

NO. 39479-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREAN BARNES

Appellant.

10 JAN 19 5:12 PM '07
STATE OF WASHINGTON
BY [Signature]
COURT OF APPEALS
STACOMA WA 98402

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

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED January 19, 2010, Port Angeles, WA [Signature]
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I. Counter Statement of the Issues:

1. Did the trial court err when it admitted into evidence a secretly recorded conversation that (1) was replete with threats and statements of a hostage holder, and (2) captured sounds that do not constitute a private conversation?
2. Did the admission of the contested recording in its entirety constitute harmless error?
3. Did the defendant receive ineffective assistance of counsel when his trial attorney did not request a jury instruction on Rape in the Third Degree after he did not introduce affirmative evidence that the rape was non-consensual and unforced?
4. Did the trial court err when it instructed the jury on Unlawful Imprisonment and stated that the “knowledge” element may be “established if a person acts intentionally”?

II. Statement of the Case:

FACTS

C.R. met the Defendant, Mr. Corean Barnes, sometime in 2007. RP (05/05/2009) at 12. The two engaged in a dating relationship for approximately 10 months. RP (05/05/2009) at 12. However, when Mr. Barnes started to become aggressive, C.R. sought to end the relationship. RP (05/05/2009) at 12.

On August 13, 2008, C.R. gave Mr. Barnes a ride from Sequim to Bremerton, Washington. RP (05/05/2009) at 14. Throughout the trip Mr. Barnes was demanding and disparaging of C.R. RP (05/05/2009) at 15.

Due to Mr. Barnes' behavior, C.R. contemplated abandoning him in Bremerton. RP (05/05/2009) at 15. However, Mr. Barnes threatened to blow up her house and car if she left him stranded. RP (05/05/2009) at 16.

C.R. took the threats seriously: having heard Mr. Barnes make similar threats against other women, and knowing that he had a history of violating restraining orders. RP (05/05/2009) at 16-17. Thus, C.R. and Mr. Barnes returned to Sequim together. RP (05/05/2009) at 17.

C.R. promised to give Mr. Barnes a ride to Port Townsend, Washington, two days later. RP (05/05/2009) at 18. C.R. was afraid that if she did not give him the ride, Mr. Barnes would get angry and follow through with the threats that he made on the previous trip to Bremerton. RP (05/05/2009) at 18-19.

On August 15, 2008, C.R. purchased a digital recorder to memorialize any threats or abusive treatment that she may endure on the road to Port Townsend.¹ RP (05/05/2009) at 23. C.R. met Mr. Barnes at a residence on River Road in Sequim (River Road). RP (05/05/2009) at 19.

¹ In the past, C.R. had been in an abusive relationship with another man and was led to believe that she was the cause for the mistreatment. C.R. wanted to record her conversation with Mr. Barnes to verify that she was not crazy, not at fault, and not deserving of any mistreatment. *See* RP (05/05/2009) at 23.

Before speaking with Mr. Barnes, C.R. turned on the recorder.² *See* Exhibit 10.

Mr. Barnes walked to C.R.'s vehicle and demanded that she roll down the window. RP (05/05/2009) at 26; Exhibit 10 at 1. Mr. Barnes leaned through the window and began to kiss and fondle C.R. against her will. RP (05/05/2009) at 26-27. *See* Exhibit 10 at 1-3. According to C.R., Mr. Barnes penetrated her digitally with his finger.³ RP (05/05/2009) at 26.

Despite C.R.'s numerous objections, Mr. Barnes forcibly removed her from the vehicle and dragged her by the wrist towards a camper on the River Road property.^{4, 5} RP (05/05/2009) at 27, 79. *See* Exhibit 10 at 2-7. C.R. pleaded with Mr. Barnes to release her. RP (05/05/2009) at 27; *See* Exhibit 10 at 2-9. However, Mr. Barnes ignored C.R.'s pleas. RP (05/05/2009) at 27. *See* Exhibit 10 at 6-7.

² The digital recording is approximately 3 hours in length, capturing the entire duration of Mr. Barnes and C.R.'s dealings on August 15, 2008. Mr. Barnes was unaware of, and did not consent to, the recording. Exhibit 10.

³ The first recording starts with the sounds of a sexual assault. C.R. repeatedly states: "No." "I don't want you to do this." "Stop." *See* Exhibit 10 at 1-3.

⁴ The recording includes sounds of a car door opening. There are sounds of struggle and C.R. cries out in pain twice. Mr. Barnes responds, "[o]h you got my favorite underwear." "Come here." "Quit running away from me." "Turn around." *See* Exhibit 10 at 2-8.

⁵ Mr. Barnes' hold on C.R.'s wrists caused her pain. *See* Exhibit 10 at 9.

Mr. Barnes managed to get C.R. inside the camper. RP (05/05/2009) at 28. *See* Exhibit 10 at 7. Against C.R.'s will, Mr. Barnes restrained her inside the camper, tried to kiss her, and attempted to remove her clothing. RP (05/05/2009) at 28. C.R. struggled against her captor, repeatedly stating that she did not want to have sexual contact, and reaching for the sides of the camper to pull herself out the door. RP (05/05/2009) at 29; *See* Exhibit at 7-9. Again, Mr. Barnes digitally penetrated C.R. without her consent. RP (05/05/2009) at 28, 80.

Mr. Barnes allowed C.R. to escape when his cell phone rang. RP (05/05/2009) at 29. However, due to Mr. Barnes' aggressive attitude, C.R. was too afraid to refuse him a ride to Port Townsend. RP (05/05/2009) at 30. The two entered the car and departed. RP (05/05/2009) at 30.

As C.R. drove toward Port Townsend, Mr. Barnes spoke of sex. RP (05/05/2009) at 30. C.R. repeatedly stated that she no longer wanted to have a sexual relationship with Mr. Barnes. RP (05/05/2009) at 30. *See* Exhibit 10 at 9-74. Occasionally, Mr. Barnes grabbed C.R.'s private areas against her wishes. RP (05/05/2009) at 30. *See e.g.* Exhibit 10 at 13, 24, 37, 58, 60. Mr. Barnes stated that their relationship would end only if C.R. agreed to have sex with him one more time. RP (05/05/2009) at 30. *See e.g.* Exhibit 10 at 14, 15, 16, 22, 38, 39, 41-44.

As the two approached Port Townsend, Mr. Barnes tried to persuade C.R. that the only way to get rid of him is to have sex with him. *See* Exhibit 10 at 13-15. When C.R. told Mr. Barnes “no,” he responded: “Well I guess I’ll be in your life forever. I’ll show up at your house and everything while your mom is home and all.” *See* Exhibit 10 at 16.

When C.R. told Mr. Barnes that her mother did not want him at the house because she thought he was dangerous, Mr. Barnes became upset. Mr. Barnes declared: “Dangerous is an understatement.... I’m so sick and tired of you simple minded f**king white f**king female[s]. Always trying to make it seem like somebody’s actually gonna f**king do something to your ass. Now you f**king should be worried.” *See* Exhibit 10 at 18.

Later, Mr. Barnes revisited the subject of sex, and C.R. reiterated her lack of consent: stating “no” and “I don’t want to do that.” *See* Exhibit 10 at 22. Mr. Barnes responded, “Well you’re gonna do that. I’m not taking no for an answer, in case you haven’t figured that out. *See* Exhibit 10 at 22.

C.R. drove Mr. Barnes to a men’s group. RP (05/05/2009) at 32. C.R. then proceeded to the Port Townsend Police Department. RP (05/05/2009) at 33. The business office at the police station was closed, and C.R. was unable to locate a call box to summon an officer. RP

(05/05/2009) at 34-35. C.R. then went to a local store to purchase some pepper spray. RP (05/05/2009) at 35.

C.R. picked-up Mr. Barnes after his meeting, and the pair headed back to Sequim. RP (05/05/2009) at 47. Immediately, Mr. Barnes made sexual remarks and demanded that C.R. have sex with him one last time. RP (05/05/2009) at 47; RP (05/07/2009) at 139. Again, C.R. refused. RP (05/05/2009) at 47.

On the return trip, Mr. Barnes made a variety of threats against C.R.: stating that they would have sex, and that he was not going to take “no” for an answer, RP (05/05/2009) at 48; RP (05/07/2009) at 139-40; Exhibit 10 at 39, 42, 52; stating that he would get five or six people to defend him against any harassment charge, and that these people would make her look like an idiot and support his suit for slander, RP (05/05/2009) at 49; RP (05/07/2009) at 139; Exhibit 10 at 39-40, 42, 46; stating that a protection order was not going to keep him away from her, Exhibit 10 at 46; stating that “revenge is a dish best served cold” and for “every action there is a reaction,” Exhibit 10 at 46-47; stating that he doesn’t have to put his hands on her to instill fear, Exhibit 10 at 51; stating that underestimating him would not be smart, Exhibit 10 at 51; stating he would kill her because he loved for her, RP (05/05/2009) at 49, RP (05/07/2009) at 137, Exhibit 10 at 51-52; stating that he would kill any

man she subsequently dated, RP (05/05/2009) at 49; Exhibit 10 at 52; and stating that he would kill her cat. RP (05/05/2009) at 49, 92; Exhibit 10 at 52). C.R. was terrified. RP (05/05/2009) at 49. *See e.g.* Exhibit 10 at 52.

When the two arrived in Sequim, Mr. Barnes claimed that he would allow C.R. to end the relationship if she agreed to buy him a bottle of alcohol. RP (05/05/2009) at 50; RP (05/07/2009) at 143; Exhibit 10 at 53-54. After purchasing the alcohol, C.R. drove Mr. Barnes to a residence on Victoria View in Carlsborg (a suburb of Sequim) (Victoria View). RP (05/05/2000) at 51. As the two drove toward the Victoria View residence, Mr. Barnes' demeanor changed and he became more relaxed. RP (05/05/2009) at 52. *See* Exhibit 10 at 56-59, 64-65.

At the Victoria View residence, Mr. Barnes invited C.R. inside. RP (05/05/2009) at 52; Exhibit 10 at 63. C.R. sat on a sofa while Mr. Barnes tended to his laundry. RP (05/05/2009) at 52. Mr. Barnes approached C.R. and began speaking to her in soft, complimentary tones. RP (05/05/2009) at 53. Mr. Barnes then initiated a kiss, which C.R. briefly reciprocated. RP (05/05/2009) at 54. However, C.R. realized that she did not desire the contact and pulled away. RP (05/05/2009) at 54, 106.

Mr. Barnes picked C.R. off the couch and carried her toward one of the bedrooms. RP (05/05/2009) at 54. *See* Exhibit 10 at 65-67. C.R. struggled against Mr. Barnes efforts, fighting to get free. RP (05/05/2009)

at 54-55, 98-99, 110-11. *See* Exhibit 10 at 65-67. Mr. Barnes laughed at C.R.'s futile efforts and responded: "Wrestlemania." *See* Exhibit 10 at 65-66. C.R. never consented to sexual intercourse. RP (05/05/2009) at 56. *See* Exhibit 10 at 65-67.

According to C.R., Mr. Barnes threw her against the bedroom wall. RP (05/05/2009) at 56. C.R.'s arms and knees were pinned against the wall, and she could not prevent Mr. Barnes from forcibly removing her pants. RP (05/05/2009) at 56. C.R. fought to keep her clothes on and escape to no avail.⁶ RP (05/05/2009) at 56.

Mr. Barnes held C.R.'s hands together in one of his own and prevented her from breaking free. RP (05/05/2009) at 56-57. Eventually, C.R. pulled herself away from her assailant, but not until Mr. Barnes had digitally penetrated her again. RP (05/05/2009) at 57. At no point did C.R. consent to sexual activity on August 15, 2008.⁷ RP (05/05/2009) at 62, 100. *See* Exhibit 10 at 65-67.

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⁶ C.R. is an asthmatic and had difficulty breathing throughout the violent struggle. RP (05/05/2009) at 57, 100, 107-08. The recording reflects gasping and heavy breathing. *See* Exhibit 10 at 66. *See also* Exhibit 10 at 4-8.

⁷ Mr. Barnes gave a different account as to what transpired in the bedroom. According to Mr. Barnes, C.R. willingly followed him into the bedroom and the two engaged in consensual sex. Mr. Barnes claimed that C.R.'s initial, recorded protests were not because she wanted to stop having sex, but because their initial sexual position was uncomfortable. When C.R. continued to experience discomfort and/or lost interest the two discontinued the sexual act. RP (05/07/2009) at 112-23, 149-55.

PROCEDURAL HISTORY

The State charged Mr. Barnes with two counts of Rape in the Second Degree, Unlawful Imprisonment, and Burglary in the First Degree. CP 21-23.

Prior to trial, Mr. Barnes moved to suppress the recording made by C.R. CP 72-76, 77-80. Mr. Barnes argued the recording was made without his consent and violated RCW 9.73.030 (Privacy Act). CP 72, 78-79. According to Mr. Barnes, the recorded statements constituted “sarcastic language” and were made in jest. CP 73-75, 80. The trial court denied Mr. Barnes’ motion, ruling that the recording included threats that were admissible under an exception to the Privacy Act. CP 70-71. However, the trial court did not foreclose any challenge to the recording on the grounds of relevance or other evidentiary rules. CP 70-71.

Mr. Barnes requested that the contested recording be played in its entirety pursuant to ER 106. CP 59-62. Mr. Barnes believed that certain self-reflections that C.R. recorded were exculpatory evidence. CP 60-62. The State did not oppose this request, and the Court allowed the recording to play in its entirety. RP (02/05/2009) at 13-14.

After an earlier mistrial, the State presented testimony and evidence showing that on August 15, 2008, (1) Mr. Barnes repeatedly threatened C.R., (2) Mr. Barnes unlawfully imprisoned C.R., and (3) Mr.

Barnes raped C.R. on two separate occasions. RP (05/05/2009) at 11-115; RP (05/06/2009) at 9-123. Mr. Barnes denied the allegations, claiming the sexual contact between him and the victim was consensual. RP (05/07/2009) at 54-168.

The trial court provided “to convict” instructions for Second Degree Rape, Burglary in the First Degree, and Unlawful Imprisonment. CP 39, 40, 46, 52. Mr. Barnes did not object to the instructions, and only requested that a unanimity instruction follow the “to convict” instruction for Unlawful Imprisonment. RP (05/07/2009) at 170.

The trial court provided the following definition of knowledge. CP 53. This instruction included the following language:

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

CP 53. Mr. Barnes did not oppose this language.

A jury convicted Mr. Barnes of Unlawful Imprisonment, and two counts of Rape in the Second Degree. CP 27-28. The jury was unable to reach a unanimous decision on the charge relating to Burglary in the First Degree. RP (05/08/2009) at 10. CP 27. The trial court sentenced Mr. Barnes to a confinement term of 119 months. RP (06/25/2009) at 20; CP 10. Mr. Barnes appeals.⁸ CP 5-6.

⁸ Mr. Barnes filed a Statement of Additional Grounds. At the time of this filing, this Court has not ordered the parties to file a response.

III. Argument:

**A. THE TRIAL COURT PROPERLY ADMITTED
THE CONTESTED RECORDING.**

Mr. Barnes argues that the taped recordings should have been suppressed as a violation of RCW 9.73.030. *See* Appellant's Opening Brief at 10-12. The State contends the trial court properly admitted the recording because (1) it falls within the exceptions to the Privacy Act, and (2) its real time record of two sexual assaults does not constitute a private conversation that is protected under the Act. This Court should hold that the contested recording is admissible.

1. The recorded conversation is not protected by the Privacy Act.

Washington's Privacy Act provides, in relevant part:

- (1) Except as otherwise provided in this chapter, it shall be unlawful for any *individual*, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
 - b. Private *conversation*, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(b) (emphasis added). Generally, evidence obtained in violation of the Act is inadmissible for any purpose at trial. RCW

9.73.050; *See also State v. Christensen*, 153 Wn.2d 186, 102 P.3d 879 (2004).

However, RCW 9.73.030(2) provides:

Notwithstanding subsection (1) of this section, wire communications or *conversations* (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) *which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands*, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) *which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues*, may be recorded with the consent of one party to the conversation.

(emphasis added). Thus, the Privacy Act establishes specific exceptions to the prohibition against recording a conversation with the consent of only one party and without prior judicial approval.⁹ *See State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

a. The contested recording is admissible pursuant to RCW 9.73.030(2)(b).

First, the recording clearly falls under RCW 9.73.030(2)(b) because it conveys explicit threats of extortion. Mr. Barnes repeatedly tells C.R. that they are going to have sex one more time and if they do not he will be in her life forever. *See Exhibit 10 at 13-16, 39.* Mr. Barnes tells C.R. that if she tries to claim harassment, he has witnesses ready to testify

⁹ In the present case, the parties do not dispute that (1) C.R. consented to the recording, and (2) a neutral magistrate did not authorize the recording.

against her and he will sue her for slander. *See* Exhibit 10 at 40, 42, 46. This Court should hold that Mr. Barnes made these threats in order to extort sex from C.R.

Second, Mr. Barnes made explicit threats of bodily harm against C.R. and others. He threatens to kill her and anyone with whom she speaks or has sex with in the future. *See* Exhibit 10 at 51-52. He threatens to kill her cat. *See* Exhibit 10 at 52. He repeatedly demands sex and tells her he will not take “no” for an answer. *See* Exhibit 10 at 22, 38, 41-42. The threat of rape would qualify as a threat of “bodily harm.” This Court should hold that Mr. Barnes’ series of explicit threats of bodily harm allowed the recording to be introduced into evidence.

Finally, Mr. Barnes made implied threats against C.R.’s. Mr. Barnes tells C.R. that she should be f**king worried. *See* Exhibit 10 at 18. He tells her that “revenge is a dish best serve cold” and for “every action there is a reaction.” *See* Exhibit 10 at 46-47. He tells her that he will take revenge against her, and it would be very bad for her to underestimate him. *See* Exhibit 10 at 51. He tells her that unlike her former boyfriend, he doesn’t have to put his hands on her in order to instill fear. *See* Exhibit 10 at 51. He tells her he loves her enough to kill her. *See* Exhibit 10 at 51. This Court should hold that these veiled threats allowed the trial court to admit the recording into evidence.

Mr. Barnes contends that only explicit threats are admissible as exceptions to the Privacy Act. *See* Appellant’s Opening Brief at 11-12. Mr. Barnes provides no authority for this supposition. Nor does Mr. Barnes address the long established principle that a threat may be either direct or implied. *See* RCW 9A.04.110(27) (“threat” is defined as a direct or indirect communication). *See also State v. Shcherenkov*, 146 Wn. App. 619, 624, 191 P.3d 99 (2008) (“any legal distinction between explicit and implied threats would be unworkable and inconsistent with long-standing precedent”); *State v. Collinsworth*, 90 Wn. App. 546, 966 P.2d 905 (1997) (defendant’s threatened use of “immediate force, violence, or fear of injury sufficient for first degree theft); *State v. Gonzales*, 18 Wn. App. 701, 703, 571 P.2d 950 (1977) (implied threat instead of verbalized threat sufficient for forcible compulsion for rape).

Curiously, Mr. Barnes fails to acknowledge or distinguish *State v. Robinson*, 38 Wn. App. 871, 691 P.2d 213 (1984). In *Robinson*, the appellate court held that the defendant’s implicit threat that “anybody” related to the defendant’s wife will “suffer the consequences” was an implied threat to inflict bodily harm and admissible under RCW 9.73.030(2)(b). 38 Wn. App. at 885. The *Robinson* Court was influenced by the Supreme Court’s examination of the Act’s former language:

The word “convey” as used in RCW 9.73.030(2)(b) recently has been defined by the Supreme Court as: to impart or communicate either directly by clear statement *or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance.*

Id. at 885.

This Court should reject Mr. Barnes’ contention that “[t]hose portions of the recording that were not explicit threats should have been excluded.” Because the recording is replete with explicit and implicit threats to extort sex or inflict bodily harm, the recording is admissible pursuant to RCW 9.73.030(2)(b).

b. The contested recording is admissible pursuant to RCW 9.73.030(2)(d).

As stated above, RCW 9.73.030(2)(d) also creates an exception for communications by hostage holders. RCW 70.85.100 states, in pertinent part:

- (a) A “hostage holder” is one who commits or attempts to commits or attempts to commit any of the offenses described in RCW 9A.40.020, 9A.40.030, or 9A.040; and
 - i. Is committing or is immediately fleeing from the commission of a violent felony; or
 - ii. Is threatening or has immediately prior threatened a violent felony or suicide; or

- iii. Is creating or has created the likelihood of serious harm within the meaning of chapter 71.05 RCW relating to mental illness.

In the present case, Mr. Barnes was convicted of violating RCW 9A.40.040 – Unlawful Imprisonment. The recording supports the charge that Mr. Barnes physically restrained C.R. against her will on at least two, separate occasions. *See* Exhibit 10 at 3-8, 65-66. C.R. repeatedly stated, “[l]et me go,” and complained later that Mr. Barnes hurt her wrists when he dragged her into the camper on River Road. *See* Exhibit 10 at 7-9. Mr. Barnes can be heard laughing while C.R. struggles against him at the Victoria View residence where he prevented her from leaving the bedroom *See* Exhibit 10 at 65; RP (05/05/2009) at 56-57. This Court should hold that Mr. Barnes was a “hostage holder” and the statements he made in commission of rape in the second degree (a felony) are admissible under RCW 9.73.030(2)(d).

c. Mr. Barnes did not have a reasonable expectation that the conversation would be kept private.

Washington’s appellate courts have consistently recognized that “the protections of the Privacy Act apply to only *private* communications or conversations.” *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996) (emphasis in the original). *See also Kadoranian v. Bellingham PDI*, 119 Wn.2d 178, 189, 829 P.2d 1061 (1992). A trial court properly

admits secret recordings to the extent they do not involve private conversations. *Clark*, 129 Wn.2d at 224.

The test to determine whether a conversation is private was first articulated in *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978). In 1992, the Washington Supreme Court adopted the *Forrester* test to determine whether the Privacy Act applies to a recorded or intercepted conversation. See *Kadoranian*, 119 Wn.2d 178. Since *Kadoranian*, every Supreme Court case that evaluates whether the Privacy Act applies to a recorded or intercepted conversation has employed the same test. See e.g. *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002); *State v. Clark*, 129 Wn.2d 211, 224-27, 916 P.2d 384 (1996); *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996).

The Supreme Court in *Clark* engaged in the most thorough analysis. Whether a conversation is “private” depends on the “intent and *reasonable expectations* of the participants, as manifested by the facts and circumstances of each case. *Clark*, 129 Wn.2d at 224 (emphasis added). The term “private conversation” is given its ordinary and usual meaning, in this context:

Belonging to one’s self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.

Id. at 225. Factors bearing upon the reasonable expectations and intent of the participants include the duration and subject matter of the conversation; the location of the conversation and potential presence of a third party; and the role of the non-consenting party and his or her relationship to the consenting party. *Id.* at 225-26. The issue of whether a conversation is “private” is determined as a matter of law. *Id.* at 225.

In this case, Mr. Barnes cannot have had a *reasonable expectation* in the privacy of his conversation with C.R. due to his explicit and implicit threats. It is completely unreasonable for Mr. Barnes to believe that C.R. would keep the threats against herself and others a secret. Mr. Barnes’ threats rendered his conversation unprotected for purposes of the Privacy Act. *See* RCW 9.73.030(2)(b). This Court should hold, under the facts in this case, that Mr. Barnes’ conversation with C.R. was neither private, nor protected.

2. The “real time” recorded sexual assaults are admissible.

Additionally, the Privacy Act is not applicable to sounds of an event. In this case there are the sounds of two sexual assaults which occur at the beginning and end of the recording. *See* Exhibit 10 at 1-9, 65-67. These sounds do not constitute a “conversation” as defined by RCW 9.73.030(1)(b). Conversation is defined as an “oral exchange of

sentiments, observations, opinions, or ideas.” *Merriam-Webster Online Dictionary* (2008).

In *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975), the Washington Supreme Court held that a secret recording that captured the events surrounding a murder was admissible evidence. In *Smith* the defendant was a Seattle police detective charged with homicide. 85 Wn.2d at 842. The defendant had previously arrested the victim. *Id.* The victim agreed to meet an unidentified caller regarding a case against him. *Id.* Prior to his meeting, the victim tried to arrange police protection, but to no avail. *Id.* at 843. The victim then purchased a small tape recorder. *Id.* The victim concealed the recorder under his clothing. *Id.* The victim then met the unidentified caller at a pre-arranged location. *Id.* The victim was shot and killed. *Id.*

A recording of the incident was discovered during an autopsy in the medical examiner’s office. *Smith*, 85 Wn.2d at 843.

The tape begins with remarks by [the victim], introducing [his neighbor who waited for the victim nearby] and stating his destination. The two men discuss the walkie-talkies and other arrangements, and [the victim] starts toward the designated alley. As he walks he narrates, describing the scene around him and describing with particular care each person in the vicinity. Remarking, ‘Everything looks quite normal,’ he says he is turning into the upper part of the alley. Then, suddenly are heard the sounds of running footsteps and shouting, the words ‘Hey!’ and ‘Hold it!’ [The victim] saying [the defendant’s name], and a sound

resembling a gunshot. The running stops, and [the defendant] tells [the victim] to turn around. [The victim] asks ‘What’s the deal?’ [The defendant] replies, ‘You know what the deal is. I’ll tell you one thing baby, you have had it.’

Several more words are exchanged, not all of which are clearly intelligible, about whether [the defendant] has ‘a charge.’ Then [the victim] asks, ‘If you wanted me, why didn’t you come to see me?’ [The defendant] replies, ‘I’ll tell you why.’ A moment later, another shot is heard. The quality of the recoding becomes ‘tinny.’ ... then [the victim], screaming, repeatedly begs for his life. More shots are fired. There is a slight pause, two more shots are heard, then certain [unclear] sounds, then silence. After a period of nearly complete silence, a voice is heard to say, ‘We’ve already called the police.’ Another voice says, ‘Hey, I think this guy’s dead, man.’ Afterward, the tape records police sirens and the sounds of the officer investigation.

Id. at 844-45. The recording was played twice during a jury trial. *Id.* at 845. The Supreme Court affirmed that the tape was admissible under RCW 9.73 and reasoned that “[g]unfire, running shouting, and [the victim’s] screams do not constitute ‘conversation’ within that term’s ordinary connotation of oral exchange, discourse, or discussion.” *Id.* at 846.

In this case, there are numerous sounds and statements that do not constitute an oral exchange of sentiments, observations, opinions, or ideas. The recording captures sounds of two sexual assaults at the beginning and end of the road trip (as well as during the car ride). During these events, C.R. is overheard stating “no,” “I don’t want you to do this,” crying,

gasping, whimpering, and struggling against Mr. Barnes. This Court should hold that the real time recordings of the sexual assaults are admissible.

B. THE ADMISSION OF THE RECORDING WAS HARMLESS.

Even if this Court assumes that the trial court erred when it allowed the tape to be played in its entirety, this Court must decide whether the error was harmless. Evidentiary error is grounds for reversal only if it results in prejudice. *State v. Neal*, 144 Wash.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.* Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole. *Id.*

In the present case, overwhelming evidence shows that Mr. Barnes committed two counts of second degree rape and one count of unlawful imprisonment. The State introduced the tape to (1) corroborate C.R.’s testimony that she was forcibly raped by Mr. Barnes, (2) explain C.R.’s decision to give Mr. Barnes a ride despite her apparent fear of the man, and (3) dispel Mr. Barnes’ argument that C.R. consented to the sexual activity. As argued above, the sounds of the sexual assault, and the threats

to extort sex or inflict harm, were admissible under RCW 9.73.030(2). This evidence, coupled with C.R.'s testimony, overwhelmingly established that Mr. Barnes (1) forcibly raped C.R., and (2) knowingly restricted C.R.'s movements in a manner that substantially interfered with her liberty.

Mr. Barnes argues that his “obnoxious, immature, and offensive – but nonthreatening – behavior” painted him in a foul light that no juror could avoid having his or her passions and prejudice swayed. *See* Appellant’s Opening Brief at 12. However, the portions of the tape that clearly demonstrated Mr. Barnes’ guilt and corroborated C.R.’s testimony were properly admitted. Thus, the outcome at trial would not have been different had the trial court limited the recording to play only the sexual assaults and the threats. This Court should hold that the trial court’s decision to admit the recording in its entirety, if error, was harmless.

C. MR. BARNES RECEIVED EFFECTIVE
ASSISTANCE OF COUNSEL.

Mr. Barnes contends that he received ineffective assistance because his attorney did not propose an instruction for Rape in the Third Degree. *See* Appellant’s Opening Brief at 13-17. According to Mr. Barnes, (1) he was entitled to the instruction, and (2) it was objectively unreasonable for his attorney to elect not to pursue the inferior degree

offense. *See* Appellant's Opening Brief at 16-17. The State contends that the evidence does not support the inference that Mr. Barnes only committed the inferior crime of third degree rape, thus, his attorney was not ineffective when he did not request the instruction. This Court should hold that the facts in this case do not allow the inferior offense instruction. The ineffective assistance claim fails.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Washington's appellate courts start with a strong presumption that counsel was effective. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance (1) was deficient, and (2) prejudiced the defense. *Strickland*, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (citing *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997)). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the

outcome of the proceedings would have been different. *McFarland*, 127 Wn.2d at 335.

1. The evidence introduced at trial does not support the claim that Mr. Barnes only committed an inferior offense of third degree rape.

Third degree rape is an inferior degree offense to Rape in the Second Degree. *State v. Wright Jr.*, 152 Wn. App. 64, 71, 214 P.3d 968 (2009). Under RCW 10.61.003, a jury can find a criminal defendant not guilty of the degree of offense originally charged by the State, but convict him or her of an inferior degree.

If the trial court provides an instruction for an inferior degree offense, the evidence must support an inference that *only* the lesser crime was committed. *Wright Jr.*, 152 Wn. App. at 71 (citing *State v. Ieremia*, 78 Wn. App. 746, 754, 899 P.2d 16 (1995)) (emphasis in the original). In other words, affirmative evidence must permit a rational juror to find the defendant guilty of the lesser offense and acquit him or her of the greater. *Id.* (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). It is not sufficient that the jury might simply disbelieve the State's evidence supporting the charged crime. *Ieremia*, 78 Wn. App. at 755.

In the present case, to prove second degree rape, the State had to present evidence that, Mr. Barnes had sexual intercourse with C.R. by forcible compulsion. *See* RCW 9A.44.050(1)(a). Forcible compulsion requires that the employed level of force was (1) directed at overcoming the victim's resistance, and (2) was more than normally required to achieve penetration. *Wright Jr.*, 152 Wn. App. at 71 (citing *State v. McKnight*, 54 Wn. App. 521, 528, 774 P.2d 532 (1989)).

In contrast, third degree rape would have required the State to prove (1) Mr. Barnes had sexual intercourse with C.R., (2) C.R. was not a spouse to Mr. Barnes, (3) C.R. did not consent to sex, and (4) C.R.'s lack of consent was expressed by words or conduct. *See* RCW 9A.44.060(1)(a). Unlike second degree rape, third degree rape does not require forcible compulsion. Additionally, it specifically requires circumstances that do not constitute second degree rape. *See* RCW 9A.44.060.

A trial court may not instruct on third degree rape, as an inferior degree offense, when the defendant contends that the intercourse was consensual and the victim testifies that the intercourse was forced. *State v. Charles*, 126 Wn.2d 353, 355-56, 894 P.2d 558 (1995).

In *State v. Charles*, the State charged the defendant with second degree rape. The victim testified that the defendant grabbed her, pushed her, and removed her clothes. *Charles*, 126 Wn.2d at 354. The victim also

testified that she struggled to get away. *Id.* In contrast, the defendant testified that the victim consented to intercourse. *Id.* at 354-55. The Supreme Court held that the trial court properly refused to instruct the jury on third degree rape because, to convict, the jury would have had to disbelieve both the defendant's claim that the intercourse was consensual and the victim's testimony that there was forcible compulsion. *Id.* at 356. Additionally, the Court noted that there was no affirmative evidence to show that the intercourse was (1) unforced, and (2) without consent. *Id.*

State v. Jeremia, a consolidated case, followed the same analysis. In the first case, the victim testified that the defendant grabbed her by the arms, carried her to a bedroom, covered her mouth, removed her clothes, and raped her. *Jeremia*, 78 Wn. App. at 749. According to the victim, she cried for her attacker to stop and repeatedly slapped him. *Id.* In the second case, the victim reported that the defendant grabbed her wrists and led her to the location where the rape ensued. *Id.* According to that victim, she protested and tried to pull away. *Id.* In both cases, the defendants argued that the intercourse was consensual. *Id.* at 749-50. Under these facts, the appellate court held the instructions on third degree rape were improper. 78 Wn. App. at 755-56.

In the present case, the facts are almost identical to *Charles* and *Jeremia*. Like the victims in *Charles* and *Jeremia*, C.R. testified that she

was forcibly raped. At the River Road property, Mr. Barnes dragged her by her wrists toward the camper. RP (05/05/2009) at 27, 79. C.R. pleaded with Mr. Barnes to release her, she struggled against her captor, and repeatedly refused to engage in sex. RP (05/05/2009) at 27-29. Nevertheless, Mr. Barnes digitally penetrated C.R. RP (05/05/2009) at 28. *See also* Exhibit 10 at 1-9.

Similarly, at the Victoria View property, Mr. Barnes forcibly removed C.R. from the sofa and carried her into the bedroom. RP (05/05/2009) at 54. C.R. struggled against Mr. Barnes, fighting to get free. RP (05/05/2009) at 54-55. Mr. Barnes pinned C.R. against the wall, held her hands together in one of his own, and removed her pants. RP (05/05/2009) at 56. Again, Mr. Barnes digitally penetrated C.R. without her consent. RP (05/05/2009) at 56-67. *See also* Exhibit 10 at 65-67.

Like the defendants in *Charles* and *Ieremia*, Mr. Barnes argued that C.R. consented to intercourse. RP (05/07/2009) at 112-23, 149-55.

However, neither the State nor Mr. Barnes presented any affirmative evidence to show that the two rapes were without consent and unforced. Thus, this Court should hold that the inferior offense instruction of third degree rape is not warranted because the evidence does not support any inference that Mr. Barnes committed only the lesser crime,

rather than the greater offense of second degree rape. *See Charles*, 126 Wn.2d at 355-56; *Ieremia*, 78 Wn. App. at 754.

Mr. Barnes mistakenly relies on *State v. Grier* to support his argument that he was entitled to an inferior offense instruction. *See* Appellant's Opening Brief at 15-17. In *State v. Grier*, the parties introduced affirmative evidence that the defendant only committed the lesser included offenses of manslaughter, rather than the charged crime of second degree murder. *See* 150 Wn. App. 619, 638-39, 208 P.3d 1221 (2009). Here, there is no affirmative evidence that supports the reasonable conclusion that Mr. Barnes raped C.R. without forcible compulsion. Because no affirmative evidence shows that Mr. Barnes only committed third degree rape, this Court should find that Mr. Barnes' argument that he was entitled to an instruction on the inferior offense is without merit.

2. Mr. Barnes cannot satisfy the two prongs of an ineffective assistance of counsel claim.

As previously stated, ineffective assistance of counsel requires the defendant to show that his or her attorney's performance at trial was deficient, and that deficient performance prejudiced the defense at trial. *Strickland*, 466 U.S. at 687. However, the trial courts will not instruct on third degree rape as an inferior degree offense when the defendant contends that the intercourse was consensual and the victim testifies that

the intercourse was forced. *See Charles*, 126 Wn.2d at 355-56. Thus, Mr. Barnes cannot show (1) that his attorney was deficient by failing to request an instruction to which his client was not entitled and the trial court would have refused, and (2) that his defense was prejudiced by not receiving an instruction for which there was no affirmative evidence to support. This Court should conclude that Mr. Barnes' ineffective assistance claim fails.

D. THE TRIAL COURT'S INSTRUCTION ON UNLAWFUL IMPRISONMENT DID NOT CREATE A MANDATORY PRESUMPTION.

Mr. Barnes argues that the trial court's instruction defining "knowledge" created a mandatory presumption and relieved the State of its burden to prove the essential elements of Unlawful Imprisonment. *See Appellant's Brief* at 18-25. Because Unlawful Imprisonment requires only a single *mens rea*, and the jury was properly instructed with respect to the offense charged, no mandatory presumption resulted. This Court should affirm.

Washington's appellate courts review alleged errors of law in jury instructions *de novo*. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *State v. Hayward*, 152 Wn. App. 632, 641, 217 P.3d 354 (2009). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury

of the applicable law. *Barnes*, 153 Wn.2d at 382; *Hayward*, 152 Wn. App. at 641. “It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden” to prove “every essential element of a criminal offense beyond a reasonable doubt.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1996); *Hayward*, 152 Wn. App. at 641-42. This Court analyzes a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Pirtle*, 127 Wn.2d at 656-57; *Hayward*, 152 Wn. App. at 642.

A mandatory presumption is one that requires the jury “to find a presumed fact from a proven fact.” *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996); *Hayward*, 152 Wn. App. at 642. To determine whether a jury instruction creates a mandatory presumption, this Court examines whether a reasonable juror would interpret the presumption as mandatory. *Deal*, 128 Wn.2d at 701; *Hayward*, 152 Wn. App. at 642. Mandatory presumptions violate a defendant’s right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *Hayward*, 152 Wn. App. at 642.

This Court has recently held that jury instructions that conflate two mental states for a single offense may create an impermissible, mandatory presumption. In *State v. Goble*, 131 Wn. App. 194, 126 P.3d 821 (2005),

this Court held that the instruction that defined “knowledge” created a mandatory presumption. In *Goble*, the State charged the defendant with third degree assault after he assaulted a police officer. *Id.* at 196. The crime of third degree assault required the State to prove (1) the defendant intentionally assaulted the victim, and (2) the defendant knew the same victim was an officer. The trial court instructed the jury that “knowledge” “is established if a person acts intentionally.” *Id.* at 202. While the jurors deliberated, the jury asked for clarification of the knowledge instruction. *Id.* at 200. The jury ultimately convicted the defendant of assault. *Id.* This Court reversed the conviction, reasoning:

[T]he instruction allowed the jury to presume [the defendant] knew [the victim’s] status [as an officer] at the time of the incident if it found [the defendant] intentionally assaulted [the victim]. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden . . .

Id. at 203.

In *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009), this Court held that the trial court’s definition of “recklessness” created a mandatory presumption. In *Hayward*, the State charged the defendant with second degree assault, an offense that required the State to prove two different mental states. The trial court instructed the jury that “[a] person commits the crime of assault in the second degree when he or she

intentionally assaults another and thereby *recklessly* inflicts substantial bodily harm.” *Hayward*, 152 Wn. App. at 640. The trial court also instructed the jury that “[r]ecklessness is established if a person acts intentionally.” *Id.* This Court reversed the defendant’s conviction because the instruction “impermissibly allowed the jury to find [the defendant] *recklessly* inflicted substantial bodily harm if it found that [the defendant] intentionally assaulted [the victim].” *Id.* at 645. This Court held that the instruction conflated the two intents that the jury had to find regarding the single assault. *Id.* at 645.

In the present case, the instruction for Unlawful Imprisonment did not create a mandatory presumption because it did not conflate two mental states within the same offense, which was the situation in both *Goble* and *Hayward*. The trial court properly instructed the jury that a conviction for unlawful imprisonment required the State to prove (beyond a reasonable doubt) that Mr. Barnes knowingly (1) restrained the movements of C.R. in a manner that substantially interfered with her liberty; (2) without her consent, or by physical force, intimidation, or deception; and (3) without legal authority. CP 52. This instruction followed the language of the statute, which required the jury to find only one mental state. Compare RCW 9A.40.040 and CP 52.

The record clearly shows that Mr. Barnes knowingly restrained C.R. against her will in the camper on River Road. Mr. Barnes forced C.R. to enter the camper prior to the start of their journey. RP (05/05/2009) at 27-29. C.R. can be heard struggling against Mr. Barnes, repeatedly demanding and pleading to be released: “No. I don’t want to go in there.”; “Let me go okay?”; “No I don’t want to be here. . . . let me go now. Please. Just let me go. Please.” *See e.g.* Exhibit 10 at 5-9.

Additionally, the record clearly shows that Mr. Barnes knowingly restrained C.R. when he forced her into the bedroom at the Victoria View residence. The recording includes obvious sounds of physical struggle. *See* Exhibit 10 at 65-67. Mr. Barnes can be heard saying “[w]restlemania,” which allows the reasonable inference that he physically restrained C.R.’s movements. *See* Exhibit 10 at 65. C.R. testified that she was forcibly detained inside the bedroom. RP (05/05/2009) at 54.

Because the jury was only required to find one mental state for the charged offense, there is no reason to believe that a mandatory presumption resulted in the present case. Furthermore, the trial court instructed the jury that it had to be unanimous as to which facts and circumstances supported the unlawful imprisonment conviction. CP 23. The instructions did not deny Mr. Barnes the opportunity to present his defense that C.R. was a willing participant in the events that transpired on

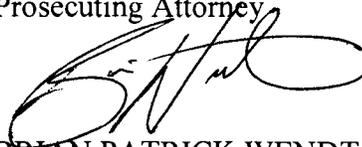
August 15, 2008. This Court should hold that there was no instructional error and affirm.

IV. Conclusion:

For the foregoing reasons, the State respectfully requests that this Court affirm Mr. Barnes' convictions and sentence for two counts of rape in the second degree, and one count of unlawful imprisonment.

DATED this January 18, 2009.

DEBORAH KELLEY
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian Patrick Wendt", written over the typed name below.

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