possess any firearm, and under federal law any
40 firearm or ammunition, unless your right to do so is restored by the court in which you are
41 convicted or the superior court in Washington State where you live, and by a federal court if
42 required. You must immediately surrender any concealed pistol license. (The clerk of
43 the court shall forward a copy of the defendant's driver's license, identicaid, or comparable
44 identification to the Department of Licensing along with the date of conviction or commit-
45 ment.) RCW 9.41.040 and RCW 9.41.047.

5.6 Sex and Kidnapping Offender Registration. RCW 9A.44.128, 9A.44.130, 10.01.200.

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1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.128, you are required to register.

If you are a resident of Washington, you must register with the sheriff of the county of the state of Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the state of Washington where you will be residing.

If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

2. Offenders Who are New Residents or Returning Washington Residents: If you move to Washington or if you leave this state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of address to the sheriff of the county where you last registered.

4. Leaving the State or Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12). You must give notice to the sheriff of the county where you are registered within three business days:

- i) before arriving at a school or institution of higher education to attend classes;
- ii) before starting work at an institution of higher education; or
- iii) after any termination of enrollment or employment at a school or institution of higher education.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register with the sheriff of the new county not more than three business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.9 Other: _____

DONE IN OPEN COURT and in the presence of Defendant this date: October 16, 2012.

Ken Williams
JUDGE

Ann Lundwall

ANN LUNDWALL
Deputy Prosecuting Attorney
WBA No. 27691

AL:ljm

Alex Stalker
Print Name: WILLIAMS
38677

ALEX STALKER
Attorney for Defendant
WBA No.

Corean Omarus Barnes

COREAN OMARUS BARNES
Defendant

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: *Corean Barnes*

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at _____ on _____ 20____
(city) (state) (date)

Interpreter (print name)

CONDITIONS OF SUPERVISION, Clallam cause 08-1-00012-4, defendant Corean Barnes:

- 1) You shall comply with the statutory requirements of community custody and other conditions as set forth in Judgment and Sentence and as imposed by Department of Corrections.
- 2) You shall report as directed to the office of Community Corrections or the Court.
- 3) You shall notify the Superior Court Clerk and office of Community Corrections prior to any change of address or employment.
- 4) You shall pay monetary obligations as set forth in the Judgment and Sentence.
- 5) You shall remain within the prescribed geographical boundaries as follows: as directed by DOC.
- 6) You shall not have direct or indirect contact with the following specified individuals for the statutory maximum length of time: CR, the victim herein
- ~~7) You shall abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale.~~
- 8) You shall abstain from the possession or use of ^{prescription} drugs and drug paraphernalia except as prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours.
- 9) During term of community custody, you shall submit to physical and/or psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence, Community Custody Board, or Department of Corrections' requirements.
- 10) You shall obtain a psychosexual evaluation from a State-certified provider (or out of state equivalent, if supervised out of state) and enter into, comply with, show progress in and successfully complete a sexual deviancy treatment program as recommended as a result of the evaluation.
- 11) Register as a sex offender in accordance with State law.
- 12) Do not use or possess firearms.
- 13) Must consent to allow home visits by the Department to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access.
- 14) Refrain from further violations of the law.
- 15) You shall pay the cost of counseling to the victim that is required as a result of your crime or crimes.
- 16) Your residence and living arrangements shall be subject to the prior approval of the Department of Corrections.
- 17) Other conditions as imposed by CCO and/or Community Custody Board.

VI. IDENTIFICATION OF THE DEFENDANT

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

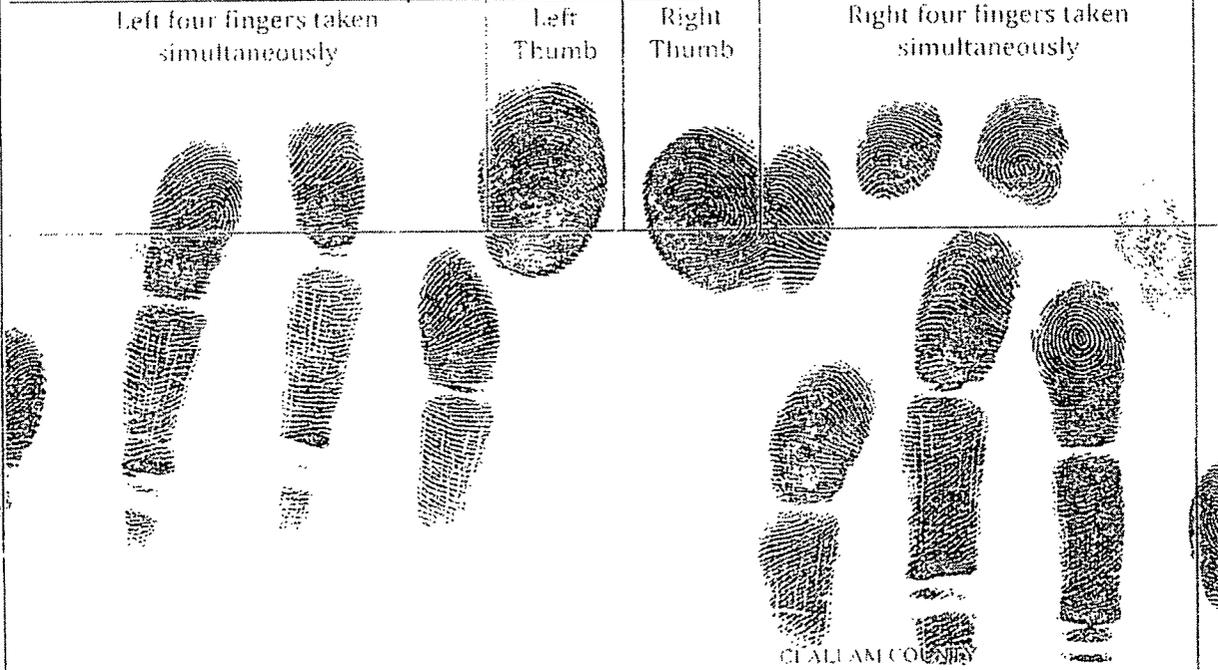
SID No.	<u>WA22113507</u>	Date of Birth	<u>11/12/1982</u>
FBI No.	_____	Local ID No. (pick one):	<u>WA0050000 (CCSO)</u>
	_____	OCA	<u>08-08578</u>
PCN No.	_____	Other	_____
Alias name.	<u>DOC 317817</u>		
DOB:	<u>5'11, 228 lbs., black hair, brown eyes</u>	POB:	_____
LKA:	_____		

Race:	Ethnicity:	Sex:
<input type="checkbox"/> Asian/Pacific Islander <input type="checkbox"/> Native American	<input checked="" type="checkbox"/> Black/African-American <input type="checkbox"/> Other: _____	<input type="checkbox"/> Caucasian <input type="checkbox"/> Hispanic <input type="checkbox"/> Non-Hispanic
		<input checked="" type="checkbox"/> Male <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: Seena Goris Deputy Clerk. Dated: 10-16-2012

The defendant's signature: [Signature]



FELONY JUDGMENT AND SENTENCE (FJS) (Prison)
 (Sex Offense and Kidnapping of a Minor Offense)
 (RCW 9.94A.500, 505)
 (WPP CR 84.0400 (7/2011))

CLALLAM COUNTY
 PROSECUTING ATTORNEY
 Clallam County Courthouse
 223 East Fourth Street, Suite 11
 Port Angeles, Washington 98362-3015
 (360) 417-2301 FAX 417-2469

Appendix E

NO. 16

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An act is not an assault, if it is done with the consent of the person alleged to be assaulted. As to the crime of assault, the State has the burden to prove the absence of consent beyond a reasonable doubt.