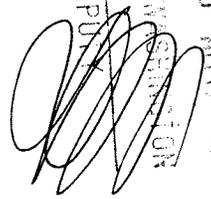


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STATE OF WASHINGTON  
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No. 39479-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Corean Barnes,**

Appellant.

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

The Honorable Judge Kenneth Williams

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court erred by admitting illegally recorded conversations that did not fit within an exception to the Privacy Act.
2. The trial court erred by finding that conversations providing “context” to a threat were admissible under an exception to the Privacy Act.
3. Mr. Barnes was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
4. Defense counsel was ineffective for pursuing a strategy that required the jury to choose between conviction and outright acquittal.
5. Defense counsel was ineffective for failing to propose instructions on the inferior degree offense of Rape in the Third Degree.
6. The trial court provided an erroneous definition of knowledge.
7. The trial court erred by giving Instruction No. 22.
8. The trial court’s instruction defining knowledge contained an improper mandatory presumption.
9. The court’s instruction defining knowledge impermissibly relieved the state of its burden to establish each element by proof beyond a reasonable doubt.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A conversation recorded in violation of the Privacy Act is inadmissible in court unless the conversation conveys a threat. Here, the trial judge admitted illegally recorded conversations that did not convey threats. Did the erroneous admission of illegally recorded conversations violate Mr. Barnes’s rights under the Privacy Act?

2. An accused person is entitled to jury instructions on an inferior degree offense if there is evidence that only the inferior offense was committed. The evidence here, when taken in a light most favorable to Mr. Barnes, established that he committed only Rape in the Third Degree. Should the jury have been instructed on the inferior degree offense?
3. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel provided deficient performance that prejudiced Mr. Barnes when he failed to propose instructions on the inferior degree offense of Rape in the Third Degree. Was Mr. Barnes denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. Unlawful Imprisonment requires proof that the accused person acted knowingly with respect to three elements of the offense. The trial court instructed the jury that knowledge “is established if a person acts intentionally,” without limiting the intentional acts that could be used as proof of knowledge. Did the trial court’s instruction misstate the law and relieve the state of its burden of proof?
5. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that “Acting knowingly or with knowledge...is established if a person acts intentionally.” Did the court’s instruction defining recklessness create an unconstitutional mandatory presumption?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Corean Barnes and Christina Russell met in the fall of 2007 at Olympic Care Center, where they both worked. RP (5/5/09) 11-12; RP (5/7/09) 58, 60. They developed a sexual relationship. RP (5/5/09) 66, 78; RP (5/7/09) 62-65. Mr. Barnes didn't have a car, so he often got rides from Ms. Russell to his jobs and for other errands. RP (5/5/09) 77; RP (5/7/09) 66.

In August of 2008, Ms. Russell decided she wanted to break up with Mr. Barnes. RP (5/5/09) 14-18, 85. She purchased a digital recorder, turned it on, and went to pick up Mr. Barnes to give him a ride. RP (5/5/09) 18, 23. She did not get his permission; nor did she tell him she was recording their conversations. Exhibit 10, Supp CP.

Ms. Russell also recorded several soliloquies. Exhibit 10, Supp. CP. In one, she said she was making the recording for evidence, and talked about providing the recording to law enforcement. RP (5/5/08) 23; Exhibit 10, pp. 33-34, Supp. CP. In another, she said that Mr. Barnes hadn't done anything wrong yet, and so she had nothing to provide the police. Exhibit 10, p. 73, Supp. CP. RP (5/5/09) 80. At one point, she told the recorder that she wished Mr. Barnes would just rape her so that she could record it and use it to make a report. RP (5/5/09) 46; Exhibit 10,

p. 36, Supp. CP. In her final soliloquy, after dropping Mr. Barnes off, she told the recorder that she didn't know if she'd been raped, and noted that she didn't feel raped and that Mr. Barnes hadn't hurt her. Exhibit 10, p. 72.

The recording included the two interactions that she later described as rape. First, Ms. Russell can be heard saying "no" 27 times before she took Mr. Barnes on his errands. Exhibit 10, pp. 1-6, Supp. CP. She later claimed that Mr. Barnes was touching her breasts, penetrating her vagina, dragging her to his trailer, and penetrating her a second time, all against her will (although she later recorded herself saying that he hadn't done anything wrong yet.<sup>1</sup>) RP (5/5/09) 26-28, 80; Exhibit 10, pp. 5-7, 31-34. Second, Ms. Russell drove Mr. Barnes to a house where he'd been staying to pick up some of his property. Instead of waiting for him in the car, Ms. Russell went into the house.<sup>2</sup> RP (5/5/09) 50-52. She sat on the couch, and when Mr. Barnes kissed her she kissed him back. RP (5/5/09) 53-54. According to Ms. Russell, she pulled away and then Mr. Barnes forced himself on her and raped her. RP (5/5/09) 54-59. Ms. Russell is heard

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<sup>1</sup> She explained at trial that she was in denial and that she didn't think it was a crime for Mr. Barnes to touch her in this way. RP (5/5/09) 46; Exhibit 10, p. 33, Supp. CP

<sup>2</sup> The house belonged to a man named Ken Johnson, who was friends with Mr. Barnes. RP (5/5/09) 50-52.

saying “no,” “I don’t want to,” “stop,” and (according to the transcriptionist) “gasping and whimpering.”

Throughout the course of their time together on August 15, the recording also captured Mr. Barnes using racial slurs and coarse language and making offensive suggestions. Early in the recording, Mr. Barnes ended a statement (partially inaudible) with the phrase “Christians now sh\*\*.” He also said “a little f\*\*\*ing wet back [sic] Mexican prick” (apparently referring to Ms. Russell). Exhibit 10, pp. 6, 8, Supp. CP. During the drive, Mr. Barnes told her he planned to finger her “p\*ssy,” talked about “sucking [her] t\*tties,” and asked if she was horny. Exhibit 10, pp. 9, 13, 15, Supp. CP.

On the recording, Mr. Barnes told Ms. Russell their relationship wouldn’t end until he said it could end, and that he might let her break up with him if she had sex with him one more time. Exhibit 10, pp. 13-16, Supp. CP. When Ms. Russell revealed that she’d told her mother about their relationship, he became angry and swore repeatedly. Exhibit 10, pp. 16-21, Supp. CP. He called Ms. Russell a “simple-minded f\*\*\*ing white f\*\*\*ing female,”<sup>3</sup> and referred to Christianity as a “cult.” Exhibit 10, pp. 18-19, Supp. CP.

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<sup>3</sup> Mr. Barnes is African-American.

On the drive back to Sequim, Mr. Barnes told Ms. Russell that he knew she had a new boyfriend. Exhibit 10, p. 36, Supp. CP. He prodded her regarding her lack of interest in a threesome. Exhibit 10, p. 37, Supp. CP. He told her, in increasingly rough language, that he would not be out of her life until they had sex one more time. Exhibit 10, pp. 39-42, 43-45, 57-59, 60, Supp. CP. Mr. Barnes told her that he was too smart to get into trouble for harassing her, crudely criticized her mother, and told her details of her daily activities. Exhibit 10, pp. 43-44, 46-47, 48-49, Supp. CP. He also referred to another of Ms. Russell's boyfriends as her "f\*\*\*ing wetback f\*\*\*ing over the border boyfriend." Exhibit 10, p. 51, Supp. CP.

Mr. Barnes made two statements on the recording that could be interpreted as explicit threats. First, he told her that he wanted to have sex one more time, and that he wouldn't take no for an answer. Exhibit 10, Supp. CP. Second, he told her he loved her enough to kill her, and that he "might just kill your cat, just for fun" (although he immediately explained that he was joking, chided her to "loosen up," and said that instead of killing her he'd settle for a bottle of alcohol). Exhibit 10, pp. 52-53, Supp. CP.

After Ms. Russell left Mr. Barnes at his trailer, she didn't consider what had happened to be a sexual assault so she did not make a police

report. RP (5/5/09) 61-62; Exhibit 10, 72-73, Supp. CP. She contemplated the recording over the weekend, and then called her health care provider, who referred her to an advocate who called the police on her behalf. RP (5/5/09) 63-64, 105.

The state charged Mr. Barnes with Unlawful Imprisonment, two counts of Rape in the Second Degree by Forcible Compulsion, and Burglary in the First Degree.<sup>4</sup> CP 21-23.

Prior to trial, Mr. Barnes moved to suppress the recordings made by Ms. Russell. Motion and Declaration for CrR 3.6 Hearing, Supplemental Defense Brief Re: Suppression Motion, Supp. CP. He argued that the recordings violated the Privacy Act, RCW 9.73.030. The trial court denied the motion, ruling that the recording included threats and thus fell within an exception to the Privacy Act. Memorandum Opinion on Motion to Suppress; *see also* Opposition to Defense Motion, Supp. CP. The court noted that Ms. Russell's lengthy narratives would not fall within the statute's ambit, and that portions of the recording might be objectionable under the rules of evidence. Memorandum Opinion on Motion to Suppress, Supp. CP.

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<sup>4</sup> The burglary charge stemmed from the state's theory that Mr. Barnes did not have permission to be at his friend Ken Johnson's home during the second alleged rape. The evidence regarding the element of unlawful entering or remaining was unpersuasive to the jury, who did not reach a verdict on that count. RP (5/6/09) 18-42; RP (5/8/09) 9-11.

Mr. Barnes also moved to suppress the entire recording because it was duplicative hearsay and not the best evidence. RP (1/26/09) 46-48. The state responded that the recording was a “witness” to the event, and did not include any statements of fact. RP (1/26/09) 48-50. The court denied the motion. RP (2/5/09) 13.

In light of the court’s rulings, Mr. Barnes asked the court to admit those additional portions of the recording in which Ms. Russell talked to herself, under ER 106. Defense Statement Re: ER 106 and Admissibility of all of the Secretly Recorded Tape, Supp. CP. Mr. Barnes’s attorney urged the court to allow the entire recording into evidence to show the overall context of the alleged threats and Ms. Russell’s thinking. RP (1/26/09) 39-40, RP (2/5/09) 11-14. The court agreed to allow Ms. Russell’s soliloquies to be introduced under the rule of completeness. RP (2/5/09) 13-14.

The court directed the state to refrain from bringing out testimony that Mr. Barnes attended a domestic violence batterer’s group. RP (1/26/09) 13-16. Despite this, the prosecutor asked Ms. Russell what happened when she picked up Mr. Barnes from his domestic violence class. RP (2/18/09) 51. The court declared a mistrial. RP (2/18/09) 57-58.

The retrial started on May 4, 2009. RP (5/4/09) 7-8. The state argued that Mr. Barnes threatened Ms. Russell to keep her from leaving him and raped her twice on August 15, 2007—once when she picked him up, and again later at his friend’s home.<sup>5</sup> RP (5/5/09) 11-115; RP (5/6/09) 8-123. Mr. Barnes denied the first alleged penetration, and contended that the second incident involved consensual sex. RP (5/5/09) 11-115; RP (5/6/09) 8-123; RP (5/7/09) 9-169.

The court gave the following definition of knowledge, without defense objection:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance, or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Instruction No. 22, Court’s Instructions to the Jury, Supp. CP.

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<sup>5</sup> Ms. Russell testified that she picked up Mr. Barnes to take him to Port Townsend on August 13, two days before the offense date. RP (5/5/09) 14. She claimed that Mr. Barnes told her that he would blow up her house if she left him in Port Townsend. RP (5/5/09) 15-16. She also said he’d told her he wished he could take all of the women in his life and just pour gas on them and watch them burn. RP (5/5/09) 17. She said he talked about another woman who had stopped lending him her car and how he wished he could have slit her throat to watch the dust pour out. RP (5/5/09) 17.

The jury convicted Mr. Barnes of Unlawful Imprisonment, and two counts of Rape in the Second Degree.<sup>6</sup> Verdict Form, Supp. CP. The court ruled that the unlawful imprisonment conviction merged with the rape convictions, and sentenced Mr. Barnes to 119 months to life. RP (6/25/09) 7-8, 20. Mr. Barnes timely appealed. CP 5-6.

### **ARGUMENT**

**I. THE TRIAL JUDGE VIOLATED MR. BARNES’S RIGHTS UNDER THE PRIVACY ACT BY ADMITTING ILLEGALLY RECORDED CONVERSATIONS THAT DID NOT FIT WITHIN THE ACT’S EXCEPTIONS.**

Washington’s Privacy Act requires the consent of all participants before a private conversation may be recorded. RCW 9.73.030(1). 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). Recordings made in violation of the Privacy Act are inadmissible in court. RCW 9.73.050. By enacting the Privacy Act, the legislature “intended 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.” *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980).

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<sup>6</sup> The jury was unable to reach a verdict on the burglary charge.

An exception permits the admission of recordings made of threatening communications, where one party consents to the recording. RCW 9.73.030(2)(b). The exception covers communications which “convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands...” RCW 9.73.030(2)(b).

The exception “must be strictly construed” in order to effectuate the underlying legislative intent. *Williams*, at 548; *see also Christensen*, at 201 (“In light of its strong wording, the act must be interpreted to effectuate the legislative intent.”) When strictly construed, the exception does not extend to ambiguous statements, or to communications that might provide “context” to threats that fall within the exception. RCW 9.73.030(2).

In this case, the trial judge erroneously admitted a recording of the entire interaction between Mr. Barnes and Ms. Russell. Memorandum Opinion on Motion to Suppress, p. 1, Supp. CP. Although the recording included two statements that could be construed as overt threats, it also included many statements that were (at worst) ambiguous, and others that could not be construed as threats.<sup>7</sup> The court acknowledged that “parts of

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<sup>7</sup> The overt threats were Mr. Barnes’s statement that he planned to have sex with her whether she wanted to or not, and that he might kill her and her cat. Exhibit. 10, Supp. CP.

the conversation are likely not relevant except for purposes of context,” but did not restrict admission of those parts under the Privacy Act. Memorandum Opinion on Motion to Suppress, Supp. CP. Those portions of the recording that were not explicit threats should have been excluded. RCW 9.73.030.

The admission of evidence obtained in violation of the Privacy Act requires reversal unless “within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial.” *State v. Porter*, 98 Wn.App. 631, 638, 990 P.2d 460 (1999).

Here, the evidence prejudiced Mr. Barnes because it showed him engaged in obnoxious, immature, and offensive—but nonthreatening—behavior: begging, demanding, and pressuring C.R. to have sex with him, using racial slurs and other offensive language, and demeaning Christians and Christianity. The erroneous admission of the recordings was not harmless because it cannot be said that the evidence did not materially affect the outcome of the trial. *Porter, supra*. The illegally recorded material painted Mr. Barnes in such a foul light that no juror could avoid having her or his passions and prejudices swayed. Accordingly, Mr. Barnes’s conviction must be reversed and the case remanded to the trial court for a new trial. *Porter, supra*.

**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.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

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). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that,

but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *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.”)

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person’s own testimony. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

*Fernandez-Medina*, at 460-461.

Defense counsel's failure to seek instructions on an inferior degree offense or a lesser-included offense can deprive an accused of the effective assistance of counsel. *State v. Grier*, 150 Wn.App. 619, 635, 208 P.3d 1221 (2009) (citing *Pittman, supra*, and *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004)). Counsel's 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*, at 456. The instruction should be given even if there is contradictory evidence, or if the accused person presents other defenses. *State v. Fernandez-Medina, supra*. The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164.

Rape in the Third Degree is an inferior degree offense to Rape in the Second Degree.<sup>8</sup> 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.

In this case, defense counsel’s failure to propose instructions on second-degree rape was objectively unreasonable, and deprived Mr. Barnes of the effective assistance of counsel. First, Mr. Barnes was entitled to the instructions. Taking the evidence in a light most favorable to Mr. Barnes, the testimony showed that C.R. expressed her lack of consent but that he 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

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<sup>8</sup> See *Fernandez-Medina*, at 454: an inferior degree instruction is proper if “(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense...” (internal quotation marks and citations omitted).

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 in this case, because 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) that applied on each count of second-degree rape. *See Sentencing Guidelines Commission, Adult Sentencing Manual*, III-178, III-182.

As in *Grier*, *Ward*, and *Pittman*, defense 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. MR. BARNES'S UNLAWFUL IMPRISONMENT CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S KNOWLEDGE INSTRUCTION CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE OFFENSE.**

Under the Fourteenth Amendment's Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be "manifestly clear," since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions 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)). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). 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).

The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus “[w]hen acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.” RCW 9A.08.010(2).

Here, the prosecution was required to prove that Mr. Barnes acted knowingly when he (1) restrained the movements of Ms. Russell in a manner that substantially interfered with her liberty, (2) without her consent or by force, intimidation, or deception, and (3) without legal authority. Instruction No. 21, Court’s Instructions to the Jury, Supp. CP.

The trial court’s instruction defining knowledge included the following language: “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 22, Court’s Instructions to the Jury, Supp. CP. The instruction did not place any limitation on the intentional acts that could establish the knowledge required under RCW 9A.08.010. Thus the jury could have interpreted Instruction No. 22 to mean that any intentional act conclusively established Mr. Barnes’s knowledge—that he restrained Ms. Russell’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.

Identical language in an instruction defining “knowledge” has previously been found to require reversal under the same circumstances. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). The Court of Appeals has recently reaffirmed its holding in *Goble*, in light of

subsequent revisions to WPIC 10.02. *State v. Hayward*, \_\_\_ Wn.App. \_\_\_, 217 P.3d 354 (2009).

The flawed language first criticized in *Goble* requires reversal in this case, because a reasonable juror might interpret the language as creating 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.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The

reviewing court must conclude that the error was “unimportant in relation to everything else the jury considered on the issue in question...” *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In other words,

a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone...[I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. *Yates*, at 403-405 (footnotes and citations omitted).

A court must examine the proof actually considered, and ask: [W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said...that the presumption did not contribute to the verdict rendered. *Yates*, at 403-405 (emphasis added).

Thus, a reviewing court evaluating harmlessness cannot rely on evidence drawn from the entire record “because the terms of some presumptions so narrow the jury’s focus as to leave it questionable that a reasonable juror

would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed.” *Yates*, at 405-406.<sup>9</sup>

Here, the conclusive presumption required the jury to find Mr. Barnes acted with knowledge. Instruction No. 22, Court’s Instructions to the Jury, Supp. CP. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that Mr. Barnes acted with knowledge). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume knowledge from proof of *any* intentional act.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above. *See, e.g., Sandstrom*, at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette, supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person’s will, but the presumption may be rebutted,” and “[a] person of sound mind and discretion is presumed to

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<sup>9</sup> In *Deal, supra*, the court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal*, at 703.

intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates*, at 401 (“‘malice is implied or presumed’ from the ‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

The lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Barnes acted with knowledge. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence bearing on Mr. Barnes’s mental state. Because it is impossible to make the determination required by *Yates, supra*, it cannot be said that the error was harmless beyond a reasonable doubt.

Furthermore, even considering the entire record (contrary to the requirement under *Yates, supra*), reversal is required. A reasonable juror could have acquitted Mr. Barnes of the charged crime by deciding (for example) that he was ignorant of Ms. Russell’s lack of consent when he held her wrist(s). Thus the error was not trivial, formal, or merely

academic, and it cannot be said that the error was harmless beyond a reasonable doubt. *Lorang*, at 32. Because of this, Mr. Barnes's conviction for Unlawful Imprisonment must be reversed and the case remanded for a new trial. *Hayward, supra*.

### **CONCLUSION**

For the foregoing reasons, Mr. Barnes's convictions must be reversed. The case must be remanded to the trial court for a new trial.

Respectfully submitted on November 17, 2009.

### **BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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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 November 17, 2009.

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 November 17, 2009.

  
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