NO. 47611-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREAN O. BARNES,

Appellant.

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

BRIEF OF RESPONDENT

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3. Whether there was sufficient evidence for a jury to find that the defendant knowingly and unlawfully restrained the victim?
4. Whether the same criminal conduct analysis requires reversal of Burglary in the First Degree when the analysis only applies at sentencing?
5. Whether the court erred by imposing the sexual motivation enhancement for Burglary in the First Degree when the faulty consent instruction for the Rape charge had no bearing on evidence of motivation?

II. STATEMENT OF THE CASE

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

> Corean Barnes and Christina Russell met in 2007 and dated between 2007 and 2008. They developed a sexual relationship. By August 2008, Russell decided that she did not want to have a further relationship with Barnes, but agreed to drive Barnes on various errands. On August 15,

Russell purchased a digital tape recorder and placed it in her purse in order to surreptitiously record her conversations with Barnes.

Later that day, Russell met Barnes at the house of Kenneth Johnson, who had rented a room to Barnes starting in July 2008. 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. B, *State v Barnes*, unpublished decision no. 44075-0-II, 181 Wn. App. 1035 (2014) (hereinafter "*Barnes* II").[1]

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* App. A, *State v Barnes*, No. 39479-1-II (Sept. 28, 2010)(hereinafter "*Barnes* I").

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

[1] All citations to Appendix (App.) in this brief refer to Appendix attachments for Brief of Respondent, *In re Personal Restraint Petition of Corean Omarus Barnes*, COA no. 47171-0-II, filed April 14, 2015.

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." App. A, *Barnes* I.

2012 Trial

Following the reversal of his convictions, Barnes was tried again in 2012. At the 2012 trial a jury convicted Barnes of both counts of rape in the second degree, unlawful imprisonment, and first degree burglary with sexual motivation. At sentencing the trial court ruled that the second degree rape and first degree burglary convictions were the "same criminal conduct" and, therefore, merged for sentencing purposes. *See* App. B, *Barnes* II (citing RP at 563).

Direct Appeal Following 2012 Trial

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

> A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse, there are actual words or conduct indicating freely given agreement to have sexual intercourse.
>
> The defendant has the burden of proving that sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case,

> that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to a charge to which the defense of consent is raised.

App. C.[2]

This Court held that the trial court erred when it gave this affirmative defense instruction over Barnes's objection, *citing State v. Coristine*, 177 Wn. 2d 370, 378, 300 P.3d 400 (2013) *and State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013).[3] This Court thus reversed the rape convictions but affirmed the unlawful imprisonment and burglary convictions. App. B, *Barnes* II.

Then Mr. Barnes filed the present petitions beginning with his Motion to Vacation, 08-1-00340-9, on Dec. 24, 2014 which was transferred to COA II as a PRP.

Then on Jan. 21, 2015 Mr. Barnes filed his Personal Restraint Petition no. 47171-0-II. On Apr. 14, 2015, the State filed its response to Mr. Barnes' Personal Restraint Petition, 47171-0-II.

Finally, Mr. Barnes was resentenced on May 20, 2015. After resentencing, Mr. Barnes immediately filed a notice of appeal and the

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[2] This instruction can be found at CP 75 in *State v Barnes*, No. 44075-0-II.

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

Appellant's Brief on Aug. 25, 2015 under COA no. 47611-8-II. This Court consolidated Mr. Barnes' petitions on July 14, 2015 under COA no. 47611-8-II.

III. ARGUMENT

A. MR. BARNES HAS NOT ESTABLISHED A BASIS FOR RE-LITIGATING SUFFICIENCY OF THE EVIDENCE FOR THE ELEMENT OF UNLAWFUL ENTRY FOR BURGLARY IN THE FIRST DEGREE.

Mr. Barnes claims that he could not be convicted of Burglary in the First Degree because the State did not present sufficient evidence that Mr. Barnes entered the residence of 121 Victoria View unlawfully. *See* Motion to Vacate, 08-1-00340-9, transferred to COA II as PRP, at 1, 2.

With respect to a possible claim that the evidence was insufficient, this claim was already denied in the second direct appeal, where this Court held that the evidence was sufficient despite Barnes' claim that the evidence was insufficient because he had access to the residence. App. B, *Barnes* II.

Moreover, the Court already reviewed the issue in the 2nd direct appeal:

> 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.
>
> 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.

App. B, *Barnes* II, at *9.

Moreover, Mr. Barnes' cursory claim in the present petition does not offer any argument why re-litigation of this issue is warranted, and this Court should decline to review this claim. *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990) ("A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby").

In order to show that he 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 Mr. Barnes was not new evidence discovered since trial. Such evidence could certainly have been discovered before trial.

Further, Mr. Barnes' current claim that he was not unlawfully on the premises because Mr. Johnson had no right to not let Mr. Barnes back into Mr. Johnson's house is a speculative legal conclusion at best. The testimony referred to by this Court in the 2nd appeal shows that Mr. Barnes had already stopped living in Mr. Johnson's residence sometime in August 2008 *before* the date of the burglary on Aug. 15, 2008, because he could not pay any rent. *See* App. B, *Barnes* II, at *8.

Additionally, the legal documents referred to by Mr. Barnes listing Mr. Barnes' residence as 121 Victoria View are Port Orchard Municipal Court docket entries showing violation dates from 2006 and 2007 *prior* to Aug. 15, 2008. Such documents do not establish a legal right to reside on the premises against the owner's will. These documents only suggest that Mr. Barnes may have failed to report a new address to the Municipal Court.

Thus Mr. Barne's alleged evidence simply does not warrant a new

trial under Washington law.

B. REVERSAL OF THE RAPE CHARGE HAS NO EFFECT UPON THE BURGLARY CONVICTION BECAUSE THE AFFIRMATIVE DEFENSE OF CONSENT INSTRUCTION APPLIED ONLY TO THE RAPE CHARGE AND DID NOT RELIEVE THE STATE FROM ITS BURDEN TO PROVE ASSAULT BEYOND A REASONABLE DOUBT.

Barnes argued in his PRP, 47171-0-II, that the trial court improperly switched the burden of proof by "providing a consent instruction for first degree burglary and unlawful imprisonment." Petitioner's Br., 47171-0-II, at iii. Specifically, Barnes claims that the trial court "gave an affirmative defense instruction for consent over the defense's objection for not only the charge of Rape in the Second Degree but also for Burglary and Unlawful Imprisonment." Petitioner's Br., 47171-0-II, at 5. This claim, however, lacks merit because the faulty consent instruction only applied to the rape counts, and this Court thus properly only overturned the rape counts in the direct appeal.

Mr. Barnes argues again in his Motion to Vacate that the reversal of both counts of Rape in the Second Degree removed an element (assault any person) that was needed to sustain the conviction for First Degree Burglary. Motion to Vacate, 08-1-00340-9, transferred to COA as PRP, at 3.

The Rape convictions were reversed because the affirmative defense

of consent instruction was given to the jury over the defendant's objection violating his Sixth Amendment right to control his own defense. *See* App. B., *Barnes* II.

However, the instruction for Burglary in the First Degree required the State to prove that Mr. Barnes committed Assault, not Rape. The trial court, clearly instructed the jury that "As to the crime of assault, the State has the burden to prove the absence of consent beyond a reasonable doubt." App. E, Br. of Respondent, *In re Detention of Barnes*, 47171-0-II.[4] "The jury is presumed to follow the instructions of the court." *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) (citing *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976).

As outlined above, the consent instruction in the present case specifically stated that "a person is not guilty of **rape** if the sexual intercourse is consensual" and that "the defendant has the burden of proving that sexual

[4] This instruction can be found at CP 79 in *State v Barnes*, No. 44075-0-II. As the issue of the faulty consent instruction was previously addressed in the direct appeal, this Court could also decline to address this issue at all, as Barnes has failed to show why re-litigation of this issue is warranted. *See In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990) ("A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby"). This Court previously addressed the consent instruction in the second direct appeal and determined that the appropriate remedy was reversal of the two rape counts. The present petition thus represents little more than Barnes's attempt to have this Court re-litigate this issue and apply a different remedy. Further, Barnes's claim should be denied for the reasons outlined in this brief, even if this Court were to consider the issue on its merits.

intercourse was consensual." App. C (emphasis added). Rape and sexual intercourse were terms that clearly only applied to the rape counts, as sexual intercourse (and rape) were not elements of the burglary or unlawful imprisonment counts. Barnes' claim that the trial court gave a consent instruction for the burglary and unlawful imprisonment counts, therefore, is simply incorrect.

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

Stated another way, reversal of the Burglary and Unlawful Imprisonment counts is not warranted in the present case because the faulty "consent" instruction caused no prejudice with respect to those counts.

Under Washington law, even if an instruction may be misleading it will not require reversal unless prejudice is shown by the complaining party. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010) (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)).

Here, it is true that one of the elements of the crime of burglary in the first degree is that a defendant must have "assaulted" a person in the building (or in immediate flight therefrom) and it is further true that the jury was instructed that "an act is not an assault, if it is done with the consent of the

person alleged to be assaulted." The trial court, however, clearly instructed the jury that "As to the crime of assault, the State has the burden to prove the absence of consent beyond a reasonable doubt." App. E.[5]

The faulty instruction clearly dealt with consent in the context of Rape and sexual intercourse, which were not elements of Burglary and Unlawful Imprisonment. Thus there simply was no prejudice caused by the consent instruction with respect to the Burglary and Unlawful Imprisonment counts.[6]

For the reasons outlined above the faulty "consent" instruction by its very terms only applied to the rape counts, thus this Court properly only reversed the rape counts in the direct appeal.

C. THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE ELEMENT OF KNOWING RESTRAINT TO SUPPORT THE UNLAWFUL IMPRISONMENT CONVICTION.

Mr. Barnes argues that the jury lacked sufficient evidence to find that he unlawfully restrained the victim. Specifically, Mr. Barnes argues that he never forced the victim, Ms. Russell, to stay with him, that she came and went as she pleased, and that interacting with his intimate partner does not constitute Unlawful Imprisonment.

> We review claims of insufficient evidence to determine "whether, after viewing the evidence in the light most favorable to the State, any

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

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

> rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

In re Pers. Restraint of Crow, 187 Wn. App. 414, 422, 349 P.3d 902 (2015); *see also State v. Smith*, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985). A defendant who claims insufficiency of evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Gentry*, 125 Wn.2d 570, 596–97, 888 P.2d 1105 (1995).

The testimony was that Mr. Barnes pulled Ms. 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.

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.

Mr. Barnes' claim lacks merit because in the light most favorable to the state the testimony clearly supports a finding of unlawful restraint by a rational juror.

D. THE FINDING THAT THE RAPE AND BURGLARY CONVICTIONS CONSTITUTED SAME CRIMINAL CONDUCT WAS ONLY RELEVANT FOR SENTENCING PURPOSES AND IS NOT RELATED TO THE STATE'S BURDEN TO PROVE BURGLARY IN THE FIRST DEGREE AT TRIAL.

Barnes next appears to claim that because: (1) the trial court found that some of the offenses were the "same criminal conduct;" and (2) this Court had found error and reversed the rape counts, that reversal of all of the counts was somehow required. Mr. Barnes also makes this claim in his Brief in Support of PRP, 47471-0-II, at 1, 7. This is not a cognizable legal argument.

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

Therefore, Mr. Barnes claim on this basis lacks merit.

E. REVERSAL OF THE RAPE CONVICTION DID NOT REQUIRE THE COURT TO DISMISS THE SEXUAL MOTIVATION ENHANCEMENT FOR BURGLARY IN THE FIRST DEGREE BECAUSE THE JURY WAS NOT REQUIRED TO FIND MR. BARNES GUILTY OF RAPE IN ORDER TO FIND SEXUAL MOTIVATION FOR BURGLARY.

Mr. Barnes links the faulty consent instruction for the Rape charge with the Sexual Motivation enhancement for Burglary in the First Degree. In order to make this connection Mr. Barnes assumes that the State had to prove Rape in order to prove the assault element of Burglary in the First Degree. This is incorrect. In this case, the State did not need to prove Rape in order to prove the defendant committed Burglary with a sexual motivation.

The Rape convictions was reversed because the defendant's right to present a defense of his choosing was violated as to the Rape charge when the trial court instructed the jury on the affirmative defense of consent over Mr. Barnes' objection.

As discussed *supra*, sec. B, this faulty consent instruction specifically applied only to the Rape charge which was not an element of Burglary in the First Degree. A jury could find that Mr. Barnes committed assault without finding Mr. Barnes committed Rape. Thus the consent instruction, which interfered with Mr. Barnes' control of his defense to Rape, had no impact on the Burglary charge. This is especially true considering that, in order to prove

assault, the State was required to prove absence of consent beyond a reasonable doubt. The State carried its burden in proving Burglary in the First Degree.

Furthermore, whether an act is consensual has nothing to do with a person's motivation for engaging in the act. "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030 (47).

A jury could find a sexual motivation for a Burglary regardless of whether there was consent or not to an alleged rape. Therefore, the faulty consent instruction for the Rape charge had no impact on the sexual motivation enhancement for Burglary in the First Degree charge.

IV. CONCLUSION

This Court should decline to reconsider Mr. Barnes' claim of insufficiency of evidence to prove he was unlawfully present because the evidence Mr. Barnes presents is not new and could have been discovered before trial. Furthermore, Mr. Barnes' assertion that the owner of the home had no legal right to prevent Mr. Barnes' from being on his property is a speculative legal conclusion.

Additionally, the reversal of the Rape conviction due to the interference with Mr. Barnes's right to control his own defense had no bearing on the Burglary in the First Degree conviction because the faulty

instruction specifically applied only to the Rape charge which was not an element of the offense. Further, the jury was instructed that the State had the burden to prove lack of consent beyond a reasonable doubt in order to carry its burden and establish the element of assault for the Burglary charge.

A finding of same criminal conduct does not merge crimes such that reversal of one requires reversal of all convictions. The same criminal conduct analysis under RCW 9.94A.589 (1)(a) is a sentencing provision that has no application to the State's burden of proof at trial. Mr. Barnes' fails to provide any legally cognizant argument as to this claim.

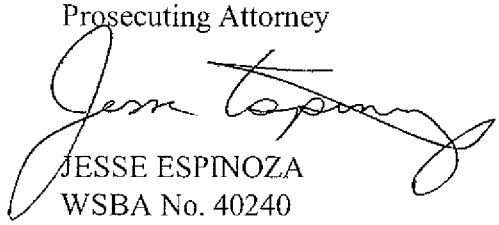
Finally, the trial court did not err by imposing the sexual motivation enhancement on the basis that the Rape conviction was reversed due to the faulty consent instruction. Sexual motivation and consent have nothing to do with the other.

For the foregoing reasons, Mr. Barnes' sentence should be affirmed.

Respectfully submitted this 26th day of October, 2015.

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 John A. Hays on October 26, 2015.

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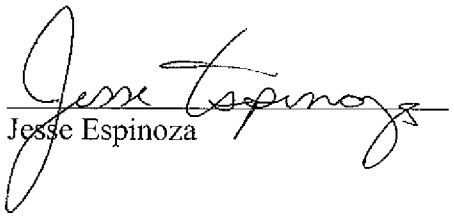

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Comments:

This brief responds to Petitioner's personal restraint petitions Nos. 47171-0-II and 47621-5-II, which have been consolidated to Petitioner's direct appeal, No. 47611-8-II.

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