90604-1

COA NO. 44075-o-II

SUPREME COURT OF THE STATE

OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

V.

COREAN BARNES,

Petitioner.

PETITION FOR REVIEW

COREAN BARNES
Petitioner

COREAN BARNES - 317817
Airway Heights Corr. Cntr.
P.O. BOX 2049
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A. IDENTITY OF PETITIONER

Corean Barnes asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

I. The decision rendered by the Court Of Appeals Div. II violated Mr. Barnes's Right to Due Process when they failed to reverse his conviction for Burglary in the First Degree with Sexual Motivation but reverse the predicate offense which is an element that is needed to prove Burglary in the First Degree. (SEE Court Of Appeals Div. II opinion pg. 5, 15-17 filed on June 17, 2014 and denial of Motion to Reconsider filed on July 15, 2014 in Appendix A).

II. The decision rendered by the Court Of Appeals Div. II did not address whether the trial court erred under the Privacy Act in admitting a redacted version of the Illegal Secret Recording. (SEE Court Of Appeals Div. II opinion pg. 9-10 filed on June 17, 2014 in Appendix A-1 and denial of Motion to Reconsider filed on July 15, 2014 in Appendix A-1). A copy of the decision, and order denying petitioners Motion For Reconsideration is in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

I. The Court Of Appeals failed to reverse Mr. Barnes' conviction for Burglary in the First Degree with Sexual Motivation after removing an element (Assaults any person) that is needed to prove that conviction. Did the Court Of Appeals Div. II violate Mr. Barnes' Right to Due Process under the Fourteenth Amendment when they failed to reverse his conviction for First Degree Burglary after an element (Assualts any person) was removed that is needed to prove the crime of first Degree Burglary. (SEE Appendix A and B).

II. A conversation recorded in violation of the Privacy Act is inadmissible in court for any purpose RCW 9.73.050. The trial court erred in allowing the jury to listen to a redacted version of the illegal recordings. Did the erroneous admission of illegally recorded conversations violate Mr. Barnes's rights under the Privacy Act? (SEE Appendix A and C).

D. STATEMENTS OF THE CASE

BURGLARY

Mr. Barnes and Mr. Johnson were roommates in August 2008. Mr. Barnes initially moved in with Mr. Johnson and his wife with approval of the landlord in July 2008. Mr. Barnes gave Mr. Johnson money to pay to the landlord. Mr. Barnes rented a room until the middle to the end of August RP 306. Mr. Barnes kept all of his belongings and did his laundry at the residende (121 Victoria View). RP 307. Mr. Barnes entered the home through an unlocked door. RP 314-317. Mr. Johnson testified that Mr. Barnes lived with him until the middle to the end of August. RP 306, 315-316. Neither Mr. Johnson nor the landlord ever put anything in writing that Mr. Barnes was evicted or could not come back on the premisis. RP 309. The state charged Mr. Barnes with Burglary in the First Degree; Unlawful Imprisonment; and two counts of Rape in the Second Degree. The Burglary charges stem from Mr. Johnson saying Mr. Barnes did not have permission to be in the home on August 15, 2008 and that Mr. Barnes assaulted Ms. Russell in the home. Moreover, Mr. Johnson also told the mother of his child (Emily Beadle) that "He got Mr. Barnes arrested for something he did not do." The state charged Mr. Barnes

with Burglary for a residence he legally resided at. The Court Of Appeals Div. II failed to reverse Mr. Barnes's Burglary conviction after they removed an element that is needed to sustain the conviction. (SEE Appendix A and B).

ILLEGAL RECORDING

Corean Barnes and Christian Russell met in the Fall of 2007 and dated between 2007 and 2008. RP 199. They developed a sexual relationship. RP 240. During that relationship Mr. Barnes was never abusive towards Ms. Russell. RP 240. Ms. Russell agreed to give Mr. Barnes a ride to attend to errands on both August 13 and 15, 2008. RP 200. In August 2008, Ms. Russell decided she wanted to break-up with Mr. Barnes. RP 204. She purchased a digital recorder, turned it on, and went to pick-up Mr. Barnes to give him a ride. RP 204-205. She did not get his permission, nor did she tell him she was recording their conversations. After a reversal and remand by the Court Of Appeals Div. II in 2011, COA 39479-1-II, the trial court held a redaction hearing. The recording was played to the jury in a redacted form as Exhibit 3. Supp. CP. Ms. Russell also recorded several soliloquies, in one Ms. Russell told the tape recorder prior to picking-up Mr. Barnes that she was afraid that Mr. Barnes was going to try to rape her but wished he would so she could get that

on tape and Mr. Barnes could be arrested. RP 247. Ms. Russell also explained that she did not call the police because she did not want to cause a big scene unless it was going to keep Mr. Barnes away and she did not believe that whatever happened was sufficient to do more than simply cause a big scene. RP 247-248. She would later claim that Mr. Barnes was touching her breast, digitally penetrating her vagina and dragging her to his trailer. RP 210-213. She later explained at trial that she was in denial and did not think it was a crime for Mr. Barnes to touch her in this way. RP 235. The state charged Mr. Barnes with two counts of Rape in the Second Degree by Forcible Compulsion, Burglary in the Firste Degree with Sexual Motivation, and Unlawful imprisonment. CP 200. Prior to trial Mr. Barnes's trial counsel move to suppress the recordings made by Ms. Russell. He argued that the recordings violated the Statutory Provision of the Privacy Act. RP 194-195. The Court Of Appeals Div. II fail to address this issue. (SEE Appendix A and C).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

BURGLARY

I. In a criminal prosecution, Due Process requires the state to prove every element of the crime beyond a

reasonable doubt. "Elements" are the Constituent parts of the crime, usually consisting of the actus reus, mens rea, and causation, that the prosection must prove to sustain a conviction. Black's Law Dictionary 559 (8th Ed. 2004) In Re MARTINEZ, 171 Wn.2d 254,256 p.3d 277 (2011); STATE V. GARCIA, 318 p.3d 266 (2014). This Honorable Court should accept review because a significant question of law under the Constitution of the State and United States is involved as to rather or not the Court Of Appeals Div. II failure to reverse Mr. Barnes's First Degree Burglary conviction violated the Laws of Due Process. This court should also accept review because the Appellate Court's reversal of Mr. Barnes's Rape convictions removed the element (Assaults any person) that is neede to sustain that conviction thus the Appellate Court decision is in conflict with a decision of the Supreme Court. STATE V. SMITH, 155 Wn.2d 496, 120 p.3d 559 (2005); STATE V. HICKMAN,135 Wn.2d 97, 954 p.2d 900 (1998).

ILLEGAL RECORDING

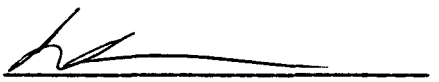
II. Washington's Privacy Act requires the consent of "ALL" participants before a private conversation may be recorded. RCW 9.73.030. Recordings made in violation of the Privacy Act, are inadmissible in court for any purpose. RCW 9.73.050. RP 194-195. "Washington's Privacy Act is the most restrictive in the nation." STATE V. TOWNSEND, 147 Wash.2d 666, 672, 57 p.3d 255 (2002). This Honorable Court should accept review because the Appellate Courts non-ruling on the admissibility of the Illegal Recording, redacted or otherwise, is in conflict with this Supreme Courts most recent decisions rendered in STATE V. KIPP, 179 Wn.2d 718, 317 p.3d 1029 (2014); STATE V. RODEN, WL766681 (2014); STATE V. HINTON, 319 p.3d 9 (2014) and STATE V. CHRISTENSEN, 152 Wn.2d 186, 102 p.3d 789 (2004). This court should accept review because this petition involves an issue of substantial public interest that should be determined by the Supreme Court because a violation to Mr. Barnes's Constitutional Rights to Due Process, as well as a violation to the statutory provisions set out within the Privacy Act pursuant to RCW 9.73.030 and 9.73.050 has occured.

F. CONCLUSION

This Honorable Court should accept review for the reasons indicated in Part E to determine whether the Appelate Court violated Mr. Barnes's Rights to Due Process and whether the trial court violated Mr. Barnes's Rights to Privacy by failing to suppress an Illegally obtained recording.

Dated this 5th day of August, 2014.

Respectfully submitted



COREAN BARNES

Petitioner

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Petition For Review to:

LEWIS M. SCHRAWYER
Clallam County Prosecutor
223 E. 4th St. Ste. 11
Port Angeles, Wa. 98362-3000

LISE ELLNER
Attorney At Law
P.O. Box 2711
Vashon, Wa. 98070-2711

and that I sent the original to the Court Of Appeals Div. II and Washington Supreme Court for filing;

I certify under the penalty of perjury under the laws of washington State that the foregoing is true and correct.

dated this 5th day of August, 2014.

Signed at Airway Heights, Wa. on August, 2014.

COREAN BARNES _ 317817
Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COREAN BARNES, Appellant.	No. 44075-0-II UNPUBLISHED OPINION

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

And we reject Barnes's Statement of Additional Grounds (SAG) arguments. Accordingly, we affirm Barnes's convictions for unlawful imprisonment and first degree burglary.

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

FACTS

Rape and Burglary

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

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

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

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

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

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

First Trial and Appeal

A jury convicted Barnes of two counts of second degree rape and one count of unlawful imprisonment.[1] *State v. Barnes*, noted at 157 Wn. App. 1076, 2010 WL 3766574, at *1 (unpublished). Barnes appealed, challenging the trial court's admission of Russell's tape

[1] The jury in the first trial did not reach a verdict on the burglary charge.

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[ed a] consent instruction on us when it's not requested." Report of Proceedings (RP) at 487. Barnes argued that this instruction placed a

burden on him to prove consent, and that this burden shifting would confuse the jury. The trial court gave this instruction despite Barnes's objection.

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[2] 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.

[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.

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.

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.

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[3] 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

[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.

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.

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.

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

D. LESSER INCLUDED OFFENSE INSTRUCTION

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

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

When the State charges a defendant with an offense "divided by inferior degrees of a crime, the jury may find the defendant not guilty of the charged offense, but guilty on any lesser degrees of the crime." *State v. Buzzell*, 148 Wn. App. 592, 602, 200 P.3d 287 (2009) (citing RCW 10.61.003, .006). A defendant is entitled to a jury instruction on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong); and (2) the evidence in the case supports an inference that the defendant committed the lesser crime to the exclusion of the greater crime (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *see State v. Berlin*, 133 Wn.2d 541, 546-47, 947 P.2d 700 (1997). The court must view the evidence in the light most favorable to the

party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

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

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

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

Regarding the second incident, Russell again testified that Barnes used forcible compulsion to have nonconsensual sexual intercourse with her. Barnes testified that the sexual intercourse was consensual. Once again, there is no evidence that would support a finding that in this incident Russell did not consent but Barnes did not use force. Our Supreme Court has held that a defendant is not entitled to an instruction on a lesser offense where "a victim's testimony

that she was physically overpowered negates any inference that sexual intercourse was nonconsensual but still unforced." *Buzzell*, 148 Wn. App. at 604 . *Buzzell* applies here.

Russell testified that the sexual contact was through forcible compulsion. According to Barnes's testimony, there was no sexual intercourse in the first incident and the sexual intercourse was consensual in the second incident. Even taking all the evidence in the light most favorable to Barnes, there is no evidence that Barnes made nonconsensual sexual contact without the use of physical force. Therefore, we hold that the trial court properly refused to give an instruction of rape in the third degree.

E. SUFFICIENT EVIDENCE OF BURGLARY

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

Evidence is sufficient to support a conviction if, viewed "in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). When a defendant challenges the sufficiency

[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.

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.

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.

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.

Maxa, J.
MAXA, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

J
LEE, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross-Appellant, v. COREAN BARNES, Appellant/Cross-Respondent.	No. 44075-0-II ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **June 17, 2014** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Maxa, Lee

DATED this 15th day of July, 2014.

FOR THE COURT:

Bjorgen, A.C.J.

ACTING CHIEF JUDGE

2014 JUL 15 AM 8:57

Lewis M. Schrawyer
Attorney at Law
223 E 4th St Ste 11
Port Angeles, WA 98362-3000

Lise Ellner
Attorney at Law
PO Box 2711
Vashon, WA 98070-2711

Corean Barnes
DOC #317817
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

APPENDIX B

NO. 13

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

NO. 14

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

(1) That on or about August 15, 2008, the Defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building, the Defendant assaulted a person; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NO. 15

Building, in addition to its ordinary meaning, includes any dwelling.

NO. 16

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

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

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

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

NO. 17

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

No. 18

The defendant is charged in count III with BURGLARY IN THE FIRST DEGREE. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of CRIMINAL TRESSPASS IN THE FIRST DEGREE.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

No. 19

A person commits the crime of CRIMINAL TRESSPASS IN THE FIRST DEGREE when he or she knowingly enters or remains unlawfully in a building.

No. 20

To convict the defendant of the crime of Criminal Trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 15, 2008, the defendant knowingly entered or remained in a building;

(2) That the defendant knew that the entry or remaining was unlawful; and

(3) That this act occurred in the State of Washington, County of Clallam.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 21

It is a defense to a charge of BURGLARY IN THE FIRST DEGREE or CRIMINAL TRESSPASS IN THE FIRST DEGREE that the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to those charges.

When completing the verdict forms you will first consider the crime of RAPE IN THE SECOND DEGREE as charged in count I. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach.

You will next consider the crime of RAPE IN THE SECOND DEGREE as charged in count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach.

When completing the verdict forms, as to count III, you will first consider the crime of BURGLARY IN THE FIRST DEGREE as charged in count III. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form C.

If you find the defendant guilty on verdict form C, do not use verdict form D. If you find the defendant not guilty of the crime of BURGLARY IN THE FIRST DEGREE, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of CRIMINAL TRESPASS IN THE FRIST DEGREE. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form D the words "not guilty" or the word "guilty," according to the decision you reach.

NO. 28

You will also be given a special verdict form for the crime of BURGLARY IN THE FIRST DEGREE. If you find the Defendant not guilty of this crime, do not use the special verdict form. If you find the Defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

DONE IN OPEN COURT and in the presence of Defendant this date: June 25, 2009.

KENNETH D. WILLIAMS, JUDGE
Print Name:

Presented by:

DEBORAH S. KELLY
Prosecuting Attorney

ANN LUNDWALL WBA #27691
(Print Name:)
(Deputy) Prosecuting Attorney

Copy received, approved for entry
notice of presentation waived:

JOHNATHAN FESTE WBA # 29966
(Print Name:)
Attorney for Defendant

/am

COREAN OMARUS BARNES, Defendant

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140. Termination of monitoring by DOC does not restore my right to vote.

Defendant's signature: _____

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

Interpreter signature/Print name: _____

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

VI. IDENTIFICATION OF THE DEFENDANT

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

SID No.	WA22113507	Date of Birth	11/12/1982
FBI No.	8209KB0	Date of Arrest	08/19/2008
DOL No. (for traffic convictions)		Local ID No. (pick one):	[XX_] WA0050000 (CCSO) [_] WA0050100 (PAPD) [_] WA0050200 (Forks PD) [_] WA0050300 (Sequim PD) [_] WAWSP8000 (WSP)
		OCA	08-08578
PCN No.	966012871	Other	DOC No. 317817

Alias name, DOB: a/k/a Corgano Barnes, Cantrell Barnes, Lonney M. Barnes, Roosevelt Barnes, Roosevelt Times, Gerard Barnes, Lonnie Barnes, Kentrall Lear
5'11", 228 lbs., brown eyes, black hair

LKA: 121 Victoria View, Sequim, Washington 98382

Race:		Ethnicity:	Sex:
[ ] Asian/Pacific Islander	[X] Black/African-American	[ ] Hispanic	[X] Male
[ ] Caucasian	[ ] Native American	[X] Non-Hispanic	[ ] Female
[ ] Other: _____			

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

Clerk of the Court: Deena Gott, Deputy Clerk. Dated: 6-25, 2009

DEFENDANT'S SIGNATURE: X

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

This is the address I was living at but I was charged with the Burglary.

DEFENDANT
BARNES, COREAN OMARUS
121 VICTORIA VIEW
SEQUIM WA 98382

CASE: 16288006 POP
Criminal Traffic
Agency No. C61265
Home Phone: 3604403922

AKA BARNES, COREAN O

*** WARRANT ISSUED ***
*** FTA ISSUED ***

OFFICER
00716 POP HOLDEN, TREY SGT

CHARGES

Violation Date: 10/19/2006		DV Plea	Finding
1 46.20.342.1B	DWLS 2ND DEGREE	N Not Guilty	Guilty

TEXT

S	11/17/2006	Case Filed on 11/17/2006		EOS
		DEF 1 BARNES, COREAN OMARUS Added as Participant		
		OFF 1 HOLDEN, TREY Added as Participant		
		ARR YN Set for 12/11/2006 01:30 PM		
		in Room 1 with Judge TSD		
	11/22/2006	Notice Issued for ARR YN on 12/11/2006 01:30 PM		KME
U	12/11/2006	DEFENDANT FAILS TO APPEAR.		EOS
		CITY REPRESENTED BY BUSKIRK		
		WARRANT ORDERED IN THE AMOUNT OF $7500		
S		BENCH Warrant Ordered		
		Print on or after 12/11/2006		
		Warrant expires on 12/11/2011		
		FTA Ordered		
U		----------DECKER		
S		FTA Issued, Amount Due	500.00	SYS
		ARR YN: Not Held, Hearing Canceled		EOS
		OTH: Held		
	12/18/2006	BENCH Warrant Issued for		SYS
		Fail To Appear For Hearing		
		Bail: 7,500.00 + 0.00 Warrant Fee; Total Bail	7,500.00	
	03/09/2007	OTH BW Set for 03/12/2007 01:30 PM		KME
		in Room 1 with Judge TSD		
U	03/12/2007	DEFENDANT FAILS TO APPEAR.		EOS
		CITY REPRESENTED BY BUSKIRK		
		WARRANT TO REMAIN OUTSTANDING		
		----------DECKER		
S		OTH BW: Held		
	04/06/2007	OTH BW Set for 04/09/2007 01:30 PM		KME
		in Room 1 with Judge TSD		
U	04/09/2007	DEFENDANT FAILS TO APPEAR.		EOS
		CITY REPRESENTED BY BUSKIRK		
		WARRANT TO REMAIN OUTSTANDING		
		----------CAULKINS		
S		OTH BW: Not Held, Hearing Canceled		
		OTH: Held		

Docket continued on next page

CASE: 16288006 POP
Criminal Traffic
Agency No. C61265

DEFENDANT
BARNES, COREAN OMARUS

TEXT - Continued

S	05/28/2008	Revoked Suspended Jail : 30 D	DMH
	06/25/2008	PCN added to case	MEP
U	07/22/2008	DEF APPEARED WITH COUNSEL, LITTLE CITY REPRESENTED BY BUSKIRK PROOF OF DV TREATMENT COMPLIANCE FILED DEF HAS A NEW VIOLATION MOT & CERTIFICATE FOR ORDER REVOKING SUSPENDED SENTENCE FILED DEF REQUESTS CONTINUANCE - GRANTED	CLP
S		MOT REVOK Set for 09/16/2008 09:00 AM in Room 1 with Judge TSD	
U		----------DECKER	
S		OTH COMP: Held	
	08/13/2008	RSJ Review Date Changed to 10/10/2008	EOS
	08/25/2008	MOT REVOK on 09/16/2008 09:00 AM Changed to Room 316 with Judge TSD	DMH
U	09/03/2008	DEF HAS A NEW VIOLATION, FORWARDED TO PA	CLP
	09/04/2008	MOT & CERTIFICATE FOR ORDER REVOKING SUSPENDED SENTENCE FILED	
	09/16/2008	DEFENDANT FAILS TO APPEAR. ATTY LITTLE PRESENT CITY REPRESENTED BY MOSCA WARRANT ORDERED IN THE AMOUNT OF $5000 ----------DECKER	
S		MOT REVOK: Held	
	09/17/2008	BENCH Warrant Ordered Print on or after 09/17/2008 Warrant expires on 09/17/2013	
	09/22/2008	BENCH Warrant Issued for Fail To Appear For Hearing Bail: 5,000.00 + 0.00 Warrant Fee; Total Bail 5,000.00	SYS
	10/15/2008	Imposed date for RSJ changed to 05/27/2008	DMH
U	10/17/2008	OCT PROB RPT - SENT INQUIRY TO JAIL RE: JAIL TIME	
	11/14/2008	OCTOBER PROB RPT - SENT INQUIRY TO JAIL RE: JAIL TIME	EOS
S	11/17/2008	Defendant Complied with Revoked Suspended Jail	
U	01/30/2009	JAN PROB RPT - NO NEW VIOLATIONS SINCE LAST RPT IN SEPT'08, CASE IS IN WARRANT STATUS	CLP
S	02/02/2009	ATY 1 ROVANG, W. DAVID Removed	DMH
U	07/13/2009	JULY PROB RPT - NO NEW VIOLATIONS, CASE IS IN WARRANT STATUS	CLP
	10/13/2009	PETITION TO WAIVE PENALTY FOR TRAFFIC INFRACTION PURSUANT TO RCW 46.63.120(2) FILED BY DEF LETTER DENYING REQUEST SENT TO DEF AT WALLA WALLA PRISON	DMH
	10/30/2009	LETTER FROM DEF REQUESTING COPIES OF RECORD	
	11/04/2009	NOTICE OF IMPRISONMENT & REQUEST FOR FINAL DISPOSITION OF UNTRIED MISDEMEANOR INDICTMENT, INFORMATION OR COMPLAINT FILED BY DEF DETAINER OR WARRANT RESOLUTION REQUEST FILED BY DEF	EOS
S		MOT DEFYN Set for 12/08/2009 09:00 AM in Room 316 with Judge TSD	
*	11/05/2009	Notice Issued for MOT DEFYN on 12/08/2009 09:00 AM	KME
U		SUMMONS MAILED TO VICTORIA VIEW, SEQUIM ADDRESS	EOS

Docket continued on next page

PORT ORCHARD MUNICIPAL COURT

216 PROSPECT STREET PORT ORCHARD, WA 98366
PHONE: (360) 876-1701

RE: CITY OF PORT ORCHARD
November 05, 2009

vs. BARNES, COREAN OMARUS

YOUR ARRAIGNMENT WAS 07/17/2007

Cause No. 16288008 POP CN
Violation Date 01/30/2007
Violation DV-PROTECTION ORDER VIOLATION

BARNES, COREAN OMARUS
121 VICTORIA VIEW
SEQUIM WA 98382

SUMMONS/NOTICE TO APPEAR

IN THE NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY SUMMONED AND ORDERED TO APPEAR ON THE FOLLOWING DATE AND TIME.

TIME: 09:00 AM

DATE: December 08 2009

DEFENSE MOTION

ARRAIGNMENT
TRIAL
SENTENCING
X HEARING MOT DEFY

JUDGE: Court Rm 316 DECKER,TARRELL S

☒ COURT APPEARANCE IS MANDATORY. YOUR FAILURE TO APPEAR WILL RESULT IN THE ISSUANCE OF A WARRANT FOR YOUR ARREST.

cc: Pros. Atty.:
Officer:
Defense Atty.:
Bondsman:

By: HUNT, DEBORAH M
Court Administrator KME

PORT ORCHARD MUNICIPAL COURT

216 PROSPECT STREET PORT ORCHARD, WA 98366
PHONE: (360) 876-1701

RE: CITY OF PORT ORCHARD
November 05, 2009

vs. BARNES, COREAN OMARUS

YOUR ARRAIGNMENT WAS 07/17/2007

Cause No. 16288007 POP CN
Violation Date 11/30/2006
Violation
DV--PROTECTION ORDER VIOLATION

BARNES, COREAN OMARUS
121 VICTORIA VIEW
SEQUIM WA 98382

SUMMONS/NOTICE TO APPEAR

IN THE NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY SUMMONED AND ORDERED TO APPEAR ON THE FOLLOWING DATE AND TIME.

TIME: 09:00 AM

DATE: December 08 2009

ARRAIGNMENT
TRIAL
SENTENCING
XHEARING MOT DEFYN

DEFENSE MOTION

JUDGE: Court Rm 316 DECKER,TARRELL S

☒ COURT APPEARANCE IS MANDATORY. YOUR FAILURE TO APPEAR WILL RESULT IN THE ISSUANCE OF A WARRANT FOR YOUR ARREST.

cc: Pros. Atty.:
Officer:
Defense Atty.:
Bondsman:

By: HUNT, DEBORAH M
Court Administrator KME

Subject: Barnes--Emily Beadle
From: Leigh Hearon <leigh@hearoninvestigations.com>
Date: 9/9/2012 1:01 PM
To: Alex Stalker <astalkercpd@olypen.com>

Mr. Stalker,

I finally spoke to her this morning. She had a short relapse about six months ago, when I first tried to find her, but now is back in her parents' home in PA, with her son, and sober.

Emily remembers meeting Corean at Kenny Johnson's home a few months after her son was born on 2/9/08 (Kenny is the bio dad). Kenny introduced Corean as his new room mate who was going to help out around the house. Emily had seen Corean before at some local establishment working as a bouncer. Emily remembers talking to Corean for about five minutes. It was the only time that she spoke to Corean (other than showing him her ID in his professional capacity).

Emily couldn't place the date of this meeting any more clearly, but it sounds as if it occurred before August, 2008. She recalled that Corean definitely was in Kenny's "good graces" when she met him. She heard later that Corean and Kenny had had a big falling out.

There is no established parenting plan between Emily and Kenny. But Emily was allowing Kenny to take their son for a few hours at a time. Over time, this turned into overnight visits. Emily knows that Kenny is now married and has a baby daughter (both of whom I met when I interviewed Kenny).

After Corean was arrested, Kenny told Emily that when he kicked him out of his house, he called the cops on Corean and had him arrested for something he didn't do. Emily said she stopped the conversation, not wanting to know more, but thinks Kenny was referring to "drugs or something," not a sex offense.

Emily said she doesn't know who the alleged victim is in this case. I asked her if the name Christina Russell was familiar to her. Emily said it was, and then recalled one of Kenny's babysitters named Christina, with whom he had an affair, who came by Emily's parent's home with Kenny, both before and after Corean's arrest. She said this Christina was about her height (5'5") or perhaps a bit taller, and had long brown hair. She said she would be willing to look at a photo of the A/V to see if it was the same person who accompanied Kenny to her parents' home.

Emily recently had a long court battle with Kenny and now has primary custody of their son. Kenny could go back to court with a proposed parenting plan, she said, but she's heard through reliable sources that Kenny is once more strung out on meth, and may not be living in the same place.

Emily recently testified in a criminal court case--defendant's name is Guy Ralph (?); she said she got death threats and had to be escorted by the police to the courthouse to testify.

Corean has written to Emily at her parents' address, asking her if she remembers meeting him at Kenny's and if so if she would be willing to testify. Emily said Corean never wrote anything

about telling her what to say, and continually apologized in his letters for bothering her.

I'll be in Clallam County on Tuesday if you want me to get a more complete statement, subpoena her, and/or show her photographs (I have none).

Emily Beadle's contact info:

360-452-6960 (landline)
83 S. Maple Ln, PA 98362-8150
DOB 1/8/85

Best,

Leigh

P.S. Also checked Kenny's court record--only several criminal traffic stops since 2008.

Leigh Hearon
Hearon Investigative Services
www.hearoninvestigations.com
WA Lic #1744
360.732.0732 office
360.732.0017 fax
206.240.8324 cell

INVESTIGATION CONT'D:

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

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

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

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

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

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

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

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

Detective: _____ Date: 8/20/08

Supervisor Approval: SAME Date: _____

APPENDIX C

IN THE SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

STATE OF WASHINGTON, Plaintiff, v. COREAN BARNES, Defendant.	NO. 08-1-00340-9 SUPPLEMENTAL DEFENSE BRIEF RE: SUPRESSION MOTION

COMES NOW the defendant, by and through his attorney, Jonathan P. Feste, and files this brief response to the State's *Opposition to Defense Motion* filed on November 17, 2008.

CERTIFIED STATEMENT

JONATHAN P. FESTE hereby certifies and states as follows:

This statement is supplemental to the previous suppression motion filed in this matter and is responsive to issues raised in the State's brief.

RCW 9.73.030 prohibits the recording of a private conversation without first obtaining the consent of all persons engaged in the conversations. Exceptions to

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this requirement are enumerated in RCW 9.73.030(2). The State in this matter emphasizes subsections (b) and (d) of RCW 9.73.030(2) and asserts they are applicable in this matter. It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed. *Hall v. Corp. Catholic Archbishop*, 80 Wn.2d 797, 801, 498 P.2nd 844 (1972). There is a reasonable concern that an overbroad construction of the catchall provision under subsection (b) would be inconsistent with the legislative intent underlying the entire Privacy Act. *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980). The exceptions to the Privacy Act seem to regulate pure speech. Bomb threats seem to be part of the catchall provision. Pure speech statutes, such as RCW 9.61.160 (1) must nevertheless be interepreted with the commands of the First Amendment clearly in mind." *State v. Williams*, 144 Wn.2d 197, 207, 36 P.3d 890 (2001). Some forms of speech offer no socially redemptive value, which prompted the State to adopt the "truth threats" standard for bomb threats. *State v. Johnston*, 156 Wn.2d 355, 360, 127 P.3d 707 (2006). Such a threat is a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted...as a serious expression of an intention to inflict bodily harm upon or to take the life of {another individual}." *Id* at 361 (quoting *United States v. Khorrami*, 895 F.2d 1186 1192 (7th Cir. 1990). A true threat is a serious threat, not one said in jest, idle talk or political argument. *Id.* With regard to the *Gunwall* case (106 Wn.2d 54, 720. P.2d 808 (1986)). cited in the original suppression motion brief that underscores both Washington's greater constitutional protections for privacy under Art. 1, Sec. 7, plus the importance of independent analysis of that and other liberty interests in state constitution that may

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be similar but that are also different than those in the federal constitution, this court should also consider, in addition to the First Amendment, Art. I, Sec. 5 of the Washington State Constitution: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

In response to the State's brief, there is a reasonable question whether the words uttered by the defendant were of a "true threat" nature because, by C.R.'s own admission upon arriving in Jefferson County, "I don't have proof of anything," irrespective she recorded statements the State believes are admissible in the event of a trial *(Transcript at 52)*. With regard to the incident of sexual intercourse between the defendant and C.R., there is no indication from the tape the defendant restrained her in the house. Furthermore, they engaged in conversation during the act. In her own recorded statement after having engaged in sexual intercourse with the defendant, C.R. could not clearly articulate a characterization of what happened. *(Transcript at 93)*.

C.R. claimed she tried to contact law enforcement officials in Jefferson County. *(Transcript at 52)*. Instead, she chose to give the defendant a ride back to Sequim, still recording him a second time without any warning. The defendant made clear that his words were exaggeration when he simply asked C.R. to buy him some liquor (*Transcript at 74)*. Such a request hardly seems to be the crescendo of a rising true threat situation.

The reasonable question for all recordings at issue in this matter is at what point C.R. was duty-bound to inform the defendant the conversations were recorded before she engaged him in talk meant to elicit statements that might be exceptions to the general objective of RCW 9.73.030. Furthermore, if C.R. felt so compelled to

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provide a ride to the defendant to reach Jefferson County, based on the State's assertion she feared the defendant would blow up her house and car, RCW 9.73.040 provides a means by which court-authorized recording may occur in such dire circumstances.

The Privacy Act's exceptions are narrowly drawn. If C.R. was as fearful as alleged, based on both threats to her she claimed the defendant made prior to the ride to Jefferson County and during that trip, she had ever means to extricate herself from the situation by making actual contact with a law enforcement officer. Her belief that the defendant required her to give her ride back to Sequim is equivalent to nonsensical psychobabble (*Transcript at 52).* Law enforcement officers, prosecutors and the courts are equipped to help people avoid such risky situations. Thus, the words of C.R. and the defendant that are recorded may be reasonably deemed the equivalent to jest, idle talk, and political statement. Furthermore, despite the assertion of the State in charging documents that acts of rape and unlawful imprisonment occurred in the context of the facts of this case, the State's interpretation of what happened is speculative and not proof that, indeed, such acts were committed as C.R. and the defendant discussed the end of their relationships.

The Court is urged to suppress all of the tapes involving conversations between C.R. and the defendant on the basis of alleged violations of RCW 9.73.030. It seems C.R. intended to tape the defendant to elicit responses from him meant to invoke exceptions to the Privacy Act. If the tapes in this matter of conversations between the defendant and C.R. were deemed admissible, any participant in an intimate relationship could construct circumstances under which a person with whom they are involved could be coaxed into saying things or doing things that could later be turned against

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them. In the *Caliguri* case (99 Wn.2d 501, 507-508, 664 P.2d 466 (1983) cited by the State with regard to the meaning of the word "convey" as part of the exception to the Privacy Act for spoken threats, the matter there involved a case of a great public interest: organized crime in Pierce County that corrupted the sheriff's office there. In contrast, while the State has a stake in promoting domestic tranquility in intimate relationships, the use of a taping device as part of a process for one person to end such a relationship by eliciting certain words from the partner who does not know such a conversation is being recorded seems to go beyond the bounds of public interest, particularly when they are turned over, afterward, to a government agency. Defense counsel respectfully asserts that there must be a true threat that goes beyond mere words. As indicated in the original petition for the suppression motion, RCW 9.73 is designed to protect private conversations from governmental intrusions. *State v. Clark,* 129 Wn.2d 211, 232, 916 P.2d 384 (1996).

I CERTIFY UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 24th day of November 2008.

CLALLAM PUBLIC DEFENDER

JONATHAN FESTE, WSBA #29966
Attorney for Defendant

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IN THE SUPERIOR COURT OF CLALLAM COUNTY
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

COREAN O. BARNES,

Defendant.

No. 08-1-00340-9

DEFENDANT'S MOTIONS IN LIMINE

COMES NOW the defendant, by and through his attorney and moves the court for the following motions in limine:

1. Prohibit testimony concerning any part of the recording made by Christina Russell of herself and Corean Barnes which has been ruled to violate RCW 9.73.030. RCW 9.73.030 generally makes it unlawful for any individual to intercept or record any private conversation by any electronic device without first obtaining the consent of all persons involved in the conversation. The court has ruled that portions of the recording made by Ms. Russell do not fall into any of the enumerated exceptions of RCW 9.73.030(2), and has ordered that those portions of the recording will not be admitted into evidence.

RCW 9.73.050 states "[a]ny information obtained in violation of RCW 9.73.030 [...] shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except [...] in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security." RCW 9.73.050. Because Mr. Barnes *is not* charged with a crime, the commission of which would jeopardize national security, none of the information which has been redacted from the recording, and is part of any conversation in which Mr.

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Barnes or any other person participates, is admissible in any criminal case in this State.

RCW 9.73.050 means what it says. Any information obtained in violation of RCW 9.73.030 is inadmissible; this prohibition includes all information obtained during the unlawful recording, whether or not that information was obtained through the aid of the recording. *State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439 (1993) (An undercover detective wore a wire without judicial authorization; the court ruled that the detective's eyewitness observation of 3 kilos of cocaine was therefore inadmissible); *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990) (The defendant was arrested after he had sold marijuana to a police officer who was wearing an unauthorized body wire. Held: all of the evidence obtained during the marijuana sale, including the officer's observations, was inadmissible). Any evidence obtained in connection with the illegal recording, including testimony by any person involved, is inadmissible. *State v. Smith*, 80 Wn.App 535, 543, 910 P.2d 508 (1996).

Evidence obtained in violation of RCW 9.73.030 is inadmissible for any purpose, including impeachment. *State v. Faford*, 128 Wn.2d 476, 488, 910 P.2d 447 (1996); *See also*, *State v. Henderson*, 16 Wn.App. 526, 557 P.2d 346 (1976).

2. Prohibit testimony regarding an allegedly abusive relationship between Christina Russell and an individual believed to be named "Romero," or "Ramon." The defense investigated an alleged abusive relationship between Ms. Russell and an individual believed to be named "Romero" or "Ramon" in Colorado. Although evidence exists that indicates Ms. Russell was having an affair with while married to her then husband Justin Russell with a person named "Ramon" or "Romero" there is no evidence to suggest that person engaged in any abusive or illegal activities. If such evidence of abuse does exist, it has not been provided to the defense and should be excluded. In addition, such evidence is not relevant to the current case and would only serve to inflame the passions of the jury. ER 402; ER 403.

3. Exclude witnesses from the courtroom and direct them not to discuss the case or their testimony with each other.

4. Prohibit any reference to prior trials or their outcomes. Such information has no probative value and is exceedingly prejudicial. ER 402; ER 403.

5. Prohibit any reference to the type of "class" the defendant was being driven to by Christina Russell, or the reason the defendant was attending the "class." That the defendant was attending court ordered treatment is far more prejudical than probative (ER 403), and would allow the State to introduce otherwise prohibited ER 404 evidence.

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SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

STATE OF WASHINGTON,

Plaintiff,

vs.

COREAN BARNES,

Defendant.

NO. 08-1-00340-9

MEMORANDUM OPINION
ON MOTION TO SUPPRESS

The request in this case is to suppress certain recordings made of private conversations between the Defendant and the alleged victim. The Court has been provided a transcript of the taped material.

RCW 9.73.030 makes it unlawful for "any individual . . . to intercept or record private conversations by electronic devices."

RCW 9.73.030 (Subsection II) however, states that conversations which convey threats of extortion, blackmail, bodily harm or other unlawful requests or demands may be recorded with the consent of one party to the conversation.

To the extent that the Defendant is involved in these conversations it would appear that the conversations fall within the exemptions. Certainly parts of the conversation are likely not relevant except for purposes of context.

There are some long narratives which are contained at pages 32 through 36 which are not conversations with the Defendant. It would appear to the Court that those particular conversations would not fall within the ambit of the statute in that they are

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth

single party recordings. There may be individual portions of the transcript which should be excluded from testimony for other evidentiary rule reasons. In general however, the conversations between the Defendant and the alleged victim appear to meet the exceptions requirement of the private recording act and therefore will not be suppressed by the Court.

DATED this 2nd day of Dec, 2008.

Respectfully submitted,

KEN WILLIAMS
JUDGE

KEN WILLIAMS
JUDGE
Clallam County Superior Court
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SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

STATE OF WASHINGTON,

Plaintiff,

vs.

COREAN BARNES,

Defendant.

NO. 08-1-00340-9

MEMORANDUM OPINION
ON TRANSCRIPT REDACTIONS

On the 6th of July, 2011, the Court and the parties reviewed the written transcript which contains the transcribed communications of Ms. Christina Russell, and Mr. Corean Barnes. Ms. Russell recorded the communications without the knowledge of Mr. Barnes, thereby implicating Chapter 9.73 the Washington State Privacy Act.

Under that act it is unlawful to record any private communication without first obtaining the consent of all of the participants. Communications which violate the statute may not be used in any criminal prosecutions.

Subsection 2 has exceptions to the prohibition against use in a criminal proceeding. Subsection 2(b) allows private communications recorded without the consent of all parties to be introduced in criminal proceedings if the communications are those "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests of demands . . ."

This matter has been remanded for a retrial following a reversal by Division II of the Court of Appeals. Division II noted that: "A number of Barnes's recorded remarks

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that went before the jury did not convey threats, either directly or indirectly, and did not fall under the exceptions to the privacy act . . ."

The Court then noted:

> "In light of the narrow construction we afford the threats exception, coupled with the broad definition of 'convey' under Calgari, we hold the trial Court abused its discretion by admitting the entire recording here. Admitting certain statements that otherwise do not fall under one of the Acts exceptions, simply to add context is not proper."

The Appellate Court then noted that the trial Court should conduct a more detailed analysis of the recording before admitting the selected portions that met the threats exception to the privacy act. That was the impetus for the hearing of July 6, 2011.

Certain terms need to be defined. "Threat", as noted in the Court of Appeals opinion, is to be construed narrowly for purposes of the Privacy Act.

RCW 9A.56.110 defines extortion as follows:

> "'Extortion' means knowingly to obtain or attempt to obtain by threat property or services of the owner, and specifically includes sexual favors."

"Blackmail", according to Black's Law Dictionary, Revised Fourth Edition, in common parlance, is synonymous with extortion.

It should be noted that the threats, which are exempted from the Privacy Act prohibitions include threats which are physical (bodily harm) and threats which amount

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It would appear to the Court that beginning at approximately 1 hour and 47 minutes into the CD, and using the transcript from the middle of page 65, through the first three lines of page 67 and to the extent these sounds constitute private communications such would be exempt from the prohibitions of use under the Privacy Act statute.

DATED this 14th day of July, 2011.

Respectfully submitted,

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and that also occurred after -- in the portion of the tape recording that the Court had deemed was not admissible. So it was a reference and I took that portion out in an abundance of caution.

THE COURT: Mr. Stalker, anything else?

MR. STALKER: That's appropriate. With regards to -- I'm anticipating the State's first witness -- I don't know what the State's going to do, but when it comes to Ms. Russell, basically I want to enter continuing objections, preserve the issue, when she's talking about things that happened during the recording.

So I don't want to keep interrupting every time a question like that is asked, so I just for the record would like to either note a continuing objection to that now, or I can make one objection when the first question is asked and that can suffice to be a continuing objection.

THE COURT: What's the nature --

MR. STALKER: Basically violates the privacy act.

THE COURT: I will allow you to have a continuing objection on that, and it's the objection -- let me make clear it is the objection to the introduction of the recording?

conversation.

The State concedes the recording included conversations that were "private" while not conceding that all of the recording related to conveying a conversation. *State v. Christensen, supra* at 192, 102 P.3d 789 (Privacy Act protects telephone conversations). But, some of the recorded information clearly falls into the act's exception: RCW 9.73.030(2) provides exceptions to the consent requirement:

> Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) *which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands*, ... may be recorded with the consent of one party to the conversation.

Clearly, Mr. Barnes took umbrage at C.R.'s attempt to break off their relationship on her terms and conveyed on many occasions during the taped conversation the intent to cause bodily injury to C.R. (force her to have sex one more time or kill her if she would not consent) or physical damage to the property of C.R.

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

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

ISSUE TWO

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

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

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