SC#: 93510-6

C.O.A. No. 47611-8-II
Consolidated With Nos.
47171-0-II; 47621-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

V.

COREAN OMARUS BARNES,
Petitioner/Appellant.

PETITION FOR REVIEW

COREAN OMARUS BARNES
PRO SE

COREAN OMARUS BARNES
STAFFORD CREEK CORR. CNTR.
191 Constantine Way
Aberdeen, WA. 98520

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I. IDENTITY OF PETITIONER

Petitioner COREAN OMARUS BARNES askes of this Honorable Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals decision filed July 19, 2016 which confirmed his Conviction and sentence. A copy of the Court's unpublished opinion is attached hereto at Appendix A.

III. ISSUES PRESENTED FOR REVIEW

In a case in which the State charges of second degree rape and first degree burglary with sexual motivation out of the same act, Does an Appellate Court finding that a Jury Instruction impermissibly shifted the burden of proof on the rape charge also shift the burden of proof on the sexual motivation finding in violation of the defendant's right to Due Process under the Washington State Constitution, Article 1, Sec. 3, and the United States Constitution, Fourteenth Amendment? (Assignment of Error 1.)

Does the Reversal and Dismissal of the predicate offense rape in the second degree remove a key element that is needed to sustain the conviction for First Degree Burglary under the Constitution of the United States and the Constitution or Laws of the State of Washington? (Assignment of Error 2.)

Does a trial court violate a defendant's right to Due Process when it gives an affirmative defense of consent jury instruction over the defense's objection for First Degree Burglary as well Unlawful Imprisonment? (Assignment of Error 3.)

Does it violate a Defendant's right to Due Process under the Constitution of the United States and the Constitution or laws of the State of Washington to charge him with First Degree Burglary for a residence he legally resided in? (Assignment of Error 4.)

IV. STATEMENT OF THE CASE

By information originally filed on August 22, 2008, and later amended on February 18, 2009. The Clallam County prosecutor charged the defendant Corean O. Barnes with two counts of second degree rape (Counts I and II), one count of first degree burglary with sexual motivation (Count III) and one count of Unlawful Imprisonment (Count IV), all alleged to have occured on August 15, 2008. CP 135-138, 131-133. The second degree rape charge from Count II and the first degree burglary charge from Count III arose from the same alleged conduct. See unpublished decision in State v. Barnes, 181 Wn.App. 1035, f. 4, review denied, 339 p.3d 634 (Wash.2014).

The defendant was later convicted on all counts and appealed. CP 117-130. By an unpublished decision which became final on February 4, 2011, the Court of Appeals Div. II reversed all of the defendant's convictions and remanded for a new trial upon a finding that the trial court's admission of recorded statements into evidence in violation of the privacy act denied the denied the defendant a fair trial. CP 112-116; see also

State v. Barnes, 157 Wn.App. 1076 (2010), as amended on denial of reconsideration (Jan. 4, 2011).

The defendant subsequently went to a second jury trial and was convicted on all counts a second time. CP 96-111. He again appealed. CP 95. As part of the decision the Court of Appeals Division II in this second appeal set out the following factual background for this case:

> 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, 2008 Russell purchased a digital tape recorder and placed it in her purse in order to surreptitiously record her conversations with Barnes.
>
> 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 not want to continue and attempted to pull away. Barnes then picked her up and carried her in to 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 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, 2008, Johnson arrived home to find Barnes inside his house. Johnson objected to him being there without permission and called the police.

In the second appeal in this case the defendant argued, inter alia, that the trial court denied him the right to a fair trial when it instructed the jury on the affirmative defense of consent because he had not requested the instruction nor argued the affirmative defense. see State v. Barnes, supra. Thus, the defendant argued that the trial court's decision to instruct on this defense impermissibly shifted the burden of proof and required him to prove consent. The Court of Appeals Div. II agreed, reversed the two rape convictions and remanded for a new trial.

Prior to the third trial in this case the court granted a state's motion to dismiss the two rape charges. CP 56-57. The court then proceeded to a new sentencing hearing during which it imposed a life sentence on the burglary charge with a minimum mandatory time to serve of 44 months before the defendant can first be considered for release. CP 12-28. Following imposition of this sentence the defendant filed his third notice of appeal. CP 8.

The defendant moved the superior court under CrR 7.8 to vacate his convictions for first degree burglary and unlawful imprisonment. The superior court transferred the motion to the Court of Appeals Div. II to be considered as a PRP. The Defendant also filed a PRP in Division II. The Court of Appeals consolidated those PRPs with Mr. Barnes's direct appeal. (See Appendix A). Mr. Barnes appeals the decision of the Court of Appeals in it's entirety as it pertains to his sentence and burglary conviction.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE TRIAL COURT VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS WHEN IT ADDED A SEXUAL MOTIVATION ENHANCEMENT TO THE PETITIONER'S SENTENCE FOR BURGLARY BECAUSE THE JURY INSTRUCTION THAT THE COURT OF APPEALS DIVISION II PREVIOUSLY FOUND IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON A RAPE CHARGE ARISING OUT OF THE SAME ACT ALSO SHIFTED THE BURDEN OF PROOF ON THE SEXUAL MOTIVATION FINDING.

Under the United States Constitution, Sixth Amendment, a criminal defendant has the implicit right to control his or her defense. State v. Lynch, 178 Wn.2d 487, 309 p.3d 482 (2013); Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Thus, "[i]nstructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense." State v. Lynch, 178 Wn.2d at 492 (quoting State v. Coristine, 177 Wn.2d 370, 375, 300 p.3d 400 (2013)). The decision in State v. Coristine explains this principle.

In State v. Coristine, supra, a defendant convicted of second degree rape of a person incapable of consent appealed, arguing that the trial court violated his Sixth Amendment right to control his own defense when it instructed the jury under RCW 9A.44.030 that (1) it is a defense to the charge of second degree rape if the defendant "reasonably believed" that the alleged victim was not mentally incapacitated or physically helpless, and (2) the defendant had the burden of proving that reasonable belief by a perponderance of the evidence. The trial court had given this instruction over the defendant's objection because the defendant had affirmatively presented evidence during the trial to support the conclusion that the complaining witness

was capable of giving consent. Although the Court of Appeals rejected this argument, the Washington Supreme Court reversed, finding that "[i]mposing a defense on an unwilling defendant impinges on the independant autonomy the accused must have to defend against charges." State v. Coristine, 177 Wn.2d at 377.

Similarly, in State v. Lynch, supra, a defendant convicted of second degre rape appealed his conviction upon an argument that the trial court's decision to instruct the jury on the affirmative defense of consent also violated his Sixth Amendment right to control his defense because he had not endorsed this claim. Rather, he had simply argued before the jury that the state failed to prove forcible compulsion, which was an element of the crime charged. The court agreed and reversed, holding that the use of the affirmative defense of consent instruction over the defendant's objection "violated [the defendant's] Sixth Amendment right to control his defense..." State v. Lynch, 178 Wn.2d at 494.

In the case at bar the Court of Appeals Div. II held in the petitionet's second appeal that the trial court's use of the same consent instruction as was used in Lynch denied the defendant his Sixth Amendment right to control his own defense in the same way that it did in Lynch. The Court of Appeals held:

> 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 consenual. 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.

State v. Barnes, 181 Wn.App. 1035 review denied, 339 p.3d 634 (Wash. 2014).

Based upon this holding the Court of Appeals Div. II reversed the petitioner's two convictions for second degree rape and remanded for a new trial. What the Court of Appeals did not address, and what the petitioner's prior appellant attorney did not address, was the effect that the erroneous instruction had upon the sexual motivation element of the first degree burglary conviction. As the following explains, the erroneous instruction on consent as an affirmative defense also denied the defendant his right to control the defense on the sexual motivation enhancement the State added to the first degree burglary charge.

Under RCW 9.94A.533, the legislature has set out a number of "adjustments to the standard range" which will increase a defendant's sentence. Subsection (8) of that statute provides for such an adjustment for a defendant who commits an offense with "sexual motivation."

A sentencing enhancement under this statute is treated as if it were an element of the offense to which it applies because the "adjustment" increases the sentence beyond the maximum otherwise authorized for the underlying offense.

State v. Recuenco, 163 Wn.2d 428, 180 p.3d 1276 (2008). As a result, unlike aggravating facts alleged under RCW 9.94A.537 which are not treated as elements of an offense and need not be alleged as part of an information, enhancements, alleged under RCW 9.94A.533 must be included in the information. State v. Siers, 174 Wn.2d 269, 274 p.3d 358 (2012)(State need only put defendant on "notice" of alleged aggravating facts and need not include them in the information); State v. Crawford, 159 Wn.2d 86, 94, 147 p.3d 1288 (2006) (Failure to include enhancement allegation in the information violates a defendant's constitutional right to notice of the offense alleged).

Since enhancements are treated as elements of the underlying offense charged, the State also has the burden of unanimously proving them beyond a reasonable doubt, although they need not be found by special verdict as with aggravating factors under RCW 9.94A.537(3). Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Mason, 160 Wn.2d 910, 937, 162 p.3d 396 (2007). Thus, in the case at bar, the State had the burden of proving the sexual motivation element of the first degree burglary charge beyond a reasonable doubt as one of the elements of that offense. In RCW 9.94A.030(47) the legislature defined "sexual motivation" as follows:

> (47) "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).

In this case the State charged the petitioner with first degree burglary under RCW 9A.52.020, which states:

> (1) A person is guilty of burglary in the first degree

if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony. RCW 9A.52.020.

Under this statute there are two alternative methods for elevating what would be a second degree burglary in into a first degree burglary: (1) be armed with a deadly weapon during the offense, or (2) assault another person during the offense. In this case the state alleged both alternatives in the amended information and the "to convict" instruction. However, the state neither presented any evidence of a deadly weapon not argued under this alternative. Rather, the state's theory of the case, and the only theory that was supported by the evidence, was that the "assault" that the petitioner committed while unlawfully in a building was the second degree rape which the state alleged in Count III, and which also constituted the necessary proof of the petitioner's sexual motivation. The Court of Appeals Div. II recognized this fact when it held as follows concerning the trial court's ruling that the rape charge from Count II and the first degree burglary charge from Count III constituted the same criminal conduct:

> 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.

State v. Barnes, 181 Wn.App. 1035, footnote 2, review denied, 339 p.3d 634 (Wn. 2014).

As a result, under the facts of this case, the trial court's decision to give the unrequested instruction on the affirmative defense of consent not only shifted the burden of proof on the rape charge, but it also shifted the burden of proof on the sexual motivation allegation in the first degree burglary charge because the sexual motivation the state alleged in Count III was the fact of the rape alleged in Count II.

As a result, the same error that required the Court of Appeals to reverse the second degree rape convictions should also require this honorable court to strike the sexual motivation allegation from the first degree burglary charge. Consequently, the trial court in this case erred when it resentenced the petitioner on the first degree burglary charge with sexual motivation enhancement added. Thus, this honorable court should vacate the petitioner's sentence and remand for a resentencing hearing with the sexual motivation aggravator deleted.

The petitioner believes this honorable court should accept review of this petition because the Court of Appeals decision conflict with other decisions of the Court of Appeals and the Supreme Court, as well as involves a Significant Question of Law under the Laws and Constitution of the State of Washington and the United States Constitution. This petition also involves an issue of Substantial Public interest that should be determined by the Supreme Court. Thus review by this Court is warranted under RAP 13.4(b)(1), (2), (3), and (4).

2. THE REVERSAL AND DISMISSAL OF THE PREDICATE OFFENSE RAPE IN THE SECOND DEGREE REMOVED A KEY ELEMENT THAT IS NEEDED TO SUSTAIN THE CONVICTION FOR FIRST DEGREE BURGLARY.

The Due Process Clause of the Fourteenth Amendment and Article I sec. 3 of the Washington State Constitution requires the prosecution to prove every element of a crime charged. U.S. Const. Amend. XIV; RCWA Const. Art. I sec. 3. "Criminal defendant's are presumed innocent, and the government must prove guilt beyond a reasonable doubt." In Re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required." In Re Martinez, 171 Wn.2d 354, 256 p.3d 277 (2011).

In order to prove first degree burglary as defined in RCW 9A.52.020 the State must prove the following three elements that a person (1) With intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.
(2) Burglary in the first degree is a class A felony.

Under the "Essential Elements" rule a charging document must allege facts supporting every element of the offense, in addition to adequately identifying the crime charged. U.S. Const. Amend. VI; RCWA Const. Art. I sec. 22. See State v. Leach, 113 Wash.2d 679, 782 p.2d 552 (1989).

"Elements" are the constituent parts of a crime, usually consisting of the actus reus, mens rea, and causation, that the prosecution must prove to sustain a conviction. Black's Law Dictionary 559 (8th Ed. 2004). "Legislative intent is derived first and formost from the language of the statute. When words in statute are clear and unequivocal, courts must apply statute as written." State v. Michielli, 132 Wn.2d 229, 937 p.2d 587 (1997).

In the case at bar the State argued that the petitioner entered and remained unlawfully in Johnson's residence with the intent to commit a crime against a person and that he Assaulted "raped" the alleged victim Ms. Russell.

The Court of Appeals Div. II ruled that first degree burglary requires no predicate offens and that it merely requires that a person commit an assault during the burglary. They went on to further state that the third element must have been satisfied by proof that the petitioner(Barnes) assaulted Russell. The Court of Appeals went on to further state that the absence of the rape convictions has no effect on the sufficiency of the evidence for first degree burglary. However, this ruling is in error and direct conflict with other rulings and the Laws of the State of Washington.

In the case at bar the State was required to prove all three elements of first degree burglary. One of

those elements were that Barnes assaulted a person. The State did not charge a separate assault it merely based this third element off of the rape convictions. With the reversal and dismissal of the rape convictions it removed the assault element that would have been used to sustain the first degree burglary conviction. Broadly speaking, the "assaults" alleged were the now dismissed rapes. And with the rapes being dismissed the burglary conviction must also be dismissed since the rapes is one of the elements that the state relied upon to prove the first degree burglary.

The petitioner believes this honorable court should accept review of this petition because the Court of Appeals decision conflict with other decisions of the Court of Appeals and the Supreme Court, as well as A Significant Question of Law under the Laws and Constitution of the State of Washington and the United States is involved.

3. THE TRIAL COURT VIOLATED MR. BARNES'S RIGHT TO DUE PROCESS BY GIVING A JURY INSTRUCTION FOR CONSENT OVER HIS OBJECTION FOR FIRST DEGREE BURGLARY AND UNLAWFUL IMPRISONMENT.

The Due Process Clause requires the prosecution to prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV. In Re Winship, 397 U.S. 358, 361-64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1978). Implicit in the principle that Due Process requires the State to prove every element beyond a reasonable doubt is the requirement that the jury instruction list all of the elements of the crime. The Due Process Clause

protects the accused in a criminal case against conviction except upon proof of every fact necessary to constitute the crime with which he is charged. State v. Kjorsvik, 117 Wash.2d 93, 101, 812 p.2d 86 (1991); State v. Phuong, 174 Wn.App. 494, 299 p.3d 37 (2013).

The trial court gave an affrimative defense of consent jury instruction over the defenses objection for not only the rape in the second degree counts but also for the first degree burglary and unlawful imprisonment counts. Defense counsel objected to this consent jury instruction that was given even though the trial court said that consent was an element of all of the charges. RP 487. The consent instruction was given as it pertains to the "assault" component of the first degree burglary, as well as an element of unlawful imprisonment. (See Appendix B).

The Court of Appeals Div. II rendered in thier opinion that "Jury instructions are sufficient when they allow counsel to argue thier theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." State v. Aguirre, 168 Wn.2d 350, 363-64, 229 p.3d 669 (2010). However, defense counsel object to the consent instruction as well as argued that with the burden of proof regarding consent and the shifting of the consent instruction as it relates to the assault component of burglary was not made clear. The mis-instruction on consent regarding the rape charges would or could have confused or mislead the jury on the burden of proof regarding consent relative to the burglary charge as well as the unlawful imprisonment. RP 465-468, 485-492.

The consent jury instruction that was given over the defenses objection applied also to the elements of the charge of unlawful imprisonment.

To be guilty of unlawful imprisonment the petitioner (Barnes) had to (1) Restrain the movements of Russell, in a manner that substantially interferred with her liberty; (2) That such restraint was (a) without Russell's consent or (b) accomplished by physical force, intimidation, or deception, and (3) that such restraint was without legal authority. (See Appendix B).

The trial court in this case switched the burden by providing a consent instruction that required the defense to prove more than reasonable doubt. State v. Lynch, 178 Wn.2d 487, 309 p.3d 482 (2013). Consent was a key element in all of the crimes charged and as such giving that jury instruction could have been confusing or misleading to the jury. When a jury instruction is incorrectly presented to the jury and is given as a part of the case prejudice is presumed when the error is of constitutional magitude and violates Due Process. U.S. Const. Amend. XIV. State v. W.R.Jr. 179 Wn.2d 1001, 315 p.3d 531 (2014).

The petitioner believes this honorable court should accept review of this petition because the Court of Appeals decision conflict with other decisions of the Supreme Court, as well as raises a Significant Question of Law under the Laws and Constitution of the State of Washington and the United States.

4. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FIRST DEGREE BURGLARY CONVICTION BECAUSE BARNES LEGALLY AND LAWFULLY LIVED IN THE RESIDENCE.

The petitioner (Barnes) is unlawfully restrained because his conviction for first degree burglary was obtained "in violation of the Constitution of the United States and the Constitution or laws of the State of Washington."

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In Re Winship 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution and inquires whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The State charged Barnes with first degree burglary under the assault prong of that offense.RCW 9A.52.020(1)(b). The evidence was insufficient because the State failed to prove that Barnes did not legally live in the house. The burglary statute provides in part: A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully.

Here, Barnes lived in the residence of 121 victoria view until the middle to the end of August. RP 306. Under the Land-lord tenant laws of Washington State in order to evict someone a twenty to thirty day notice must be given by the landlord. RCW 59.20.073(5),(6). Mr. Johnson merely testifying that he told Barnes not to return is not sufficient evidence of unlawful entry and as such cannot be the nexus to uphold a first degree

burglary conviction. The Court of Appeals decline to address this issue even with Barnes supporting this argument with documentation of legal tenancy. (See Appendix C). RCW 59.04.020; 59.18.200; 59.20.070 all authorizes legal tenancy in the State of Washington. See Leda v. Whisnand, 150 Wash.App. 69, 207, p.3d 468 (2009); United States v. Botello, 360 F.Supp. 620 (D.Haw.1973).

The petitioner believes this honorable court should accept review of this petition because the Court of Appeals refuses to address this issue that raises a Significant Question of Law under the law and Constitution of the State of Washington and the United States. This issue also involves an issue of substantial public interest that should be determined by the Supreme Court.

VI. CONCLUSION

This honorable court should grant review of this case and reverse Mr. Barnes's first degree burglary conviction because the state no longer have the key elements needed and it is not supported by sufficient evidence.

DATED this 3rd day of August, 2016.

Respectfully Submitted,

Corean O. Barnes
Pro Se
Petitioner

Appendix A

Filed
Washington State
Court of Appeals
Division Two

July 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COREAN OMARUS BARNES, Appellant.	No. 47611-8-II Consolidated With
In the Matter of the Personal Restraint Petitions of COREAN OMARUS BARNES, Petitioner.	Nos. 47171-0-II; 47621-5-II UNPUBLISHED OPINION

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

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

FACTS

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

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

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

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

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

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

B. *Second Trial and Second Appeal*

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

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

The jury convicted Barnes of unlawful imprisonment, both counts of second degree rape, and first degree burglary with sexual motivation. During sentencing, the trial court ruled that the second degree rape and first degree burglary convictions were the "same criminal conduct" and, therefore, merged for sentencing purposes. *State v. Barnes*, noted at 181 Wn. App. 1035, 2014 WL 2795968, at *3.

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

C. *Resentencing*

The State declined to retry Barnes on the second degree rape charges, and it instead dismissed those charges. Accordingly, the sentencing court sentenced Barnes for first degree burglary and unlawful imprisonment. Based on the jury's finding of sexual motivation, the sentencing court found that Barnes acted with sexual motivation in committing the burglary. The sentencing court also found that the burglary and unlawful imprisonment charges constituted the same criminal conduct and counted both crimes as one point in determining the offender score.

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

ANALYSIS

I. SENTENCING COURT DID NOT ERR

Barnes argues that because we previously held that the consent instruction shifted the burden of proof regarding rape, the sentencing court unconstitutionally shifted the burden of

proof to Barnes to disprove consent regarding the sexual motivation enhancement because the jury must have relied on the rape to find the sexual motivation enhancement. We disagree.

"'Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense.'" *State v. Lynch*, 178 Wn.2d 487, 492, 309 P.3d 482 (2013) (quoting *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013)). We review allegations of constitutional violations de novo. *Lynch*, 178 Wn.2d at 491.

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

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

To the extent Barnes argues that insufficient evidence supports the sexual motivation enhancement because the rape convictions no longer exist, this claim fails. In reviewing a

challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Russell testified that Barnes raped her in Johnson's residence. From this fact, a rational trier of fact could conclude that Barnes committed the burglary with sexual motivation. That we reversed the rape charges on constitutional grounds does not undermine Russell's testimony, nor did the sexual motivation enhancement rely on the existence of a separate conviction for a sexual crime such as rape. This claim fails.

II. PERSONAL RESTRAINT PETITION

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

A. *PRP Principles*

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

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

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

If the petitioner fails to make a prima facie showing of either actual and substantial prejudice or a fundamental defect, we deny the PRP. *Yates*, 177 Wn.2d at 17. If the petitioner makes such a showing, but the record is not sufficient to determine the merits, we remand for a

reference hearing. *Yates*, 177 Wn.2d at 18. But if we are convinced that the petitioner has proven actual and substantial prejudice or a fundamental defect, we grant the petition. *Yates*, 177 Wn.2d at 18.

B. *Sufficiency of the Evidence*

Barnes makes several claims contesting the sufficiency of the evidence supporting his convictions. As stated above, we review a challenge to the sufficiency of the evidence to determine whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 221-22. We draw all reasonable inferences from the evidence in the State's favor. *Salinas*, 119 Wn.2d at 201.

1. *First-Degree Burglary*

i. Legality of Entry into Johnson's Residence

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

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

ii. Dismissal of Rape Convictions

Barnes challenges the sufficiency of the evidence for his burglary conviction for two new reasons. He argues that insufficient evidence supports his burglary conviction because the rape

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

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

Barnes also argues that the rape was the only assault Barnes committed, and therefore the reversal of the rape charges undermined the State's proof on the third element of burglary—that Barnes assaulted someone while committing the burglary.[1] This claim also fails. The testimony at trial established that Barnes assaulted Russell. Russell testified that Barnes used forcible compulsion to have nonconsensual sex with her. An assault is an offensive, intentional touching. *State v. Osman*, 192 Wn. App. 355, 378, 366 P.3d 956 (2016). A rational trier of fact could find that Barnes's act of forcibly compelling Russell to have nonconsensual sex constituted an

[1] There does not appear to have been evidence that Barnes was armed with a deadly weapon. Thus, this element must have been satisfied by proof that Barnes assaulted Russell.

assault. Thus, sufficient evidence supports the element of first degree burglary that Barnes assaulted someone during the burglary. *Salinas*, 119 Wn.2d at 201. The absence of rape convictions has no effect on the sufficiency of the evidence for first degree burglary.

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

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

Here, Johnson testified that Barnes did not have permission to be in Johnson's house on August 15, 2008, the date of Russell's encounter with Barnes. Russell testified that she and Barnes entered Johnson's house, then Barnes picked her up and carried her into a bedroom where he raped her. From these facts, viewed in the light most favorable to the State, a rational trier of fact could conclude that Barnes entered or remained unlawfully in Johnson's residence with the intent to rape Russell, and that he committed assault. In other words, a rational trier of fact could have found Barnes guilty beyond a reasonable doubt of each element of first degree burglary. This claim fails.

2. *Unlawful Imprisonment*

i. Russell's Imprisonment

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

ii. Reversal of Rape Convictions

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

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

iii. State's Previous Argument Concerning Privacy Act

Barnes appears to argue that insufficient evidence supports his conviction for unlawful imprisonment because he believes that the State conceded that he was not guilty of that crime. He supports this claim by pointing to the State's argument that the hostage holder exception did

not apply.[2] The hostage holder exception to the Privacy Act authorizes the admission of a portion of a recording during a period of unlawful imprisonment. RCW 9.73.030(2)(d). The State argued in Barnes's second direct appeal that the hostage holder exception to the Privacy Act did *not* apply to the redacted portion of the transcript of Russell's recordings that the trial court admitted. But this statement does not amount to a concession that Barnes was not guilty of unlawful imprisonment. This argument by the State had nothing to do with the sufficiency of the evidence of unlawful imprisonment; it had only to do with the admissibility of the transcript of the recordings. In any event, as stated above, sufficient evidence supports Barnes's conviction for unlawful imprisonment regardless of the State's arguments about the Privacy Act. This claim fails.

C. *Unconstitutional Vagueness*

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

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

[2] In Barnes's first direct appeal, the State argued that the entire transcript of the recording was admissible under the hostage holder exception. But in its brief on the second direct appeal, the State argued that the hostage holder exception did not apply.

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

D. *Merger and Same Criminal Conduct*

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

Barnes appears to misunderstand the significance of merger and a finding of same criminal conduct. Merger is a doctrine that courts use to avoid violating defendants' double jeopardy rights. "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). Therefore, at sentencing, courts merge crimes to avoid doubly punishing behavior. *State v. Whittaker*, 192 Wn. App. 395, 410-11, 367 P.3d 1092 (2016). And "same criminal conduct" is a doctrine courts use when calculating a defendant's offender score. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). But merger and "same criminal conduct" doctrines do not affect the underlying convictions' validity; they

impact only the punishment that the sentencing court may impose and the offender score calculation. *See State v. Tili*, 139 Wn.2d 107, 128, 985 P.2d 365 (1999); former RCW 9.94A.589(1)(a) (2002).

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

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

E. *Burden of Proof*

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

1. *Consent Instruction Applied Only to Rape*

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

2. *Consent Instruction Did Not Confuse Jury*

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

Unlawful imprisonment requires proof that the defendant restrained a person's movements "without consent." Former RCW 9A.40.040(1), .010(1) (1975). The trial court

instructed the jury that a person commits unlawful imprisonment if, among other things, the restraint is "without the other person's consent or accomplished by physical force." Suppl. CP at 167. Thus, the jury instruction properly informed the jury that lack of consent was an element of unlawful imprisonment, not that Barnes bore the burden of proving consent. And for purposes of the assault in the first degree burglary charge, the jury was instructed that an "act is not an assault, if it is done with the consent of the person alleged to be assaulted," and was also instructed that "the State has the burden to prove the absence of consent beyond a reasonable doubt." Suppl. CP at 161.

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

F. *Ineffective Assistance of Appellate Counsel*

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

To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show "'that the legal issue which appellate counsel failed to raise had merit and that [the petitioner was] actually prejudiced by the failure to raise the issue.'" *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (quoting *In re Pers. Restraint of Maxfield*,

133 Wn.2d 332, 344, 945 P.2d 196 (1997)). Barnes's ineffective assistance of appellate counsel claim requires us to consider whether his current challenge—that the consent jury instruction shifted the burden of proof on the unlawful imprisonment and burglary charges—had merit, and if so, whether Barnes was actually prejudiced by appellate counsel's failure to raise these issues on direct appeal. *Dalluge*, 152 Wn.2d at 787.

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

Similarly, to the extent Barnes relies on the notion that the consent instruction applied to the other charges because the other charges merged and constituted the same criminal conduct as rape before resentencing, this argument fails for the reasons stated above. Merger and same criminal conduct are doctrines that protect a defendant's right to be free from double punishment. They do not substantively affect convictions, nor do they relate to jury instructions. Because this claim did not have merit, Barnes did not receive ineffective assistance of appellate counsel due to counsel's failure to raise this claim. *Dalluge*, 152 Wn.2d at 787.

III. APPELLATE COSTS

Barnes asks that we waive appellate costs if the State seeks them. Under RCW 10.73.160(1), an appellate court may order adult offenders to pay appellate costs. And the clerk or commissioner of this court "will" award costs on appeal to the State as the substantially

prevailing party if the State provides a cost bill. RAP 14.2, 14.4. However, we may direct the commissioner or clerk not to award costs. RAP 14.2. In *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016), Division One of this court held that appellate courts should use their discretion to consider an appellant's request to deny appellate costs, and that this request should be made in the briefing.

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

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

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

Worswick, J.

We concur:

Bjorgen, C.J.

Maxa, J.

Appendix B

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. 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. 22

To convict the Defendant of the crime of UNLAWFUL IMPRISONMENT as charged in Count IV, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 15, 2008, the Defendant restrained the movements of Christina Russell. in a manner that substantially interfered with her liberty;

(2) That such restraint was

(a) without Christina Russell's consent or

(b) accomplished by physical force, intimidation, or deception, and

(3) That such restraint was without legal authority;

(4) That, with regard to elements (1), (2), and (3), the Defendant acted knowingly; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), and (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), or (2)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

hand down my pants and put finger into vagina, very uncomfortable. Eventually I was able to push door open --

MS. LUNDWALL: I think there was testimony showing she was physically resisting at that point and she was not consenting. It was not like she was saying no passively, she was actively trying to get away when this was occurring.

I don't think there's sufficient testimony on the record for it to be inferred that she passively accepted this.

THE COURT: All right, well, I will take a closer look at that one. Now let's go to count 2 which we'll assume is the Victoria View.

MS. LUNDWALL: It's RR and VV if you want to do abbreviations.

THE COURT: It would appear to me again that in this case that the -- to the extent that consent is an affirmative defense, that instruction should be given. My thought is if it is given it should be revised to indicate that it's a defense where the issue of consent is raised and add that language to it to make sure it's not a defense if the issue of consent is not raised. And I have not looked carefully at the Lynch and all that.

As I briefly read Lynch it appears to indicate that instruction should be given when that is a defense.

MR. GASNICK: And the problem is, well, um, and cases -- Gregory case particularly reference -- and the materials that were given to the Court from the Lynch briefing highlight this, um, when we have consent as an affirmative defense with a certain burden of proof on this one charge, and as the Court's noted the lack of consent is the essential element in 2 of the other charges that are before this jury, so when the Court phrases it well, one talks about consent being an issue here's what the burden is, it's not going to be the burden -- it's not an affirmative defense in burglary one and unlawful imprisonment. In fact, it's an essential element that the State has to -- that the absence of consent is something that the State has to disprove or the absence of consent is something the State has to establish beyond a reasonable doubt for both of those crimes. That's why frankly I'm sure -- I'm sure that the people who sit on court's of appeal and Supreme Court are smart enough to readily understand why that's not a problem. I'm not that smart. And frankly, I fret about a jury's ability

to be able to make those kinds of distinctions as well.

THE COURT: Would you agree that the if consent is raised as a defense, that it is an affirmative defense to a charge of rape in the second degree?

MR. GASNICK: We agree that that's how the law is currently structured and we disagree that that is good law.

THE COURT: Okay. Is your client offering a consent instruction?

MR. GASNICK: Um, Your Honor has the instructions that we are proposing. We are not -- we are not -- we would not be offering a consent instruction that included an affirmative defense. That included a burden that included placing the burden of proof on the Defendant.

THE COURT: Okay.

MS. LUNDWALL: I think --

THE COURT: Ms. Lundwall?

MS. LUNDWALL: My suggestion is I think I may have brought it up earlier, that we just specify as to the consent being an affirmative defense that it applies only to count 2, and we can use the normal consent definition and specify that it applies to the definition of assault and unlawful imprisonment

as part of the instructions at least to clarify any confusion that might go out with having 2 separate instructions.

THE COURT: I will take a look at that. It appears to me that one of the other issues then is the burden of proof instruction submitted by the State does not contain the statement the Defendant has no burden of proving any reasonable doubt exists.

MR. GASNICK: It's in the one I submitted.

THE COURT: My question was was that intentional, because there's going to be a Defendant -- because the Defendant does have some burden of proving a defense of consent.

MS. LUNDWALL: No, that was a type-o and I don't have an object -- I think it's a good idea for appellate review to include the language, usually I would catch that. I apologize, Your Honor.

MR. STALKER: I guess I just mention in reviewing the transcript and I discussed this with Mr. Gasnick, the reason noticed it -- he noticed it as being an alteration of it, I noticed it because it was mentioned in the transcript last time that that was missing from the proposed instructions.

THE COURT: I think it was done intentionally

I did give the lesser included on burglary in the first degree. What I did in instruction number 16 is I had that as to the crime of assault which consent is a defense, again -- actually it's an element, lack of consent is an element, and I have added the language that says the State has the burden of proof to prove the lack of consent beyond a reasonable doubt in the definition of assault. And again, I gave the lesser included of trespass in the first degree on that one the -- I think the other instructions are all fairly traditional. I did --

MR. GASNICK: Absence of consent is also an element in unlawful imprisonment.

THE COURT: It is, but it also spells out in the to convict that the State must prove the absence of consent, so that clearly can be argued that that's an element, that the State has to prove that there was no consent.

I gave the Petrich instruction on unlawful imprisonment and the concluding instruction. So that's how we got to where I got on these. So I don't know if the parties want to comment at all at this point?

MS. LUNDWALL: I was able to find case law that says criminal trespass is a lesser included.

I think the tape is basically a third source of evidence, and if the jury were so inclined to believe they had sufficient evidence to basically disbelieve what the 2 people had said and reach some sort of middle ground, so I think the rape 3 instruction would be appropriate -- as well as lack of injury. So I think rape 3 would be appropriate on both Count 1 and 2.

Object to the lack of instruction that mere penetration without more, it's not physical force that overcomes resistance, especially given the lack of a rape 3 instruction. I don't know that that's clear.

I'd object to instruction number 12, forcing consent instruction on us when it's not requested and the evidence regarding consent basically would be relevant as to whether or not there was forcible compulsion.

Additionally, I know the Court has said they took some precautions since it's pretty much an element of all of the charges here, but I think frankly it's going to be extremely confusing to a jury when what happened, who's (sic) burden it is, and who has to prove consent when.

So, I'd object to instruction number 12.

I object to the lack of an instruction defining what consent is. And I object to a lack of instruction basically indicating forcible compulsion can't be based solely on a subjective reaction to particular conduct and requires something else.

THE COURT: Okay. Ms. Lundwall, as to the naming Ms. Russell?

MS. LUNDWALL: We -- well, at this point we've always used initials when we've dealt with person's name in sex cases. It does not seem to be inflammatory or prejudicial. I am aware of no case law that says that at this point she is actually mistakenly named in the PC affidavit. We move the Court to redact her name and would replace it with her initials.

MR. STALKER: Well, to keep doing that then, to not give any special weight, I ask we replace all references of the Defendant with CB.

MS. LUNDWALL: The Defendant is actually not in -- considered inflammatory named, I'm the Plaintiff, he's the Defendant.

THE COURT: Well, I will take a look at that issue. As to the issue of defining forcible compulsion, it appeared that definition applies primarily when you give the rape in the third degree

instruction.

Again, I don't think the jury is going to have any difficulty in determining that forcible compulsion which overcomes resistance -- I mean, you can -- I suppose if you were hyper-technical you could argue that's from the mere physical standpoint being more than the laws of physics.

MR. STALKER: I was going to mention for example as resistance --

THE COURT: I don't think the jury's going to be confused by that at all. The instruction might actually confuse them more, especially in light of some of the other counts, frankly. I'm not going to give that. I don't think it's necessary. And just as I didn't give the State sort of explanation of what a body part is, it would include a finger, I don't think it's necessary. I don't think the jury's going to be troubled. I think each of you will have, frankly with these instructions, an opportunity to argue fully your theory of the case.

I'm going to look at the initials issue and I will correct the concluding instruction.

MR. GASNICK: And Your Honor, there was one other issue that the Defense wished to raise by way of exception. On the burden shifting of the consent

under the rape 2 statute, I'll incorporate by reference the briefing that has been submitted to the Court already, but, uh, just in addition to that I would note that the particular charges in this case, um, Mr. Stalker's referenced the confusion that they generate -- that's generated. I think also highlights the fundamental problems with the existing case law.

We now have a circumstance where for the rape 2 we have instructions that there's a burden on the Defendant to prove consent by a preponderance of the evidence for the -- for a burglary one where the -- this alleged rape 2 is in essence the assault element of the burglary one. The State has to prove the absence of consent. So what this -- so it's entirely possible given these weird -- these contradictory, frankly, burdens of proof and reference consent that a jury under this set of instructions can say, um, that a person -- that the Defendant didn't meet his burden of proof regarding consent on the rape 2 therefore he's guilty of that, but the State didn't meet its burden regarding lack of consent on the burglary one and acquit him of that. And what I will -- I certainly don't have a problem with my client getting acquitted of a

burglary, that would certainly be an inconsistent verdict possibility of which exists by virtue of these inconsistent standards. And that's fundamental and core to the problem that's generated by this burden shifting which is a large part of why we contend it to be unconstitutional.

THE COURT: Okay. And I do understand that, however, the explanation which you just gave in 2 minutes could be one given to the jury and explained very carefully, how they need to rule on them, certainly can be argued to them. If we end up with inconsistent verdict it may mean the jury did not understand. Certainly the argument can be made to them and if they carefully read the instructions, I think it's clear who has the burden on particular issues. Case law seems to be very clear if the Defendant raises the issue of consent on a rape charge, the Court is required to instruct the jury on what the proper burden is in that case. That's -- there was some hint from Division 2 that they didn't like that burden but if they were compelled to follow the Supreme Court's law as well as certainly I'm in no better position than Division 2.

MR. GASNICK: We're not disputing that's what the case law maintains.

Again, there's no dispute that he went into the home in Victoria View on the 15th of August, 2008.

There's no dispute that this was in the State of Washington.

Now, note the language, it's both entering or remaining. It's not necessary to prove that the person had a plan to commit a crime prior to entering the building. In that case it would be almost impossible to prove because there could be a claim I didn't intend to commit the crime until after I got in there. It can be achieved while still inside, remaining in the building. That so entering or while in the building or immediate flight from the building, the Defendant assaulted a person, and in this case while in Victoria View he assaulted Christina Russell by harmful and offensive touching. She said no. She was trying to get away. He was overpowering her. He was at times pushing her against the wall in order to get her pants down, and by doing so he assaulted her.

And you note also, specifically that burglary in the first degree does not require a showing that it was property only taken, it could be a sexual assault, it could be an assault itself.

In this case the Defendant while still inside the residence at Victoria View and he did not have permission to be there unless Mr. Johnson was home, did assault Christina Russell.

Unlawful imprisonment, that on or about August 15, 2008, the Defendant restrained the movements of Christina Russell; that substantially interfered in her liberty; that such restraint was without her consent or accomplished by physical force, intimidation, deception; that such restraint was without legal authority; and, that in regard to those 3 elements, the Defendant acted knowingly; and, these acts occurred in the state of Washington.

In this case, you have several assaults -- well, several acts of unlawful imprisonment, and it's only up to you to agree on one.

There was the unlawful imprisonment beginning at River Road while he was dragging her over across the property by her wrists trying to force her into the camper. She was saying stop, let me go. She was struggling to get free, saying I don't want to go in there, I don't want to go in there. And so you could hear that there was a definite restraint on her liberty at that point.

There was the end restraint at Victoria View

means no, he's not overcoming her resistance. It's that simple.

Now, we have a very confusing jury instruction, number 12. It's the content. One, it basically says person's not guilty of rape if the intercourse was consensual, and the defense has the burden by the preponderance of the evidence. Now, the reason this is really confusing is you don't assume Mr. Barnes is guilty, and I have to prove he's innocent by a preponderance of the evidence. That's not what the rest of the instructions say. That's the reason this is confusing.

The prosecutor would like you to believe that she's very carefully couching her argument to make you think that, but no, she has to prove every element of the crime including forcible compulsion beyond a reasonable doubt. And only if she does that do you consider consent.

So, only if you believe that he overcame her resistance then you consider was she consenting.

That's why I say this is a very confusing instruction. If he's overcoming resistance to rape her, she's probably not consenting. That one's a red herring. The State has to prove every element of the crime, only then if they have proved that do you

consider instruction number 12.

Now again, this instruction only applies to count 2. State was clear about that. Every single one of these counts involves consent one way or the other.

The only one that the State does not have to disprove beyond a reasonable doubt is with Count 2.

But that one only comes into play if you believe the State has proved beyond a reasonable doubt there was forcible compulsion.

Okay, um, burglary. The elements are instruction number 14. This one is actually extremely complicated. We all agree August 15th. We all agree this happened in Washington. What's left is did Mr. Barnes enter or remain inside a property with intent to commit a crime against persons or property therein.

The only thing you have heard testimony about -- so the only thing that could possibly be a crime against Christina Russell. And in entering or while in the building or immediate flight, he assaults a person. Again, the only thing that could possibly be is Christina Russell. So this one is different. It is not the same as rape 2. There's more things and less things the State has to prove. So, when you

are considering this, I need you to take a look at instruction number 21. What that says is it's a defense to burglary or criminal trespass that the Defendant reasonably believed the owner of the premises or the person empowered to license access to the premises would have licensed the Defendant to enter or remain. That's Kenneth Johnson. If the Defendant reasonably believed he had permission to be in this house, they had a conversation, it was clear as mud and he thought okay, I can come back if I need to get my stuff. If he reasonably believed that, he is not guilty of burglary. You can just stop right there. He's not guilty of burglary. That would also make him not guilty of criminal trespass. So you could just find him not guilty of both.

If you decide even though it's clear as mud he should have known, you go on and analyze the rest. The second part of that is the assault. Was there an assault? That's number 16, it tells you what an assault is. It's any harmful or offensive touching. So this could be perhaps if they are having sex and she says no but he's not overcoming resistance, it could be that. However, on this one, the State also has the burden, it's the last paragraph on number

16, the State has the burden of disproving consent beyond a reasonable doubt. So the thing gets flipped around again. It's the State's job that you analyze this in a different light. The State has to prove there was no consent and they have to do it beyond a reasonable doubt. That means after you consider everything, if you think it's possible Mr. Barnes thought he had consent, he has to be not guilty on that.

It also included threats, apprehension of fear, bodily injury, we've discussed that, if those were reasonable, if those were believable, she wouldn't have followed him into the house. If you define -- excuse me, if you find Mr. Barnes not guilty on the burglary, you look at criminal trespass. Again, it's a defense to both of those that he thought he had permission to be in the building. The difference between them is if he should have known he didn't have permission to be in the building but he didn't assault anybody, then it's criminal trespass. Basically, that one is you're some place you shouldn't have been and you should have known better. So is the elements for that are instruction number 20.

So if you find him not guilty on the burglary

Appendix C

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:
[ ] Asian/Pacific Islander
[X] Black/African-American
[ ] Caucasian
[ ] Native American
[ ] Other: _____

Ethnicity:
[ ] Hispanic
[X] Non-Hispanic

Sex:
[X] Male
[ ] Female

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 Gorst, 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

DONE IN OPEN COURT and in the presence of Defendant this date: May 20, 2015.

JUDGE

Print Name:

JOHN TROBERG
(Deputy) Prosecuting Attorney
WBA No. 11548
(print name)

38677
ALEX STALKER
Attorney for Defendant
WBA No.
(print name)

COREAN OMARUS BARNES
Defendant
(print name)

JT/at

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

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

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

Defendant's signature: x

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

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the state of Washington that the foregoing is true and correct

Signed at _____ (city), _____ (state) on _____ (date), 2015

_____
Interpreter (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	Local ID No. (pick one):	[X] WA0050000 (CCSO) [ ] WA0050100 (PAPD) [ ] WA0050200 (Forks PD) [ ] WA0050300 (Sequim PD) [ ] WAWSP8000 (WSP)
		OCA	08-08578
PCN No.	966012871	Other	

Alias name, DOB: a/k/a Corgano Barnes, Cantrell Barnes, Lonney M. Barnes, Roosevelt Barnes, Roosevelt Times, Gerard Barnes, Lonnie Barnes, Kentrall Lear. DOB: 11/12/1982, 5'11", 228 lbs., brown eyes, black hair

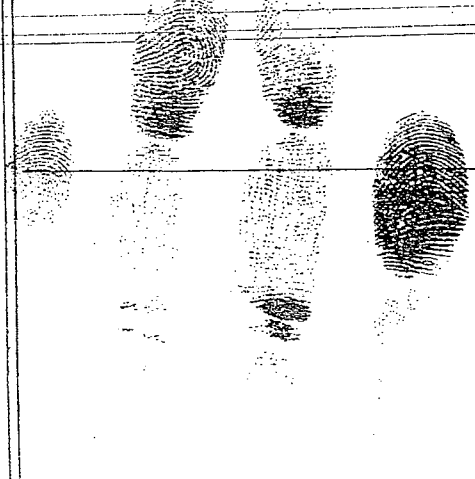
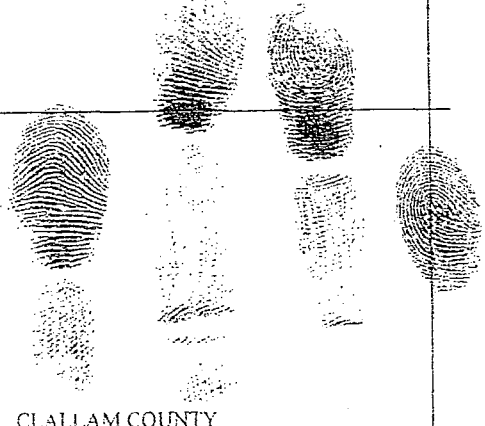
LKA: 121 Victoria View, Sequim, Washington 98382

Race:			Ethnicity:	Sex:
☐ Asian/Pacific Islander	☒ Black/African-American	☐ Caucasian	☐ Hispanic	☒ Male
☐ Native American	☐ Other:		☒ Non-Hispanic	☐ Female

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

Clerk of the Court: _____, Deputy Clerk. Dated: _____, 2015

The defendant's signature:

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
			

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.

CASE: 16288006 POP
Criminal Traffic
Agency No. C61265

DEFENDANT
BARNES, COREAN OMARUS
121 VICTORIA VIEW
SEQUIM WA 98382

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 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		EOS
	11/22/2006	Notice Issued for ARR YN on 12/11/2006 01:30 PM		KME
U	12/11/2006	DEFENDANT FAILS TO APPEAR. CITY REPRESENTED BY BUSKIRK WARRANT ORDERED IN THE AMOUNT OF $7500		EOS
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 OTH: Held		EOS
	12/18/2006	BENCH Warrant Issued for Fail To Appear For Hearing Bail: 7,500.00 + 0.00 Warrant Fee; Total Bail 7,500.00		SYS
	03/09/2007	OTH BW Set for 03/12/2007 01:30 PM in Room 1 with Judge TSD		KME
U	03/12/2007	DEFENDANT FAILS TO APPEAR. CITY REPRESENTED BY BUSKIRK WARRANT TO REMAIN OUTSTANDING		EOS
		----------DECKER		
S		OTH BW: Held		
	04/06/2007	OTH BW Set for 04/09/2007 01:30 PM in Room 1 with Judge TSD		KME
U	04/09/2007	DEFENDANT FAILS TO APPEAR. CITY REPRESENTED BY BUSKIRK WARRANT TO REMAIN OUTSTANDING		EOS
		----------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. 16288006 POP CT
Violation Date 10/19/2006
Violation
DWLS 2ND DEGREE

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
X HEARING MOT DEFY
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

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
X HEARING MOT DEFY
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

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.

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ARRAIGNMENT
TRIAL
SENTENCING
XHEARING MOT DEF

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

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: J. Reyes Date: 8/20/08

Supervisor Approval: SAME Date: _____

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

West's Revised Code of Washington Annotated
Title 59. Landlord and Tenant (Refs & Annos)
Chapter 59.04. Tenancies (Refs & Annos)

West's RCWA 59.04.020

59.04.020. Tenancy from month to month--Termination

Currentness

When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of thirty days or more, preceding the end of any of said months or periods, given by either party to the other.

Credits

[Code 1881 § 2054; 1867 p 101 § 2; RRS § 10619. Prior: 1866 p 78 § 1.]

Notes of Decisions (16)

West's RCWA 59.04.020, WA ST 59.04.020
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

West's Revised Code of Washington Annotated
Title 59. Landlord and Tenant (Refs & Annos)
Chapter 59.18. Residential Landlord-Tenant Act (Refs & Annos)

West's RCWA 59.18.200

59.18.200. Tenancy from month to month or for rental period--Termination--Armed Forces exception--Exclusion of children--Conversion to condominium--Notice

Effective: August 1, 2008
Currentness

(1)(a) When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of twenty days or more, preceding the end of any of the months or periods of tenancy, given by either party to the other.

(b) Any tenant who is a member of the armed forces, including the national guard and armed forces reserves, or that tenant's spouse or dependant, may terminate a rental agreement with less than twenty days' notice if the tenant receives reassignment or deployment orders that do not allow a twenty-day notice.

(2)(a) Whenever a landlord plans to change to a policy of excluding children, the landlord shall give a written notice to a tenant at least ninety days before termination of the tenancy to effectuate such change in policy. Such ninety-day notice shall be in lieu of the notice required by subsection (1) of this section. However, if after giving the ninety-day notice the change in policy is delayed, the notice requirements of subsection (1) of this section shall apply unless waived by the tenant.

(b) Whenever a landlord plans to change any apartment or apartments to a condominium form of ownership, the landlord shall provide a written notice to a tenant at least one hundred twenty days before termination of the tenancy, in compliance with RCW 64.34.440(1), to effectuate such change. The one hundred twenty-day notice is in lieu of the notice required in subsection (1) of this section. However, if after providing the one hundred twenty-day notice the change to a condominium form of ownership is delayed, the notice requirements in subsection (1) of this section apply unless waived by the tenant.

Credits
[2008 c 113 § 4, eff. Aug. 1, 2008; 2003 c 7 § 1, eff. March 24, 2003; 1979 ex.s. c 70 § 1; 1973 1st ex.s. c 207 § 20.]

Notes of Decisions (9)

West's RCWA 59.18.200, WA ST 59.18.200
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

(a) Filing a complaint with any federal, state, county, or municipal governmental authority relating to any alleged violation by the landlord of an applicable statute, regulation, or ordinance;

(b) Requesting the landlord to comply with the provision of this chapter or other applicable statute, regulation, or ordinance of the state, county, or municipality;

(c) Filing suit against the landlord for any reason;

(d) Participation or membership in any homeowners association or group;

(6) Charge to any tenant a utility fee in excess of actual utility costs or intentionally cause termination or interruption of any tenant's utility services, including water, heat, electricity, or gas, except when an interruption of a reasonable duration is required to make necessary repairs;

(7) Remove or exclude a tenant from the premises unless this chapter is complied with or the exclusion or removal is under an appropriate court order; or

(8) Prevent the entry or require the removal of a mobile home, manufactured home, or park model for the sole reason that the mobile home has reached a certain age. Nothing in this subsection shall limit a landlords' right to exclude or expel a mobile home, manufactured home, or park model for any other reason, including but not limited to, failure to comply with fire, safety, and other provisions of local ordinances and state laws relating to mobile homes, manufactured homes, and park models, as long as the action conforms to this chapter or any other relevant statutory provision.

Credits

[2012 c 213 § 2, eff. June 7, 2012; 2003 c 127 § 2, eff. July 27, 2003; 1999 c 359 § 6; 1993 c 66 § 16; 1987 c 253 § 1; 1984 c 58 § 2; 1981 c 304 § 19; 1980 c 152 § 5; 1979 ex.s. c 186 § 5; 1977 ex.s. c 279 § 7.]

<(Formerly Mobile Home Landlord-Tenant Act)>

Notes of Decisions (6)

West's RCWA 59.20.070, WA ST 59.20.070
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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