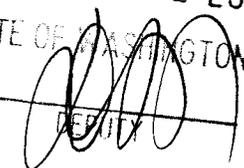


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No. 39479-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Corean Barnes,

Appellant.

Clallam County Superior Court Cause No. 08-1-00340-9

The Honorable Judge Kenneth Williams

Appellant's Reply Brief

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CORRECTION TO RESPONDENT'S STATEMENT OF FACTS:

Respondent erroneously asserts that C.R. testified to two instances of digital penetration. Brief of Respondent, pp. 4, 8. In fact, her testimony as to the second incident was that Mr. Barnes “was able to penetrate me with his penis in my vagina...” RP (5/5/09) 57.

ARGUMENT

I. THE ADMISSION OF A RECORDING MADE WITHOUT MR. BARNES'S CONSENT VIOLATED HIS RIGHTS UNDER THE PRIVACY ACT.

A. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008).

B. The Privacy Act does not include an exception for communications that provide “context” to threats.

In Washington, private conversations may not be recorded without the consent of all parties, and recordings that violate the Privacy Act are inadmissible in court. RCW 9.73.030(1); RCW 9.73.050. An exception permits the admission of recorded communications or conversations conveying “threats of extortion, blackmail, bodily harm, or other unlawful requests or demands...” RCW 9.73.030(2)(b). The exception “must be strictly construed.” *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980).

The statute does not exempt communications or conversations that provide context to threats. *See* RCW 9.73. Accordingly, recordings of such ancillary communications or conversations are inadmissible (unless made in compliance with the Act). Respondent fails to address Mr. Barnes's primary argument—that the trial court should have excluded those portions of the recording that merely provided context. *See* Appellant's Opening Brief, pp. 11-12. By failing to provide argument, Respondent apparently concedes the issue. *See, e.g., In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. Evans*, 129 Wn.App. 211, 221 n. 7, 118 P.3d 419 (2005), *reversed on other grounds at* 159 Wn.2d 402, 150 P.3d 105 (2007).

The trial court erroneously admitted those portions of the recording that merely provided “context.” Memorandum Opinion on Motion to Suppress, CP 70-71. Accordingly, Mr. Barnes's convictions must be reversed and the case remanded for a new trial. *Williams, supra*.

C. The exemption for communications or conversations conveying threats should be limited to clear threats, whether explicit or implied.

The Privacy Act “puts a high value on the privacy of communications.” *State v. Christensen*, 153 Wn.2d 186, 201, 102 P.3d 789 (2004). The legislature's intent was “to establish protections for individuals' privacy and to require suppression of recordings of even

conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements.” *Williams*, at 548. That is why the exception contained in RCW 9.73.030 must be strictly construed. *Williams*, at 548.

The Privacy Act exempts “communications or conversations... which convey threats...” RCW 9.73.030(2)(b). This language is unambiguous: the exemption is limited to “threats;” it does not cover unclear statements that could arguably be considered threatening. To fall within the exemption, a conversation or communication must include a clear threat, whether explicit or implied.¹ Respondent argues for a broader interpretation of the exemption, seeking to include ambiguous statements (which it characterizes as “implied threats”). Brief of Respondent, pp. 14-15.

But a broader interpretation, allowing ambiguous statements to be exempt from the Act’s requirements, would defeat the purpose of the Act and would be inconsistent with the “high value” placed on the privacy of communications. *Christensen*, at 201. Instead, the exemption should be interpreted to apply only to clear threats, whether explicit or implied. This

¹ In his Opening Brief, Appellant used the word “explicit” and “overt” instead of the word “clear.” By using these words, Appellant did not mean to suggest that threats that were clearly implied could not fit within the exemption.

is consistent with *Robinson*, cited by Respondent as controlling. Brief of Respondent, pp. 14-15 (citing *State v. Robinson*, 38 Wn. App. 871, 691 P.2d 213 (1984)). In *Robinson*, the defendant was involved in a custody dispute with his estranged wife, and left a message that she and her relatives would “suffer the consequences” if he didn’t get to see his children the next morning. The court found this to be a clear threat:

Mr. Robinson argues his message meant only that he would initiate legal proceedings to gain custody if he did not see his children. However, his message unambiguously states that “anybody” related to his wife will “suffer the consequences”, not just his wife through loss of custody.

Robinson, at 885.

In this case, the recording included *some* clear threats, and those portions of the recording were properly admissible under RCW 9.73.030(2)(b). However, the recording—which produced a transcript that was 74 pages long—also included many ambiguous and non-threatening statements; the trial court should have separately analyzed each of those statements to determine whether or not they clearly communicated a threat. It failed to do so, and instead admitted the entire interaction between Mr. Barnes and C.R. Memorandum Opinion on Motion to Suppress, CP 71-72. This was error. Any statements that did not clearly convey a threat were inadmissible and should have been excised from the recording. RCW 9.73.030; *Williams, supra*. Mr. Barnes’s convictions

must be reversed and the case remanded for a new trial. *See State v. Porter*, 98 Wn.App. 631, 638, 990 P.2d 460 (1999).

D. The recordings were not admissible under the exemption for “hostage holders.”

Respondent contends, for the first time on appeal, that the recordings were admissible as “communications or conversations...which relate to communications by a hostage holder...as defined in RCW 70.85.100...” RCW 9.73.030(2)(d). The phrase “hostage holder” includes a person “who commits or attempts to commit [unlawful imprisonment under 9A.40.040].” As with RCW 9.73.030(2)(b), the exemption must be strictly construed. *Williams*, at 548.

According to Respondent, “[t]he recording supports the charge that Mr. Barnes physically restrained C.R. against her will on at least two separate occasions.” Brief of Respondent, p. 16. Respondent cites a total of 16 pages of the 74 page transcript to support this claim, but then argues that the *entire recording* is admissible, including those portions unrelated to these two alleged incidents. Brief of Respondent, p. 16.

Such a broad reading of the exception is unwarranted. Even assuming that Mr. Barnes unlawfully restrained C.R. on two occasions, it is undisputed that she was not continuously restrained during the entire

recording. Exhibit 10. In fact, she was by herself at times, and was able to record lengthy soliloquies. Exhibit 10, pp. 33-34, 36, 72-73, Supp. CP.

Even assuming that portions of the recording were admissible under the exception set forth in RCW 9.73.030(2)(d), this does not provide a basis to admit the entire recording. Because the trial judge erroneously admitted the entire recording, the convictions must be reversed and the case remanded for a new trial. *Porter, supra*.

E. The conversations fit within the definition of “private conversation.”

A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. *State v. Christensen*, at 193. Whether a particular communication is private may be decided as a question of law where the facts are undisputed. *Id.*, at 192. Factors to be considered in assessing the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication, the potential presence of third parties, the role of the nonconsenting party, and his relationship to the consenting party. *Id.*, at 193.

For example, a jail inmate cannot reasonably believe that his phone conversations are private, because he is aware that the authorities may monitor and record such conversations. *State v. Modica*, 164 Wn.2d 83,

88, 186 P.3d 1062 (2008). Nor can a routine drug sale on a public street in the presence of third parties and passersby. *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996).

Here, Mr. Barnes discussed intimate matters with his sexual partner. These discussions took place primarily in the car (and other locations where no one else present), and stretched over several hours. Under these circumstances, a reasonable person would have believed that the conversations were private. *Christensen, supra*.

Respondent erroneously argues that “Mr. Barnes cannot have had a *reasonable expectation* in the privacy of his conversation with C.R. due to his explicit and implicit threats.” Brief of Respondent p. 18 (emphasis in original). Respondent misapplies the standard for evaluating whether or not a conversation is “private” within the meaning of RCW 9.73.030. According to Respondent, a party who threatens someone can never have a reasonable expectation of privacy, because the listener will always be likely to report the threats. Under this theory, the exception set forth in RCW 9.73.020(2)(b) is superfluous—since (according to Respondent) threatening conversations are never “private,” and would thus never be covered by the Privacy Act. Furthermore, any person engaged in a conversation runs the risk that the listener will later report the conversation. The Privacy Act is not concerned with that risk, but only

with the likelihood of the conversation being illegally intercepted or recorded while it is occurring.

The conversations here were private, and fell under the protections of the Privacy Act. The illegal recording should have been suppressed; accordingly, Mr. Barnes's convictions must be reversed and the case remanded for a new trial. *Porter, supra*.

F. The erroneous admission of the illegally recorded conversations was not harmless.

Privacy Act violations require reversal unless "within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *Porter*, at 638. In this case, admission of the entire tape, with its vast stretches of irrelevant but offensive conversation, materially affected the outcome of the trial. It painted Mr. Barnes in a negative light, and prejudiced the jury against him. This was particularly important because Mr. Barnes's entire defense rested on his testimony, including his explanation for the alleged threats and the sounds which C.R. contended related to sexual assault and unlawful restraint. RP (5/7/09) 182-203. By painting him in such a negative light, the improperly admitted evidence made it less likely that the jury would believe his testimony.

In support of its argument that overwhelming untainted evidence supported the convictions, the prosecution points only to C.R.'s testimony and those portions of the tape that were properly admitted. Brief of Respondent, p. 21-22. However, since Mr. Barnes provided an innocent explanation for the conversation and sounds on the recording, the evidence boiled down his version of events and her version of events. In other words, the evidence was not so overwhelming that it would necessarily lead to a finding of guilt.

Because the entire recording was erroneously admitted at trial, Mr. Barnes's convictions must be reversed. The case must be remanded with a new trial, with instructions to exclude any parts of the tape that do not include clear threats or that do not "relate to communications by a hostage holder" as set forth in RCW 9.73.030(2).

II. MR. BARNES WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WHEN HIS ATTORNEY FAILED TO PROPOSE INSTRUCTIONS ON THE INFERIOR DEGREE OFFENSE OF RAPE IN THE THIRD DEGREE.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Defense counsel was ineffective for failing to propose instructions on the lesser degree offense of Rape in the Third Degree.

To establish ineffective assistance, an appellant must show deficient performance and prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption of adequate performance is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Id.*, at 130. Furthermore, trial strategy “must be based on reasoned decision-making,” and there must be some indication in the record that counsel was actually pursuing the alleged strategy. *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007); *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

Failure to pursue an inferior degree offense can deprive an accused person of effective assistance. *State v. Grier*, 150 Wn.App. 619, 635, 208 P.3d 1221 (2009) (citing *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006), and *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004)). Failure to request appropriate instructions on a lesser offense constitutes ineffective assistance if (1) the accused person is entitled to the instructions and (2) under the facts of the case, it was objectively

unreasonable for defense counsel pursue an “all or nothing” strategy.

Grier, at 635.

RCW 10.61.003 and RCW 10.61.010 guarantee the “unqualified right” to have the jury pass on the inferior degree offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wn. 273, 276-277, 60 P. 650 (1900). The appellate court views the evidence in a light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The instruction should be given even if there is contradictory evidence, or if the accused person presents other defenses. *Id., supra*. The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164. Thus, although Mr. Barnes denied that he sexually assaulted C.R., he was entitled to pursue a lesser offense if the evidence, when viewed in the most favorable light, supported instructions on a lesser offense. *Fernandez-Medina, supra*.

Rape in the Third Degree is an inferior degree of Rape in the Second Degree. A person is guilty of third-degree rape if he engages in sexual intercourse with another person without consent, where the lack of consent was clearly expressed by words or conduct. RCW 9A.44.060.

Counsel's failure to pursue third-degree rape was objectively unreasonable. First, Mr. Barnes was entitled to the instructions. Taking the evidence in the most favorable light, the testimony showed that C.R. expressed a lack of consent but that Mr. Barnes did not use forcible compulsion. The jury was entitled to believe his testimony that he did not use physical force and that any threats were not serious (and would not have been taken as serious within the context of their relationship). The jury was also entitled to believe (from C.R.'s testimony and the recording) that she did not consent, and that her lack of consent was clearly expressed through her words and conduct.

Second, an "all or nothing" strategy was objectively unreasonable. Mr. Barnes could have asserted the same consent defense to the lesser charge. Had he been convicted of Rape in the Third Degree, his standard range would have been 15-20 months (with a statutory maximum of 60 months), instead of the 102-136 month standard range (and statutory maximum of life in prison). *See Sentencing Guidelines Commission, Adult Sentencing Manual, III-178, III-182.*

Respondent erroneously contends that Mr. Barnes was not entitled to instructions on Rape in the Third Degree. According to Respondent, such instructions are never available "when the defendant contends that the intercourse was consensual and the victim testifies that the intercourse

was forced.” Brief of Respondent, p. 25-28, *citing State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995) and *State v. Ieremia*, 78 Wn. App. 746, 899 P.2d 16 (1995). But *Charles* and *Ieremia* are inapplicable for two reasons.

First, *Charles* and *Ieremia* predated *Fernandez-Medina*, in which the Supreme Court held that an accused person may pursue a defense that is inconsistent with his own testimony. Second, in both *Charles* and *Ieremia*, the trial record was devoid of affirmative evidence suggesting that the sex was nonconsensual but unforced. *Charles*, at 356.

Here, there was such affirmative evidence. First, the recording itself could be interpreted to show both a lack of consent and a lack of force. Exhibit 10, CP. It included C.R. saying “no” repeatedly, and it also included sounds, which the jury could have believed were indicative of sexual intercourse without forcible compulsion. Exhibit 10, CP. Second, C.R. indicated, in her final soliloquy, that she didn’t know if she’d been raped, that she didn’t feel raped, and that Mr. Barnes hadn’t hurt her. Exhibit 10, p. 72.

Taken in a light most favorable to Mr. Barnes, this affirmative evidence suggests that he committed only Rape in the Third Degree. *Cf. Charles, supra*. As in *Grier, Ward*, and *Pittman*, counsel’s failure to pursue the inferior degree offense was objectively unreasonable and

prejudiced Mr. Barnes. Because he was denied the effective assistance of counsel, his convictions must be reversed and the case remanded to the trial court for a new trial. *Grier, supra*.

III. THE COURT'S KNOWLEDGE INSTRUCTION CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF UNLAWFUL IMPRISONMENT.

A. Standard of Review

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. This case is controlled by *State v. Hayward*.

Due process prohibits the use of conclusive presumptions, because they conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980) (citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). An instruction creates a conclusive

presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996).

Here, the court erroneously gave a jury instruction that included a conclusive instruction and relieved the state of its burden of proof. Specifically, the court told the jury that “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 22, CP 53. The instruction did not limit the intentional acts that could establish knowledge. Because of this lack of limitation, jurors may have interpreted the instruction to mean that any intentional act conclusively established Mr. Barnes’s knowledge—that he restrained C.R.’s movements, or that the restraint substantially interfered with her liberty, or that he lacked her consent, or that his actions constituted force, intimidation or deception, or that he lacked legal authority to restrain C.R.—even if he were actually ignorant of these things.

Similar language has previously been found to require reversal. *Hayward, supra*. The flawed language can be read to create a mandatory presumption permitting conviction upon proof of any intentional act, even in the absence of knowledge. Since juries lack the tools of statutory construction, the trial court’s failure to give an instruction that was manifestly clear requires reversal under the stringent test for constitutional error.

Respondent contends that the flawed instruction only requires reversal when the offense requires proof of two mental states for conviction. This is incorrect, and relates to only one of the two problems caused by the instruction. As the Court noted in *Hayward*, the instruction can conflate two mental elements, creating a single element from both. *Id.*, at 645. But the second problem caused by the instruction—the problem relevant here—is that it creates a mandatory presumption, and relieves the state of its burden of proof with regard to the presumed fact. *Id.*, at 645.

By its plain language, the instruction creates a mandatory presumption, requiring the jury to find “knowledge” upon proof of any intentional act. Thus, based on the instruction, the jury could have presumed that Mr. Barnes intentionally restrained C.R., and that this proved that he knew the restraint substantially interfered with her liberty, that he lacked her consent, that his actions constituted force, intimidation or deception, or that he lacked legal authority to restrain her, even if he were actually ignorant of these things.

Respondent does not argue that the error was harmless beyond a reasonable doubt. Accordingly, his conviction for Unlawful Imprisonment must be reversed, and the case remanded for a new trial. Upon retrial, the

court should instruct the jury using the revised version of WPIC 10.02.

Hayward, supra.

CONCLUSION

Mr. Barnes's convictions must be reversed, and the case remanded to the trial court for a new trial.

Respectfully submitted on February 17, 2010.

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CERTIFICATE OF MAILING

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 17, 2010.

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

Signed at Olympia, Washington on February 17, 2010.



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