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Division II  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

COREAN OMARUS BARNES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-1-00340-9

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred by denying the motion to vacate when the motion was based upon a sufficiency of the evidence claim raised and decided in a prior appeal and personal restraint petition in the Court of Appeals?
2. Whether the Court should review Mr. Barnes claim of insufficiency of the evidence as to the Burglary conviction when the matter was already litigated on the second direct appeal and the Court declined to revisit the issue again in a subsequent personal restraint petition?

## **II. STATEMENT OF THE CASE**

This Court recently summarized the facts of the present 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. Mr. Johnson 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 19, 2008. RP 309–10.

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.

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).

App. A, *State v Barnes*, no. 44075-0-II, 2014 WL 2795968, at \*1–2 , 181 Wn. App. 1035 (2014) (unpublished) (hereinafter “*Barnes II*”).

#### 2009 Trial and First Appeal

At a 2009 trial a jury convicted Barnes of two counts of Rape in the Second Degree and one count of Unlawful Imprisonment, but was unable to reach a verdict on Burglary in the First Degree. *See State v Barnes*, No. 39479-1-II, 2010 WL 3766574, 157 Wn. App. 1076 (2010) (unpublished).

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.” *Id.*

#### 2012 Trial

Following the reversal of his convictions, Barnes was tried again in 2012.

At trial Mr. Johnson testified that he was living at 121 Victoria View Lane in Sequim with his wife and two boys. RP 304. Mr. Johnson knew

Barnes through a mutual friend. RP 305. Barnes moved into the house with Mr. Johnson in July 2008 after he and Barnes agreed that Barnes would pay \$300.00 for rent. RP 305. Barnes never paid the \$300. RP 305. Instead, Barnes gave Mr. Johnson \$200. RP 306. Then Barnes was not going to be able to pay rent. RP 306.

Mr. Johnson testified that Barnes was going to move out because he could not pay rent. RP 306. Mr. Johnson told Barnes that he did not have to move out if he could pay a reduced rent of \$175. RP 306. Barnes was not able to come up with \$175 and he moved out. RP 307. Mr. Johnson allowed that Barnes could leave some of his personal belongings at the residence. RP 307. Mr. Johnson allowed that Barnes could retrieve the rest of his personal belongings as long as Barnes contacted him first. RP 307. Barnes was no longer sleeping at the residence and did not have a key. RP 307. Barnes had not been living at the residence for about two weeks prior to when Detective Reyes came by the property on August 19, 2008. RP 306, 310.

Mr. Johnson testified that he was friends with Barnes and he testified that Barnes was “the one that chose to leave and go elsewhere. . . .” RP 311. Mr. Johnson did not give Barnes permission to be in the house on August 15, 2008. RP 316.

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* App. A, *Barnes II* (citing RP at 563).

#### Direct Appeal Following 2012 Trial

Following the 2012 trial, Barnes again filed a direct appeal under cause no. 44075-0-II. At issue was a jury instruction that the trial court gave regarding consent.

This Court held, in an opinion issued June 17, 2014 (App. A, *Barnes II*), that the trial court erred when it gave this affirmative defense instruction over Barnes’ objection and reversed the rape convictions but affirmed the unlawful imprisonment and burglary convictions. The Court issued a mandate remanding to the Clallam County Superior Court for resentencing. CP 172. Barnes was resentenced on May 20, 2015. Barnes filed an appeal after resentencing on May 20, 2015. CP 154.

Prior to resentencing, on Jan. 21, 2015, Mr. Barnes filed a “Motion to Vacate Conviction/ Or Coram Nobis” in the Clallam County Superior Court. CP 246. On March 18, 2015, the trial court entered an order transferring the petition to the Court of Appeals, Division II as a Personal Restraint Petition where it was assigned COA no. 47171-0-II. CP 244. The transfer was deemed proper on June 15, 2015 and, together with Barnes May 20, 2015

appeal, was consolidated under COA no. 47611-8-II.

In Barnes' Motion to Vacate Conviction, Barnes argued that the evidence was insufficient to support the conviction for Burglary in the First Degree because the State failed to prove that Barnes entered the residence unlawfully. App. B, *State v. Barnes*, no. 47611-8-II, 2016 WL 3965889, at \*4 (Wn. App. Div. 2, 2016). More specifically Barnes argued that the landlord, Mr. Johnson, had no legal right under the Landlord Tenant Act to evict Barnes and therefore, Barnes was not unlawfully on the premises at 121 Victoria View in Sequim, WA on the date of the offense. State's Supp. CP 252-53. This Court held in its opinion issued July 19, 2016 as follows:

Barnes argued in a previous appeal, as he does now, that insufficient evidence supported his burglary conviction because he had permission to enter the residence. We rejected that argument. Barnes does not now show that the interests of justice require this issue's relitigation. We decline to review this argument.

App. B. at \*4.

Barnes then sought review in the Washington Supreme Court. On Dec. 7, 2016, the Court denied review in *State v. Barnes*, 186 Wn.2d 1030 (2016) (Washington Supreme Court cause no. 93510-6).

Also, on Dec. 7, 2016, Barnes filed a "Motion to Vacate Conviction and/or Writ of Mandamus" and "Brief in Support of 7.8" in the Clallam County Superior Court. CP 83-101. The Superior Court denied the motion because "the matter at issue has been considered and resolved per the

Washington Court of Appeals – Div. II decision (date 7/19/2016) in No. 47611-8-II.” CP 16. Barnes appeals the denial of that motion here.

### III. ARGUMENT

#### A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO VACATE THE CONVICTION BECAUSE IT HAD NO AUTHORITY TO REVIEW THE COURT OF APPEALS DECISION.

In this appeal, Barnes assigns error to the trial court’s decision denying the motion to vacate. Appellant’s Br. at 1. Barnes argues the court did not allow Barnes to relitigate the issue of sufficiency of the evidence which he raised as an actual innocence claim. Appellant’s Br. at 1, 7.

“A petitioner may . . . raise new issues on collateral attack, including errors of constitutional or nonconstitutional magnitude. A “new” issue is not created merely by supporting a previous ground for relief with different factual allegations or with different legal arguments.” *In re Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (citing RCW 10.73.140: “in a subsequent personal restraint petition, petitioner must show good cause why the new grounds were not raised in the previous petition”); and *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990)).

Here, Barnes simply argues that he was “actually innocent” because there was insufficient evidence to support the conviction because the State did not prove he entered the premises unlawfully. This is the same argument

in new form. Therefore, the trial court was faced with the same claim of insufficient evidence that was decided by the Court of Appeals rather than a new claim.

The trial court did not err in denying the motion to vacate because it did not have authority to review this Court's prior decisions.

In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Id.* (citing 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Judgments* § 380, at 55–56 (4th ed.1986)). . . . In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process. See 5 Am.Jur.2d *Appellate Review* § 605 (1995).

In 1976, RAP 2.5(c)(2) codified certain restrictions on the law of the case doctrine:

(2) Prior Appellate Court Decision. The *appellate court* may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

*Roberson v. Perez*, 156 Wn.2d 33, 41–42, 123 P.3d 844 (2005) (emphasis added); see also RAP 2.5(c)(2).

Here, the exception to the law of the case doctrine under RAP 2.5(c)(2) only allows *the appellate court* to review a prior decision of the appellate court. The trial court does not have such power. *See also* RCW 2.08.020 (providing Superior Court with appellate jurisdiction in cases “arising in courts of limited jurisdiction in their respective counties”); RCW

2.06.030 (providing exclusive appellate jurisdiction to the Court of Appeals in all cases except those which shall be appealed directly to the Washington Supreme Court).

Therefore, the trial court was correct in refusing to review the Court of Appeals decision in the prior appeal and it properly denied Barnes' motion to vacate the conviction.

This Court should affirm the trial court's denial of Barnes' motion to vacate the conviction.

**B. BARNES FAILS TO ESTABLISH A BASIS FOR RELITIGATING SUFFICIENCY OF THE EVIDENCE FOR THE BURGLARY CONVICTION.**

Rather than addressing whether the trial court erred by denying Barnes' motion to vacate, Barnes' current appeal skips that and essentially invites this Court to relitigate an issue already resolved in his prior appeal and Personal Restraint Petition. *See App. A, State v Barnes*, no. 44075-0-II, 2014 WL 2795968, at \*9, 181 Wn. App. 1035 (2014) (unpublished) (hereinafter "Barnes II"); *App. B, State v. Barnes*, no. 47611-8-II, 2016 WL 3965889, at \*4 (Wn. App. Div. 2, 2016) (unpublished).

Barnes claims that he could not be convicted of Burglary in the First Degree because the State did not present sufficient evidence that Barnes entered the residence of 121 Victoria View unlawfully because Mr. Johnson

did not legally evict Barnes. *See* Appellant's Br. at 7, 11, 14.

**1. This Court should decline to relitigate sufficiency of the evidence because Barnes fails to establish that the Court's prior decisions are clearly erroneous.**

In order for the Court of Appeals to review its prior decision, Barnes must show "that the earlier decision was clearly erroneous, such that he was prejudiced by the decision and that the ends of justice would be served by reconsidering the matter." *In re Percer*, 150 Wn.2d 41, 48, 75 P.3d 488 (2003) (citing *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999)). "This showing must be made by a preponderance of the evidence." *Id.* (citing *In re Pers. Restraint of Crabtree*, 141 Wn.2d 577, 587, 9 P.3d 814 (2000)).

"The test for determining the sufficiency of the evidence is whether, after 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 537, 551, 238 P.3d 470 (2010) (citing *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Kintz*, at 551 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

therefrom.” *Id.* “‘Circumstantial evidence and direct evidence are equally reliable’ in determining the sufficiency of the evidence.” *Kintz*, at 551 (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). Additionally, this Court “defer[s] 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).

First, it should be pointed out that in the second direct appeal, this Court held that the evidence was sufficient to support the First Degree Burglary conviction “*even if Barnes's testimony could support an alternate scenario in which he lawfully entered Johnson's property.*” App. A, *Barnes II* at \*9 (emphasis added).

Nevertheless, Barnes raised the claim again in a Personal Restraint Petition. State’s Supp. CP 244, 246, 248 (consolidated COA no. 47611-8-II); *compare with* CP 89, 99–100. Barnes specifically argued that under the Landlord Tenant Act that Mr. Johnson had no legal authority to evict Mr. Barnes and that written notice was required to terminate the tenancy. State’s Supp. CP 252–53.

This Court declined to review Barnes’ claims:

Barnes argued in a previous appeal, as he does now, that insufficient evidence supported his burglary conviction because he had permission to enter the residence. We rejected that argument. Barnes *does not now show that the interests of justice require this issue's relitigation.* We decline to review this argument.

App. B at \*4 (emphasis added).

Barnes, without arguing how the Court of Appeals decision was clearly erroneous in this regard, asserts that the Court overlooked the impact of the landlord tenant law on the issue. Appellant's Br. at 12. This assumption is incorrect. As shown above, Barnes did raise the same issues in the last Personal Restraint Petition considered under COA no. 47611-8-II. Yet, with these claims before the Court, the Court stated that "Barnes *does not now show that the interests of justice require this issue's relitigation.*" App. B at \*4 (emphasis added).

Further, assuming for argument that this issue is properly before this Court although it was not filed as a Personal Restraint Petition, Barnes fails to establish that this Court's decisions were clearly erroneous because Barnes' claim regarding his right to reside at 121 Victoria View on Aug. 15, 2008, is a speculative legal conclusion at best. This conclusory argument does not negate the testimony and evidence which, on review, are deemed to be true and weighed in the light most favorable to the State. *Kintz*, at 551.

Furthermore, Barnes' citation to *State v. Wilson*, does not support Barnes argument because the facts are not applicable here. *See State v. Wilson*, 136 Wn. App. 596, 600-01, 150 P.3d 144 (2007). In *Wilson*, the State charged the defendant with Burglary on the basis that he violated a no-

contact order when he assaulted his girlfriend in their residence. *Id.* It was clear that the no-contact order did not prohibit Wilson from living in the residence and that Wilson was still residing at the residence with his girlfriend's permission. *Id.* at 605.

Thus, unlike Barnes' speculative legal conclusion regarding a right to possession of the premises based upon information outside the record, Wilson's right to live on the premises was clearly established by the evidence presented at trial.

This Court should decline to review this claim because Barnes fails to establish this Court's prior decisions on the issue of sufficiency of the evidence were clearly erroneous.

**2. Barnes' claim does not merit review because he cannot show any prejudice based upon a speculative legal conclusion.**

Barnes' argument that he was legally on the premises under the Landlord Tenant Act plainly fails to meet the threshold for review as a Personal Restraint Petition because it is based upon a speculative legal conclusion which cannot establish prejudice and this Court may not grant the requested relief.

Collateral relief through a PRP is limited “because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.” *In re*

*Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). Thus, challenges based on constitutional error require the petitioner to demonstrate that he “was actually and substantially prejudiced by the error.” *Davis*, at 671–72.

“The evidence presented must consist of ‘more than speculation, conjecture, or inadmissible hearsay.’” *In re Spencer*, 152 Wn. App. 698, 706–07218 P.3d 924 (2009) (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)).

A petitioner may not rely on “[b]ald assertions and conclusory allegations” in order to obtain relief in a timely Personal Restraint Petition.” *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (quoting *In re Pers. Restraint of Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992)).

For ‘matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief’; if the ‘evidence is based on knowledge in the possession of others,’ the petitioner may either ‘present their affidavits’ or present evidence to corroborate what the petitioner believes they will reveal if subpoenaed. *Id.* The corroboration must be more than mere speculation or conjecture. *Id.*

*In re Pers. Restraint of Yates*, 177 Wn. 2d 1, 18, 296 P.3d 872 (2013) (citing *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)).

Here, Barnes claim that he was legally on the premises because Mr.

Johnson failed to give 20 days written notice to evict Barnes fails because it is at best a speculative legal conclusion and does not establish actual and substantial prejudice.

For example, Barnes' argument fails to consider whether or not Barnes waived any rights he may have had under the Landlord Tenant Act by abandoning the premises or whether he could legally reoccupy the premises without taking legal action first, when it appears, there was no evidence that he took any legal action to move back in.

Conversely, Mr. Johnson's testimony shows *that Barnes was going to move out because he could not pay rent.* RP 306. Mr. Johnson actually told Barnes that he did not have to move out if he could pay a reduced rent of \$175. RP 306. Barnes was not able to come up with \$175 and he moved out. RP 307. Mr. Johnson was still kind enough to allow Barnes to leave some of his personal belongings at the residence. RP 307. Mr. Johnson allowed that Barnes could retrieve the rest of his personal belongings as long as Barnes contacted him first. RP 307. Barnes was no longer sleeping at the residence and did not have a key. RP 307. Mr. Johnson testified that he was friends with Barnes and he testified that *Barnes was "the one that chose to leave and go elsewhere. . . ."* RP 311.

All of this testimony shows that Barnes not only twice failed to pay rent as agreed, but his words and actions showed he voluntarily vacated the

property without an expectation of being liable to pay for rent owed for the current and following month: Barnes abandoned the premises and yet avoided liability.

If the tenant defaults in the payment of rent and reasonably indicates by words or actions the intention not to resume tenancy, the tenant shall be liable for the following for such abandonment: PROVIDED, That upon learning of such abandonment of the premises the landlord shall make a reasonable effort to mitigate the damages resulting from such abandonment:

RCW 59.18.310 (Default in rent--Abandonment--Liability of tenant--).

Moreover, there is no evidence that after abandoning the residence that Barnes ever payed rent or came to an alternative agreement with Mr. Johnson prior to trespassing on the premises on Aug. 15, 2008. *See* RCW 59.18.080 (Payment of rent condition to exercising remedies—Exceptions).

Additionally, only three days, rather than twenty days notice was hypothetically required because Barnes failed to pay rent. *See* RCW 59.12.030(3) (emphasis added):

A tenant of real property for a term less than life is guilty of unlawful detainer either: When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of *three days* after service thereof. The notice may be served at any time after the rent becomes due[.]

Nevertheless, possession of the property was never in controversy

because Barnes, after failing to pay rent, abandoned the property alleviating any need for Mr. Johnson to resort to providing three days written notice to institute an unlawful detainer action. Thus, the right of possession was never litigated. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 370–71, 173 P.3d 228 (2007) (explaining the purpose of the Residential Landlord–Tenant Act of 1973, chapter 59.18 RCW, requiring notice before unlawful detainer action may commence in order to resolve the right to possession of property).

Furthermore, the court documents referred to by Barnes listing his address as 121 Victoria View are court docket entries which do not confer a legal right to possession of the premises. CP 108–112. Those documents only suggest that Mr. Barnes reported his address as such to the courts at one point in time.

In fact, one of those documents, the judgment and sentence dated June 25, 2009, shows that 121 Victoria View was Barnes' *last known* address (LKA). CP 107. This address is also listed in the other court documents from 2009 despite the fact that Barnes remained in custody from the time he was arrested in Aug. 2008 to the time of his trial and sentencing and when Barnes was initially ordered to prison for 119 months on June 25, 2009. CP 315, 317, 320, 324, 327, 328 (court minutes showing Barnes' in-custody status). Those documents do not confer or suggest that Barnes had a right to possession of the premises on June 25, 2009 when Barnes was first sentenced almost a year

after his arrest nore thereafter when he was serving his sentence in prison. CP 104, 107. Those documents certainly do not confer or suggest a right to possession of the premises on Aug. 15, 2008, the date of the offense.

Barnes fails to present evidence of facts which would entitle him to relief because Barnes' argument he was legally on the premises on Aug. 15 relies completely upon a speculative legal conclusion. Thus Barnes cannot show actual and substantial prejudice. Therefore, this Court should decline further review.

**3. Barnes' argument regarding the Landlord Tenant Act does not merit reconsideration as new evidence because the facts related to the claim would have been easily discoverable before trial.**

Barnes' claims do not merit relitigation as new evidence that was not available at the trial. In order to show that Barnes 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 had no legal right

to evict Barnes was not based on new evidence discovered only since trial.

Barnes moved out of the residence when non-payment of rent became an issue in early Aug. 2008. On or about Aug. 19, 2008 Barnes was arrested and remained in custody on bail. CP 327, 328. Thereafter, Barnes had two trials, the last of which began on Sept. 18, 2012. RP 1. This was over four years after the date of the offense on Aug. 15, 2008. The circumstances which Barnes used to formulate a Landlord Tenant Act argument would have existed for four years prior to Barnes' final trial from which his current conviction stems. Therefore, Barnes' claims were based on facts which would have been discoverable well prior to trial.

Ultimately, Barnes seeks to turn appellate procedure on its head by first, moving the trial court to overrule a decision of the Court of Appeals, and then appealing the trial court's denial of that motion to the Court Appeals to go full circle once again. Therefore, this Court should, once again, decline to review Barnes' claim.

**C. THE ACTUAL INNOCENCE DOCTRINE DOES NOT APPLY HERE BECAUSE NEITHER A PERSISTENT OFFENDER SENTENCE NOR A CAPITAL OFFENSE ARE AT ISSUE.**

The actual innocence doctrine has no application in this case.

[W]e recognize the actual innocence doctrine as an equitable exception to the time bar that applies in the context of a challenge to a persistent offender sentence if the petitioner can show, by clear and convincing evidence, that but for a constitutional error, the petitioner

would have been found factually innocent of a sufficient number of predicate offenses to render his persistent offender sentence unlawful.

*In re Carter*, 172 Wn.2d 917, 931, 263 P.3d 1241 (2011); *see also Id.* at n.4 (recognizing the limitations of the actual innocence doctrine).

Barnes' sentence was nowhere in the realm of a sentence for a capital offense or a persistent offender offense in Washington. CP 25. Therefore, Barnes' gateway actual innocence claim lacks merit.

#### **IV. CONCLUSION**

The trial court did not err by denying Barnes' motion to vacate conviction because Barnes' claim was already reviewed and denied by the Court of Appeals twice and the trial court had no authority to review this Court's decisions.

Additionally, this Court should decline to reconsider Mr. Barnes' claim of insufficiency of evidence raised in Barnes' prior appeal and Personal Restraint Petition because Barnes fails to establish this Court's decision was clearly erroneous. The Court of Appeals held that there was sufficient evidence for the Burglary in the First Degree conviction "even if Barnes's testimony could support an alternate scenario in which he lawfully entered Johnson's property." App. A, *Barnes II*, at \*9.

Furthermore, Barnes' claim is not reviewable because he cannot establish prejudice based upon a speculative conclusion that Mr. Johnson had

no legal right to prevent Mr. Barnes' from being on his property. This claim is speculative at best and does not entitle Barnes to any relief.

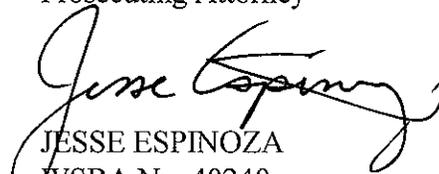
Finally, the actual innocence doctrine has no application in the current case as it has not been expanded to cases other than persistent offender cases in Washington State.

For the foregoing reasons, the trial court's denial of the Barnes' motion to vacate should be affirmed and the Court should decline to revisit Barnes' claim of insufficiency of the evidence.

Respectfully submitted this 21st day of December, 2017.

Respectfully submitted,

MARK B. NICHOLS  
Prosecuting Attorney

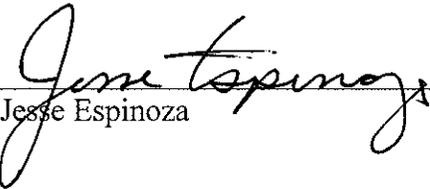


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**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Casey Grannis on December 21, 2017.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

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

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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.<sup>1</sup> *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 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." *Barnes*, WL 3766574, at \*3. 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 "forc[e]d 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 rape<sup>2</sup> 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 convictions<sup>3</sup> 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).

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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.<sup>4</sup> 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.

#### 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 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.

#### All Citations

Not Reported in P.3d, 181 Wash.App. 1035, 2014 WL 2795968

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.

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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.

In the Matter of the Personal Restraint  
Petitions of Corean Omarus Barnes, Petitioner.

No. 47611-8-II

|

Consolidated With Nos. 47171-0-II; 47621-5-II

|

July 19, 2016

Appeal from Clallam Superior Court, No. 08-1-00340-9,  
Honorable George Lamont Wood, Kenneth Williams,  
Judges

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**UNPUBLISHED OPINION**

WORSWICK, J.

\*1 After two trials and two appeals, Corean Barnes stands convicted of unlawful imprisonment and first degree burglary with sexual motivation. He directly appeals his sentence and, by way of a personal restraint petition (PRP), he contests his convictions. In his direct appeal, Barnes argues that the sentencing court violated his due process rights by imposing a sexual motivation enhancement to his burglary sentence because the jury instruction on consent (for which we previously reversed his rape convictions) shifted the burden to him regarding

the sexual motivation enhancement. We disagree and affirm his sentence.

In his PRP, Barnes makes several arguments regarding the sufficiency of the evidence and asserts various constitutional challenges. Finding no merit in any of these arguments, we deny his PRP.

**FACTS**

*A. Crimes, First Trial, and First Appeal*

Barnes and Christina Russell dated in 2007 and 2008 until Russell decided to end the relationship in August 2008. She began surreptitiously recording her conversations with Barnes while they were together.

On August 15, 2008, Russell met Barnes at the house of Kenneth Johnson, who had previously rented a room to Barnes. While the two were outside Johnson's house, Barnes had unwanted sexual contact with Russell. He pulled her out of her car and forcibly carried her to his nearby camper, where he raped her.

Later the same day, Russell drove Barnes to Johnson's house. Previously, Johnson told Barnes he could come onto the property on the condition that Barnes would first contact Johnson so that Johnson would be at home when Barnes arrived, but Barnes did not contact Johnson before entering the house. After they entered Johnson's house, Barnes picked Russell up, carried her into a bedroom, and forcibly raped her while she struggled. Russell secretly recorded both incidents of sexual assault.

The State charged Barnes with two counts of second degree rape by forcible compulsion, one count of first degree burglary with sexual motivation, and one count of unlawful imprisonment. During Barnes's first jury trial, the trial court admitted the entire transcript of Russell's recordings from August 15. The jury convicted Barnes of two counts of second degree rape and one count of unlawful imprisonment. But the jury did not reach a verdict on the burglary charge.

Barnes appealed, arguing that the admission of Russell's recordings violated the "Privacy Act." We reversed and remanded for a new trial, holding that the trial court erred by admitting the entire transcript of the recordings.

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*B. Second Trial and Second Appeal*

Barnes proceeded to a second jury trial. After the close of testimony, the trial court instructed the jury that a “person is not guilty of rape if the sexual intercourse is consensual.... The defendant has the burden of proving that sexual intercourse was consensual by a preponderance of the evidence.” Supplemental Clerk's Papers (Suppl. CP) at 157. Barnes objected, arguing unsuccessfully that the instruction foisted an unwanted affirmative defense on him. PRP, No. 471710 (Wash. Ct. App. Jan. 21, 2015) (Verbatim Report of Proceedings at 487).

\*2 The sexual motivation enhancement instruction for the burglary charge provided: “Sexual motivation means that one of the purposes for which [Barnes] committed the crime was for the purpose of his ... sexual gratification.” Suppl. CP at 176. The jury was also instructed that Barnes's not guilty plea “puts in issue every element of the crime charged. The State ... has the burden of proving each element of the crime beyond a reasonable doubt. [Barnes] has no burden of proving a reasonable doubt exists.” Suppl. CP at 148.

The jury convicted Barnes of unlawful imprisonment, both counts of second degree rape, and first degree burglary with sexual motivation. During 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. *State v. Barnes*, noted at 181 Wn. App. 1035, 2014 WL 2795968, at \*3.

Barnes appealed a second time, arguing that the trial court violated his Sixth Amendment right to control his defense by providing the jury instruction on the affirmative defense of consent on the second degree rape charges over his objection. We agreed and reversed the second degree rape convictions. We affirmed the convictions for unlawful imprisonment and first degree burglary. Accordingly, we remanded to the trial court for a new trial on only the second degree rape convictions.

*C. Resentencing*

The State declined to retry Barnes on the second degree rape charges, and it instead dismissed those charges. Accordingly, the sentencing court sentenced Barnes for first degree burglary and unlawful imprisonment. Based

on the jury's finding of sexual motivation, the sentencing court found that Barnes acted with sexual motivation in committing the burglary. The sentencing court also found that the burglary and unlawful imprisonment charges constituted the same criminal conduct and counted both crimes as one point in determining the offender score.

Barnes moved the superior court under CrR 7.8 to vacate his convictions for first degree burglary and unlawful imprisonment. The superior court transferred this motion to us to be considered as a PRP. Barnes also filed a PRP in this court. We consolidated these PRPs with Barnes's direct appeal. Barnes appeals his sentence and collaterally attacks his convictions.

ANALYSIS

I. SENTENCING COURT DID NOT ERR

Barnes argues that because we previously held that the consent instruction shifted the burden of proof regarding rape, the sentencing court unconstitutionally shifted the burden of proof to Barnes to disprove consent regarding the sexual motivation enhancement because the jury must have relied on the rape to find the sexual motivation enhancement. We disagree.

“ ‘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.’ ” *State v. Lynch*, 178 Wn.2d 487, 492, 309 P.3d 482 (2013) (quoting *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013)). We review allegations of constitutional violations de novo. *Lynch*, 178 Wn.2d at 491.

A sexual motivation enhancement requires the State to prove that “one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.” Former RCW 9.94A.030(47) (2008). Under the statute's terms, the only relevant fact for this enhancement is whether the defendant sought sexual gratification from the crime. The victim's consent or nonconsent is not an element of this enhancement. Therefore, consent is not a defense, and logically it cannot be an affirmative defense unconstitutionally foisted on Barnes.

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\*3 Furthermore, the consent instruction explained that it applied only to rape. It began: "A person is not guilty of rape if the sexual intercourse is consensual." Suppl. CP at 157 (emphasis added). Therefore, this jury instruction made clear that the consent defense applied only to the rape charges. We presume that juries follow jury instructions. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Thus, we presume that the jury did not mistakenly apply the consent instruction to the sexual motivation enhancement.

To the extent Barnes argues that insufficient evidence supports the sexual motivation enhancement because the rape convictions no longer exist, this claim fails. In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Russell testified that Barnes raped her in Johnson's residence. From this fact, a rational trier of fact could conclude that Barnes committed the burglary with sexual motivation. That we reversed the rape charges on constitutional grounds does not undermine Russell's testimony, nor did the sexual motivation enhancement rely on the existence of a separate conviction for a sexual crime such as rape. This claim fails.

## II. PERSONAL RESTRAINT PETITION

In his PRP, Barnes argues that his convictions for burglary and unlawful imprisonment must be reversed because (1) insufficient evidence supports his convictions for burglary and unlawful imprisonment for several reasons, (2) the burglary statute is unconstitutionally vague as applied to him, (3) the unlawful imprisonment conviction constitutes the same criminal conduct as and merges with the other offenses, (4) the trial court unconstitutionally shifted the burden of proof on the burglary and unlawful imprisonment charges by instructing the jury about the affirmative defense to rape of consent, and (5) he received the ineffective assistance of appellate counsel. We disagree with these arguments and deny the PRP.

### A. PRP Principles

The petitioner in a PRP must first prove error by a preponderance of the evidence. *In re Pers. Restraint of Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if the petitioner is able to show error, he must also prove prejudice, the degree of which depends on the type of error shown. *Crow*, 187 Wn. App. at 421.

If the error is constitutional, the petitioner must demonstrate that it resulted in actual and substantial prejudice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). "Actual and substantial prejudice, which 'must be determined in light of the totality of circumstances,' exists if the error 'so infected petitioner's entire trial that the resulting conviction violates due process.'" *Crow*, 187 Wn. App. at 421 (quoting *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)). If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015).

\*4 A PRP may raise an issue that was raised and litigated on direct appeal only if the interests of justice require the issue's relitigation. *Schreiber*, 189 Wn. App. at 113. The interests of justice require relitigation where the law has changed after the direct appeal, or where some other justification exists for the petitioner's failure to have raised a critical argument in the prior appeal. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013).

If the petitioner fails to make a prima facie showing of either actual and substantial prejudice or a fundamental defect, we deny the PRP. *Yates*, 177 Wn.2d at 17. If the petitioner makes such a showing, but the record is not sufficient to determine the merits, we remand for a reference hearing. *Yates*, 177 Wn.2d at 18. But if we are convinced that the petitioner has proven actual and substantial prejudice or a fundamental defect, we grant the petition. *Yates*, 177 Wn.2d at 18.

### B. Sufficiency of the Evidence

Barnes makes several claims contesting the sufficiency of the evidence supporting his convictions. As stated above, we review a challenge to the sufficiency of the evidence to

determine whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 221-22. We draw all reasonable inferences from the evidence in the State's favor. *Salinas*, 119 Wn.2d at 201.

1. *First-Degree Burglary*

i. *Legality of Entry into Johnson's Residence*

Barnes argues that insufficient evidence supports his burglary conviction because he lawfully lived at Johnson's residence. The State argues that Barnes may not raise this issue again because it was fully litigated in a previous direct appeal. We agree with the State.

Barnes argued in a previous appeal, as he does now, that insufficient evidence supported his burglary conviction because he had permission to enter the residence. We rejected that argument. Barnes does not now show that the interests of justice require this issue's relitigation. We decline to review this argument.

ii. *Dismissal of Rape Convictions*

Barnes challenges the sufficiency of the evidence for his burglary conviction for two new reasons. He argues that insufficient evidence supports his burglary conviction because the rape convictions no longer support it. Specifically, he argues that the rape convictions' reversal deprived the burglary conviction of the "predicate offense" of assault, which in this case was a rape. Order Transferring Defendant's Motion as a Personal Restraint Petition as Required by CrR 7.8(c)(2) (Clallam County Super. Ct. Wash. Mar. 18, 2015) (Motion to Vacate Conviction And/Or Coram Nobis (Pet'r[s] Br. in Support at 3)). He also argues that he is "[a]ctually [i]nnocent." Order Transferring Defendant's Motion (Pet'r[s] Br. in Support at 3-4). We disagree.

First degree burglary occurs when a person (1) enters or remains unlawfully in a building (2) with intent to commit a crime against a person or property therein, and (3) the person assaults any person or is armed with a deadly weapon while "entering or while in the building or in immediate flight therefrom." RCW 9A.52.020(1). First degree burglary requires no predicate offense; it merely requires that a person commit an assault during the burglary. RCW 9A.52.020(1). Thus, this argument fails.

\*5 Barnes also argues that the rape was the only assault Barnes committed, and therefore the reversal of the rape charges undermined the State's proof on the third element of burglary—that Barnes assaulted someone while committing the burglary.<sup>1</sup> This claim also fails. The testimony at trial established that Barnes assaulted Russell. Russell testified that Barnes used forcible compulsion to have nonconsensual sex with her. An assault is an offensive, intentional touching. *State v. Osman*, 192 Wn. App. 355, 378, 366 P.3d 956 (2016). A rational trier of fact could find that Barnes's act of forcibly compelling Russell to have nonconsensual sex constituted an assault. Thus, sufficient evidence supports the element of first degree burglary that Barnes assaulted someone during the burglary. *Salinas*, 119 Wn.2d at 201. The absence of rape convictions has no effect on the sufficiency of the evidence for first degree burglary.

Barnes further argues that insufficient evidence supports his conviction for burglary because he is "[a]ctually [i]nnocent." Order Transferring Defendant's Motion (Pet'r[s] Br. In Support at 3-4). We disagree.

In support of this argument, Barnes attaches an email from the defense investigator to Barnes's trial counsel, which quotes something Johnson allegedly said to the mother of Barnes's child: "[Johnson] got Mr. Barnes arrested for something that he did not do." Order Transferring Defendant's Motion (Pet'r[s] Br. In Support at 4). Because actual innocence is a doctrine that allows equitable tolling of the time limits for filing a PRP, *In re Personal Restraint of Carter*, 172 Wn.2d 917, 931, 263 P.3d 1241 (2011), and because Barnes needs no such tolling, we consider his argument to be a challenge to the sufficiency of the evidence.

Here, 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. Russell testified that she and Barnes entered Johnson's house, then Barnes picked her up and carried her into a bedroom where he raped her. From these facts, viewed in the light most favorable to the State, a rational trier of fact could conclude that Barnes entered or remained unlawfully in Johnson's residence with the intent to rape Russell, and that he committed assault. In other words, a rational trier of fact could have found Barnes guilty beyond a

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reasonable doubt of each element of first degree burglary. This claim fails.

## 2. Unlawful Imprisonment

### i. Russell's Imprisonment

Barnes argues that insufficient evidence supports his conviction for unlawful imprisonment because Russell was at liberty to leave. This claim fails. As stated above, we view the evidence and all inferences therefrom in the light most favorable to the State, and we do not reweigh the credibility of witnesses. *Salinas*, 119 Wn.2d at 201. Russell testified that during both rapes, she struggled to break free from Barnes's grasp. From this testimony, when viewed in the light most favorable to the State, a rational trier of fact could conclude that Russell was not at liberty to leave, and that Barnes was, in fact, unlawfully imprisoning her.

### ii. Reversal of Rape Convictions

Barnes also argues that the reversal of the rape charges deprived the unlawful imprisonment conviction of a necessary "predicate offense." PRP, No. 471710 (Pet'r[s] Br. in Support at 7). This argument fails.

Unlawful imprisonment requires proof that the defendant knowingly restrained another person by restricting that person's movements "without consent and without legal authority in a manner [that] interferes substantially with his liberty." Former RCW 9A.40.040(1), .010(1) (1975). This crime does not require proof of any predicate offense; thus, this claim fails.

### iii. State's Previous Argument Concerning Privacy Act

\*6 Barnes appears to argue that insufficient evidence supports his conviction for unlawful imprisonment because he believes that the State conceded that he was not guilty of that crime. He supports this claim by pointing to the State's argument that the hostage holder exception did not apply.<sup>2</sup> The hostage holder exception to the Privacy Act authorizes the admission of a portion of a recording during a period of unlawful imprisonment. RCW 9.73.030(2)(d). The State argued in Barnes's second direct appeal that the hostage holder exception to the Privacy Act did *not* apply to the redacted portion of the transcript of Russell's recordings that the trial court admitted. But this statement does not amount to a concession that Barnes was not guilty of unlawful

imprisonment. This argument by the State had nothing to do with the sufficiency of the evidence of unlawful imprisonment; it had only to do with the admissibility of the transcript of the recordings. In any event, as stated above, sufficient evidence supports Barnes's conviction for unlawful imprisonment regardless of the State's arguments about the Privacy Act. This claim fails.

### C. Unconstitutional Vagueness

Barnes argues that the burglary statute is unconstitutionally vague as applied to him. We disagree.

The party challenging a statute has the heavy burden of proving unconstitutionality beyond a reasonable doubt. *State v. Enquist*, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011). There is a "strong presumption in favor of the statute's validity." *State v. Harrington*, 181 Wn. App. 805, 824, 333 P.3d 410 (2014). A statute is void for vagueness if it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or it "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Harrington*, 181 Wn. App. at 823.

As stated above, Barnes argues that he is actually innocent of burglary. Barnes appears to argue that *because* he is innocent, the statute is unconstitutionally vague as applied to him. Order Transferring Defendant's Motion (Pet'r[s] Br. In Support at 4) ("Mr. Barnes[s] conduct does not support his conviction fo[r] First D[e]gree Burglary therefore making the statute unconstitutionally vague."). But as stated above, sufficient evidence supports his conviction for first degree burglary. He presents no other argument to carry his burden of establishing the statute's unconstitutionality. Barnes's mere claim of actual innocence does not meet his burden to show that the burglary statute is unconstitutionally vague.

### D. Merger and Same Criminal Conduct

Barnes argues that his conviction for unlawful imprisonment should be reversed because the sentencing court determined that it constituted the same criminal conduct as, and therefore merged with, other convictions. This argument fails.

Barnes appears to misunderstand the significance of merger and a finding of same criminal conduct. Merger is a doctrine that courts use to avoid violating defendants'

double jeopardy rights. “Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). Therefore, at sentencing, courts merge crimes to avoid doubly punishing behavior. *State v. Whittaker*, 192 Wn. App. 395, 410-11, 367 P.3d 1092 (2016). And “same criminal conduct” is a doctrine courts use when calculating a defendant's offender score. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). But merger and “same criminal conduct” doctrines do not affect the underlying convictions' validity; they impact only the punishment that the sentencing court may impose and the offender score calculation. See *State v. Tili*, 139 Wn.2d 107, 128, 985 P.2d 365 (1999); former RCW 9.94A.589(1)(a) (2002).

\*7 Here, the sentencing court ruled before the second appeal that the second degree rape and first degree burglary convictions were the “same criminal conduct” and, therefore, merged for sentencing purposes. *Barnes*, 2014 WL 2795968, at \*3. Then, at resentencing after our decision and after the State dismissed the rape charges, the sentencing court ruled that the unlawful imprisonment conviction constituted the same criminal conduct as the first degree burglary conviction.

Barnes appears to believe that this finding of “same criminal conduct” and merger means that the unlawful imprisonment charge depended upon the existence of the rape convictions. But this is not the case. Neither merger nor same criminal conduct extinguishes a conviction; these doctrines instead prevent double punishment and govern the offender score calculation. And as stated above, neither the unlawful imprisonment conviction nor the burglary conviction depended on a separate conviction for rape. Both the burglary and unlawful imprisonment charges exist, regardless of whether any rape convictions exist and regardless of the finding that they comprised the same criminal conduct. This claim fails.

#### E. Burden of Proof

Barnes argues that the consent instruction regarding rape shifted the burden of proof to him regarding the burglary and unlawful imprisonment convictions. We disagree.

##### 1. Consent Instruction Applied Only to Rape

As stated above, the consent instruction applied only to the rape charges. It read in part: “A person is not guilty of rape if the sexual intercourse is consensual.” Suppl. CP at 157 (emphasis added). Thus, this instruction did not instruct the jury that there was an affirmative defense of consent to the burglary or unlawful imprisonment charges. It could not have shifted the burden of proof on the other charges because we presume that the jury followed the instructions and considered the affirmative defense instruction on consent only for the rape charges. *Lamar*, 180 Wn.2d at 586.

##### 2. Consent Instruction Did Not Confuse Jury

Barnes also may be arguing that other jury instructions which mention consent or related concepts violated his due process rights by confusing the jury and therefore shifting the burden of proof to him. To the extent Barnes makes this argument, it fails. “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010) (internal quotations omitted) (quoting *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). Even a potentially misleading instruction should not be reversed without a showing of prejudice. *Aguirre*, 168 Wn.2d at 364. As explored below, the trial court properly instructed the jury on the type of consent relevant to each of the charges, and the instructions regarding unlawful imprisonment and burglary did not place any burden of proof on Barnes.

Unlawful imprisonment requires proof that the defendant restrained a person's movements “without consent.” Former RCW 9A.40.040(1), .010(1) (1975). The trial court instructed the jury that a person commits unlawful imprisonment if, among other things, the restraint is “without the other person's consent or accomplished by physical force.” Suppl. CP at 167. Thus, the jury instruction properly informed the jury that lack of consent was an element of unlawful imprisonment, not that Barnes bore the burden of proving consent. And for purposes of the assault in the first degree burglary charge, 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,” and was also instructed that “the State has the burden to prove the absence of consent beyond a reasonable doubt.” Suppl. CP at 161.

\*8 Both of those instructions properly instruct the jury on consent as an element of the crimes charged. The jury was instructed that the State bore the burden of proving each element of each crime beyond a reasonable doubt. Thus, as a whole, the jury instructions made clear that the State bore the burden of proving beyond a reasonable doubt Russell's lack of consent to the unlawful imprisonment and to the assault. *Aguirre*, 168 Wn.2d at 363-64. Neither of these instructions give any suggestion that Barnes bore a burden of disproving consent.

*F. Ineffective Assistance of Appellate Counsel*

Barnes argues that he received ineffective assistance of appellate counsel because his appellate counsel did not argue that the affirmative defense consent instruction applied to the burglary and unlawful imprisonment charges. This claim fails.

To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show “ ‘that the legal issue which appellate counsel failed to raise had merit and that [the petitioner was] actually prejudiced by the failure to 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)). Barnes's ineffective assistance of appellate counsel claim requires us to consider whether his current challenge—that the consent jury instruction shifted the burden of proof on the unlawful imprisonment and burglary charges—had merit, and if so, whether Barnes was actually prejudiced by appellate counsel's failure to raise these issues on direct appeal. *Dalluge*, 152 Wn.2d at 787.

Here, the consent instruction clearly applied only to the rape charge. By its plain terms, it instructed the jury only about rape, and we presume that the jury followed this instruction. Thus, the substantive claim that the instruction shifted the burden of proof on burglary and unlawful imprisonment has no merit. Because the claim has no merit, Barnes did not receive ineffective assistance of appellate counsel due to counsel's choice not to raise this issue on direct appeal. *Dalluge*, 152 Wn.2d at 787.

Similarly, to the extent Barnes relies on the notion that the consent instruction applied to the other charges because the other charges merged and constituted the same criminal conduct as rape before resentencing, this argument fails for the reasons stated above. Merger and same criminal conduct are doctrines that protect a

defendant's right to be free from double punishment. They do not substantively affect convictions, nor do they relate to jury instructions. Because this claim did not have merit, Barnes did not receive ineffective assistance of appellate counsel due to counsel's failure to raise this claim. *Dalluge*, 152 Wn.2d at 787.

III. APPELLATE COSTS

Barnes asks that we waive appellate costs if the State seeks them. Under RCW 10.73.160(1), an appellate court may order adult offenders to pay appellate costs. And the clerk or commissioner of this court “will” award costs on appeal to the State as the substantially prevailing party if the State provides a cost bill. RAP 14.2, 14.4. However, we may direct the commissioner or clerk not to award costs. RAP 14.2. In *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016), Division One of this court held that appellate courts should use their discretion to consider an appellant's request to deny appellate costs, and that this request should be made in the briefing.

We have not yet terminated review, and the State has not filed a cost bill. Nevertheless, should the State file a cost bill after we terminate review in this case, we use our discretion to deny appellate costs. Because of Barnes's indigent status, and our presumption under RAP 15.2(f) that he remains indigent “throughout the review” unless the trial court finds that his financial condition has improved, we exercise its discretion to waive appellate costs. RCW 10.73.160(1).

\*9 In summary, we affirm Barnes's sentence and we deny his PRP. We exercise our discretion to waive appellate costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Bjorgen, C.J.

Maxa, J.

**All Citations**

Not Reported in P.3d, 195 Wash.App. 1008, 2016 WL  
3965889

**Footnotes**

- 1 There does not appear to have been evidence that Barnes was armed with a deadly weapon. Thus, this element must have been satisfied by proof that Barnes assaulted Russell.
- 2 In Barnes's first direct appeal, the State argued that the entire transcript of the recording was admissible under the hostage holder exception. But in its brief on the second direct appeal, the State argued that the hostage holder exception did not apply.

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**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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