

NO. 44075-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREAN BARNES

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Kenneth Williams, Judge

BRIEF OF APPELLANT

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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 “no”, “stop” and “I don’t want to” were nonverbal communications admissible under an exception to the Privacy Act.
3. The trial court erred by denying the defense request for a lesser rape in the third degree instruction
4. There was insufficient evidence of burglary in the first degree.
5. Counsel was ineffective for failing to move to suppress the tape recording under the rules of evidence: ER 401, 402, 403.

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. Where the complainant dismissed the sexual encounter as rape and terminated the sex act without against the defendant’s wishes, was the act of sex committed with forcible compulsion?
4. Was counsel ineffective for failing to move to suppress the illegal tape recording under the rules of evidence?

5. Was there sufficient evidence of burglary in the first degree where the defendant left his clothing and belongings, washed his clothes and usually came and went as he pleased with the permission of the home owner?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Corean Barnes and Christina Russell met in 2007 and dated between 2007 and 2008. RP 199. They developed a sexual relationship. RP 240. During that relationship Mr. Barnes was never abusive. RP 240. Ms. Russell agreed to give Mr. Barnes a ride to attend to errands on both August 13 and 15, 2008. RP 200.

In August of 2008, Ms. Russell decided she wanted to break up with Mr. Barnes. RP 204. She purchased a digital recorder, turned it on, and went to pick up Mr. Barnes to give him a ride. RP 204-205. She did not get his permission; nor did she tell him she was recording their conversations. The transcript of the redacted recording is attached hereto as Exhibit A.

The recording was played to the jury in a redacted form as Exhibit 3. Supp. CP. The recording included the two interactions that Ms. Russell later described as rape. First, Ms. Russell can be heard saying “no” 27 times before she took Mr. Barnes on his errands and before the alleged rapes. Exhibit 13, pp. 1-8, Supp. CP. She later claimed that Mr. Barnes was touching her breast, digitally penetrating her vagina, and dragging

her to his trailer. RP 210-213. Thereafter, Ms. Russell drove Mr. Barnes on errands to Port Townsend. After the errands were complete, Ms. Russell drove Mr. Barnes to Mr. Johnson's home where she voluntarily entered Mr. Johnson's home and voluntarily kissed Mr. Barnes, but claimed that Barnes penetrated her against her will for 1-2 minutes until she made Mr. Barnes stop before ejaculating(although she later recorded herself saying that he hadn't done anything wrong yet.¹) RP 224-229, 258. Ms. Russell had her pepper spray with her while in the house. RP 258. According to Ms. Russell, she did not use her pepper spray because she did not think it was necessary. RP 261. Ms. Russell is heard saying "no," "I don't want to," "stop," . Ex 3. After Mr. Barnes and Ms. Russell had intercourse, she drove him to his to rock plaza. RP 262.

On the recording, Mr. Barnes told Ms. Russell their relationship wouldn't end until he said it could end, and that he would let her break up with him if she had sex with him one more time. Exhibit 3 pp. 10-13. 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. RP 213, 217. Ms. Russell told the tape prior to picking up Mr. Barnes that she was afraid that Mr. Barnes was going to try to rape her but wished he would so she

¹ 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 235

could get that on tape and he could be arrested. RP 247. Ms. Russell also explained that she did not call the police because she did not want to cause a big scene unless it was going to keep Mr. Barnes away and she did not believe that whatever he did to her was sufficient to do more than simply cause a big scene. RP 247-248.

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 3, pp 9, 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,") Exhibit 3, pp. 17-18, Supp. CP. Mr. Barnes was never abusive toward Mr. Russell during their relationship. RP 240.

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 261, 264. 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 235. 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 with sexual motivation. CP 200.

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 163. He argued that the recordings violated the Privacy Act, RCW 9.73.030. On remand for this Court, the trial court, believing it was following this Court's directive by redacting several threats, but permitting a redacted transcript and recording that contained 19 pages of conversation that did not contain any threats. Ex 3; CP 163. Memorandum Opinion on Motion to Suppress.

The second retrial started on September 18, 2012. 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.² RP 1-320. Mr. Barnes denied the first alleged penetration, and contended that the second incident involved consensual sex. RP 347-361, 374-375

The jury convicted Mr. Barnes of Unlawful Imprisonment, Burglary in the first degree with sexual motivation and two counts of Rape

² 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 199-200. She claimed that Mr. Barnes told her that he would blow up her house if she left him in Port Townsend. RP 203. 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 203. 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 203.

in the Second Degree. CP 54, 57, 58, 59, 196, 197. The court ruled that the unlawful imprisonment conviction merged with the rape convictions, and the burglary with sexual motivation and the rape constituted the same criminal conduct and sentenced Mr. Barnes to 119 months to life. 563-564, 573-574. CP 14. Mr. Barnes timely appealed. CP 11.

Burglary

Mr. Barnes rented a room from Mr. Johnson until the middle to end of August. RP 306. On the day in question, August 15, 2008, Mr. Barnes kept clothing at Mr. Johnson's and frequently did his laundry on the premises and was allowed to be at Mr. Johnson's home when Mr. Johnson was home. RP 307. Mr. Barnes was permitted to enter the home through an unlocked door. RP 314. On the day of the incident, Mr. Barnes was doing his laundry and gathering some of his belongings when Mr. Johnson arrived at his home shortly after Mr. Barnes' arrival. RP 315-317. Even though Mr. Johnson testified that Mr. Barnes was not allowed to be in his home without prior permission, he also testified that Mr. Barnes lived in the home until the middle to end of August. RP 306, 315-316. Mr. Barnes believed, as per his custom with Mr. Johnson that he could do his laundry and collect his belongings as needed. RP 389, 393-394.

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); accord, *State v. Babcock*, 168 Wn.App. 598, 604-605; 279 P.3d 890 (2012). 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).

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).

Threat," is defined as "[a] communicated intent to inflict harm or

loss on another or on another's property, esp[ecially] one that might diminish a person's freedom to act voluntarily or with lawful consent”

Black's Law Dictionary 1618 (9th ed. 2009); *see also Webster's Third New International Dictionary* 2382 (2002) (“threat” defined as “expression of an intention to inflict loss or harm on another by illegal means and esp[ecially] by mean involving coercion or duress of the person threatened ...”).) *State v. Schaler*, 169 Wn.2d 274, 293, 236 P.3d 858 (2010). RCW

9A.04.110 (28)(a) “Definitions” defines “threat” as:

(28) “Threat” means to communicate, directly or indirectly

the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

(b) To cause physical damage to the property of a person other than the actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships;

(29) "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail;

(30) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

Id.

The definition of "threat" while broad, "must be strictly construed" in order to effectuate the underlying legislative intent. *Williams*, 94 Wn.2d at 548; *see also Christensen*, 153 Wn.2d 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 the tape recording that largely contained language that cannot be defined as a threat under RCW 9.73.030(2) or 9A.04.110 (28)(a). 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.³

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).

The bulk of the recording do not convey threats, even under a broad definition because they do not communicate intent to inflict harm or loss to MS. Russell, or by illegal means involving coercion or duress to harm Ms. Russell or her property, in any manner that might diminish her freedom to act voluntarily or with lawful consent. The statements convey Mr. Barnes’ frustration and desire to have sex and discuss his past feelings

³ 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.

but none of the statements are in any sense actual threats.

In *State v. Brown*, 137 Wn.App. 587, 154 P.3d 302. (2007), the Court held insufficient to establish a “threat” the defendant's statements about a judge regarding the defendant’s past thoughts about harming the judge and the judge's family. *Brown*, 137 Wn.App. at 591.

In *State v. Caliguri*, 99 Wn.2d 501, 507-508, 664 P.2d 466 (1983) the court held that under the Privacy Act ,the trial court did not err in playing a tape that conveyed planning among coconspirators to implement an earlier request to commit murder. *Id.*

Here, the evidence prejudiced Mr. Barnes because it showed him engaged in offensive but nonthreatening behavior: begging, demanding, and pressuring Ms. Russell to have sex with him. However as in *Brown*, the evidence did not constitute threats. 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 negative 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*.

- A. The Trial Court Erred by Construing as non-verbal communication the Words “No”, “stop”, and “I don’t want to”, and

“Permitting their Admissibility in Violation
of the Privacy Act.

The Privacy Act is inapplicable to sounds of an event, however, “No”, “stop”, and “I don’t want to” are verbal communications not exempt from the Privacy Act. *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975). The trial court erroneously categorized these words as non-verbal threats but explicitly ruled that the words were to inform the jury that Ms. Russell repeatedly said she did not want to have sex with Mr. Barnes: i.e. verbal communications. RP 80-81. These remarks **did not convey threats**, either directly or indirectly, and did not fall under the exceptions to the Privacy Act. Under *Smith*, the word “no” and “stop” do not “convey” threats thus the trial court erred by permitting the jury to listen to these communications.

B. Hostage Holder Exception Inapplicable

The trial also erroneously admitted the tape recording under the hostage holder exception which authorizes the admission of certain statements made “which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100. RCW 70.85.100 defines a “hostage holder” as someone who commits unlawful imprisonment under RCW 9A.40.040. Under the hostage holder exception authorizes the admission of the portion of the recording only during the period of

unlawful imprisonment. Here, the trial court erred in admitting the portions of the recording that did not fall within this or any other statutory exceptions.

For the sake of this argument only, according to Ms. Russell she voluntarily stayed with Mr. Barnes during the entire duration of the recording with the exception of 1-2 minutes. Ms. Russell informed the jury that on August 15, 2008, she arrived at Mr. Barnes' residence to give him a ride because she had promised to do so. RP 212, 227-229; EX 3 pp. middle 7-middle page; bottom p. 17-18. She was not coerced or threatened into driving Mr. Barnes around that day and not even arguably a hostage, during more than 1-2 minutes, this exception does not apply to permit the 22 minute recording. RP 549.

II. NOTWITHSTANDING PRIVACY ACT ISSUES, COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ADMISSION OF THE TAPE RECORDING UNDER THE EVIDENCE RULES: ER 401, 402, AND 403.

Here, the trial court did not conduct an ER 401, 402 or ER 403 analysis prior to admitting the defense challenged tape recording. CP 101, 138. Evidentiary errors that are non-constitutional require reversal when within reasonable probabilities, the error materially affected the outcome

of the trial. *State v. Beadle*, 173 Wn.2d 97, 121, 265 P.3d 863 (2012).

Evidentiary errors admitting *res gestae* evidence, are reviewed “not under ER 404(b), but under ER 401, ER 402, and ER 403.” *State v. Briejer*, 172 Wn.App. 209, 225, 289 P.3d 698 (2012). Only relevant evidence is admissible at trial. ER 402. “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403. Evidence that is likely to stimulate an emotional response rather than a rational decision, creates a danger of unfair prejudice. *Beadle*, 173 Wn.2d at 121; *Briejer*, 172 Wn.App. at 225-226; *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d. 615 (1995).

Recently this court addressed the proper analysis for considering the admission of “*res gestae*” under ER 404(b). *Briejer*, 172 Wn.App. at 225. Following, *State v. Grier*, 168 Wn.App. 635, 645, 278 P.3d 225 (2012), which departs “from characterizing this ‘*res gestae*’ evidence as an exception to ER 404(b), the Court held that ” [s]uch a distinction, in our

view, is necessary because, as other courts and commentators have noted, “characterizing the res gestae rule as an exception to ER 404(b) is indefinite, is prone to abuse, and ‘tends merely to obscure’ ER 404(b) analysis.” *Briejer*, 172 Wn.App. at 224, quoting, *Grier*, 168 Wn.App. at 645 n. 19, 278 P.3d 225, quoting, *United States v. Krezdorn*, 639 F.2d 1327, 1332 (5th Cir.1981).

In *Briejer*, this Court reversed a conviction for credit card theft and remanded for a new trial where the trial court admitted res gestae regarding the defendant’s extreme sports activities because those activities while minimally part of the background leading up to the reason for the investigation, operated as propensity evidence that would have led a reasonable juror to believe that the defendant was deceitful. This Court held that the nexus requirement was missing between the extreme sport evidence and the credit card theft. *Briejer*, 172 Wn. App.at 227. This Court reversed and held that the evidence was unfairly prejudicial and an abuse of discretion under ER 401, ER 402, ER 403, as well as under ER 404(b). *Id.*

Rape in the second degree required the state to prove: a rape “under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) By forcible compulsion”. RCW 9A.44.050. The conversations between Mr. Barnes

and Ms. Russell did not create a nexus to the element of “forcible compulsion” said to have occurred for a 1-2 minute period following the tape recording. Ms. Russell was not threatened or coerced into following Mr. Barnes into the house; she chose to follow Mr. Barnes into the house because she wanted Mr. Barnes to rape her so she could get rid of him, but following the 1-2 minute incident, she told the tape recorder she did not believe that she had been raped. RP 261-262

Here similar to *Breijer*, Mr. Barnes conversations while background evidence, operated as propensity evidence that would have led a reasonable juror to believe that the Mr. Barnes was a rapist. The conversation on the tape recorder in its entirety should have been suppressed because it was irrelevant to any element and unfairly prejudicial and did not rise to the level of creating a “logical nexus [] between the evidence and the fact to be established.” *Breijer*, 172 Wn. app.at 225. RP 225-228, 240, 250, 258.

A. Defense counsel was ineffective for failing to object to the tape recording under ER 401, 402 and 403.

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). To establish ineffective assistance, an appellant must show

deficient performance and prejudice. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). . The presumption of adequate performance is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d 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 object to the admission of inadmissible evidence on all proper grounds can deprive an accused person of effective assistance when it is not based on sound trial strategy. *Nichols*, 161 Wn.2d at 14-15. For the defendant to prevail he must establish a lack of sound trial strategy. *Id.* Generally, a party may not raise an objection not properly preserved at trial absent manifest constitutional error unless the failure to object argument is based on ineffective assistance of counsel which may be raised for the first time on appeal. *Powell*, 162 Wn.2d at 82-83; *State v.*

Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007), overrule don other grounds in *State v. Jasper*, 174 Wn.2d 69, 271 P.3d 876 (2010); *State v. Contreras*, 92 Wn.App. 307, 317, 966 P.2d 915 (1998), citing, *McFarland*, 127 Wn.2d at 334 n. 2, 899 P.2d 1251).

Here, the failure to move to suppress under the rules of evidence cannot be considered legitimate trial strategy where the majority of the defense case was devoted to preventing the admission of the tape recording. The defense argued the evidence was inadmissible under the Privacy Act and gained nothing by failing to move to suppress on grounds of relevance and unfair prejudice. Had the trial conducted an ER 403 balancing it likely would have concluded that the evidence was unfairly prejudicial.

Moreover, without the tape recording the verdict likely would have differed. Thus Mr. Barnes demonstrates both deficient performance and prejudice requiring reversal of his convictions and remand for a new trial.

III. THE TRIAL COURT ERRED BY DENYING THE DEFENSE REQUEST FOR A LESSER INCLUDED INSTRUCTION ON RAPE IN THE THIRD DEGREE WHERE THE EVIDENCE PROVIDED WAS SUFFICIENT TO SUPPORT THAT INSTRUCTION.

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, 141 Wn.2d at 460-461.

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. *Fernandez-Medina*, 141 Wn.2d 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*, 141 Wn.2d at 456. The right to an appropriate lesser degree offense instruction is

“absolute,” and failure to give such an instruction requires reversal. *Parker*, 102 Wn.2d at 164.

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 Ms. Russell, 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*, 141 Wn.2d at 456.

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.

Mr. Barnes was entitled to the instructions. Taking the evidence in a light most favorable to Mr. Barnes, the testimony showed that Ms. Russell’s 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 the context of their relationship). The jury was also entitled to believe (from Ms. Russell’s testimony and the recording) that she did not consent, and that her lack of consent was clearly expressed through her words and conduct.

The trial court's erroneous denial of the request for a rape in the third degree instruction denied Mr. Barnes his right to a fair trial. For this reason, his convictions must be reversed and the case remanded to the trial court for a new trial. *Grier, supra*.

IV. THE STATED FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF BURGLARY IN THE FIRST DEGREE.

Due process requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. Washington*, 135 Wn.App. 42, 48, 143 P.3d 606 (2006). Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). “‘A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.’ ” *Id.* (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). The reviewing courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Under 9A.52.020. Burglary in the first degree:

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

The element at issue in this case is the entering or remaining unlawfully. *Unlawfully Entering Premises*. “A person ‘enters or remains unlawfully’ in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(5). *State v. J.P.* 130 Wn.App. 887, 892, 125 P.3d 215 (2005).

In *State v. Wilson*, 136 Wn.App. 569, 150 P.3d 144 (2007), the defendant entered a home he shared with the victim in violation of a no contact order. *Wilson*, 136 Wn.App. at 604, 607. The Court reversed the burglary conviction and held that the violation of a no contact order did not create unlawful entry or remaining on a property where the owner consented. RCW 9A.52.010(3). *Wilson*, 136 Wn.App. at 609, 612.

In Mr. Barnes case, Mr. Johnson rented a room in his home to Mr. Barnes until the middle to end of August. RP 306. On the day in question, August 15, 2008, Mr. Barnes kept clothing at Mr. Johnson’s and frequently did his laundry on the premises and was allowed to be at Mr.

Johnson's home when Mr. Johnson was home. RP 307. Mr. Johnson kept the doors unlocked so Mr. Barnes could enter when he needed to. RP 314. On the day of the incident, Mr. Barnes was doing his laundry and gathering some of his belongings when Mr. Johnson arrived at his home shortly after Mr. Barnes, thus the entering and remaining was not unlawful. RP 315-317.

Given the fact that Mr. Barnes kept clothing at Mr. Johnson's, frequently did his laundry at Mr. Johnson's and Mr. Johnson arrived at his home when Mr. Barnes was present, there is insufficient evidence that Mr. Barnes committed first degree burglary as the element of entering and remaining unlawfully is not supported by proof beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Mr. Barnes's respectfully requests this Court reverse his convictions or in the alternative remand to the trial court for a new trial.

Respectfully submitted on April 21, 2013

LISE ELLNER

Lise Ellner

Lise Ellner WSBA No. 20950
Attorney for the Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office lschrawyer@co.clallam.wa.us; and Corean Barnes DOC# 317817 Airway heights Corrections Center P.O. Box 2049 Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on April 21, 2013. Service was made by electronically to the prosecutor and to Mr. Carter by depositing in the mails of the United States of America, properly stamped and addressed.

Lise Ellner

Signature

APPENDIX A

'CLALLA\I\ COUNTY SHERIFF'S DEPARTMENT
CASE REPORT NARRATIVE

9/17/125:50 PM
PAGE NUMBER: 1
#2008-8578

Case Number:

2008-8578

RECORDI7\..fG

CR: Christina Russell

CB: Corean Barnes

CR: What are you doing?

CR: No, I don't want, no.

CB: What happened to your thumb?

CR: What?

CB: What happened to your thumb?

CR: No it's just the nail.

Sounds in background.

CR:

What?

j
/

You don't like my touch any more?

CB:

CR:

I don't want to do this any more.

CB:

Just one last time?

CR:

CB:

No.

One last time.

CR:

No. I don't want to.

CB : You know when you - these things what they do to me. You're telling me you don't

want to?

CR: No.

I certify under penalty of perjury that the foregoing is true and correct.
Written and signed in Clallam County

Deputy:

Date:

Notarizing/Notary:

"-----,-----,----- .

Date:

._-----_. _---

CLALLAM COUNTY SHERIFF'S DEPARTMENT
CASE REPORT NARRATIVE

CB: Whispering.

CR: No. What is this?

CB:

CR: No. No. Stop.

CB: Come here. Come here. Stop being like that.

CR: I don't want to.

CB: Oh my goodness.

Sound of car door open.

CR: Do you want me to give you a ride or not?

CB: Mmmh.

CR: Well then you better be nice and do what I say.

C3: I am being nice.

_ .o. _":- not. I iori't want you to do this.

CB: Yes I am.

CR: o. No. No.

CB: Do I need to pick you up out of here?

CR: You better not.

CB: I will.

CR: No.

CB: Laughing. Ow. What the hell you doing.

CR: I don't want you to.

CB: How was work?

I certify under penalty of perjury that the forgoing is true and correct.
Written and signed in Clallam County.

DUle,;

Deputy: __ __

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#2008-8578

Dale:

CLALLAM COUNTY SHERIFF'S DEPARTMENT
CASE REPORT NARRATIVE

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#2008-8578

CR: Okay.

Scratchy sounds.

CB: Come here.

CR: No.

Rustling sounds.

CR: Stop.

CB: Will you stop acting like, why you acting like that?

CR: I told you, I don't like that. I promised you I'd give you a ride and that's why I came here, so you won't do something crazy.

CB: Mmh. Why would I do something crazy.

CR: Cuz you said so. You're gonna be late.

CB: Uhhuh.

C?: "eah yo are.

CB: It's only like, not even 4:15. Stop.

CR: I told you no. Uh. Quit.

Rustling sounds,' scratchy sounds. Crying.

CR: Uh. Uh. I don't want to. I don't want to do this.

CB: Why not. We always do it.

CR: No.

CB: You don't want me any more? Is that it?

CR: I told you.

Scratchy sounds.

I certify under penalty of perjury that the forgoing is true and correct.
Written and signed in Clallam County

Deputy: _

.Gate::

Supervisor: . __ . __ .. _~ .. ~_..

Dat~:

CLALLAM COUNTY SHERIFF'S DEPARTMENT
CASE REPORT NARRATIVE

91171125:50 PM

PAGE NUMBER: 4

#2008-8578

CB: Is that what you're telling me? You don't feel anything? Feel what I feel? Huh?

CR: No. Tired of you yelling at me.

CB: Oh you got my favorite underwear.

CR: Uh. Uh. Uh. Crying.

Rustling sounds. Breathing hard.

CB: Come here.

CR: You know you didn't miss me.

CB: Yes I do.

CR: No. You don't miss me. Stop. Uh. Gasping.

Rustling sounds.

CR:

C3- _ 0_

CB: It looks like it was changing color or something.

CR: It is.

CB: Oh.

CR: Needs to be dyed. Are you done now?

Gasping and rustling sounds. Voices unintelligible.

CR: Ouch. No. Stop. I don't want you to do that. Uh. Uh. Ow. Ow. Uh. Uh. Stop.

CB: Laughs. What am I, _

CR: No.

CB: You're not? How about now?

CR: o. I don't want to go in there.

CB: Come here. Quit running away from me.

CR: I don't want to.

CB: Babe stop.

CR: No, I want you to stop. Stop. No. No. I don't want to. No.

CB: Laughs. You're funny. Stop.

Scratchy sounds.

CR: No. Uh. No. Stop. Stop. (Sound of motor in background). Let me go okay?

do this . I'm just gonna go.

CB: No you're not.

I certify under penalty of perjury that the forgoing is true and correct.
Written and signed in Clallam County.

Deputy

Supervisor: _

Date:

CLALLAM COUNTY SHERIFF'S DEPARTMENT
CASE REPORT NARRATIVE

CR: Yes I am.

CB: I want to show you something.

CR: I don't want to go in there.

CB: No you're not.

CR: Yes I am. Stop. Stop. No. Dh. Dh.

CB:

CR: What?

CB:

CR: No.

CB: No, I want to show you.

CR: No, I don't want to go in there.

Rustling sounds. Laughing.

C3: step up.

CR: No I don't want to.

CB: Step up.

? We gotta go in. I'm just trying to show you.

CR: You're not.

CB: One. Yeah, I am.

CR: No you're not.

CB: Yes I am.

CR: You're not. I don't want to do this any more.

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#2008-8578

CB: Would you. Look. Listen to me. Listen to me. Stop. Stop. Stop. Listen.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _ _ _ _ _

Superv isor: . . _

Dale:

Dale:

-._-----

CLALLAM COUNTY SHERIFF'S DEPARTMENT
CASE REPORT NARRATIVE

Rustling sounds.

CR: Stop.

CB: See look. Like I said, I got a bed right there.

CR: Uh. Breathing heavily. Uh. No I don't want to be here.

Please. Just let me go. Please.

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____ let me go now.

CB: I will if you turn around and look at me.

CR: No you won't. Please. Just let me go now. Uh. No.

CB: You keep doing that _

CR: No.

CB: Turn around. Turn around. Turn around. Turn around. Turn around.

CR: Stop.

Quit. Let me go.

CB: . o.

CR: Let me go. Don't. Uh. Uh. Stop it. I don't want to. No.

CB: Will you.

CR: I don't want to go in there.

CB: You're not going in here. Come here. Come here.

CR: What?

CB: Come here.

CR: What?

CB: Come here.

I certify under penalty of perjury that the forgoing is true and correct.
Written and signed in Clallam County

Deputy: . "

Dale:

Supervisor:

! -----_ .. _-----

Dale:

CR: No. No. Rustling sounds. No.

Music in background

CB: Stop.

CR: Well then let me go. Just let me go.

CR: I just don't. I just don't want to any more.

CB: Have a cigarette before we go?

CR: Yeah.

CB: Are you sure that's okay?

CR: Yeah.

CR: What are you doing?

CB: Smoking and texting. What does it matter to you?

~~~~~S" \_lla'-e:o give you this ride.

CB:

CR: My time. You hurt my wrist.

CB: I'm sorry, I didn't mean to. You're the one who's being a\_.

CR: No, I just don't want to do that.

CB:

See.

\_\_\_\_ . What's up.

Scratchy sound

CR: Yeah.

CB: I want you to know I'm gonna finger your pussy while you're driving.

CR: That is not okay.

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County

Deputy \_ . ...

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Supervisor: \_ . \_

Dule: . \_

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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#2008-8578

CB: It will be.

CR: No it won't.

CB:

CR: If you do that, you're getting out.

CR: No I just don't want to do that any more.

CB: Oh you just don't want to do it with me any more.

CR: Yeah, that's basically what I'm saying. I'm trying to end this and you don't want to end

it.

CB: It's not gonna end until I say so.

CR: It's not gonna end until you say so?

CB: You know what. I'm going to fuck you now. Do not number on you. Do

:-0 hear me? Again. You don't want me to say nothing Come on.

\_\_ : -- \_ '::::0 x, when ve fuck, when we have sex. \_

C:K: );"0.

CB: Why.

CR: I don't want to do that.

CB: Well you're gonna do that. I'm not taking no for an answer, in case you haven't figured

that out. I never do. Because actually the camper shit I just wanted to show you like, you know, the little area. I wasn't trying to fucking have sex with you. Cuz number one that's not cool enough to have sex in.

Rap music in background.

CR: No. I don't want you to do that. I don't want you to.

CB: Get you all hot for it.

CR: No.

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County.

Deputy:

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Supervisor: .

Date:

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CB: Be honest about it. Get you all wet?

CR: No.

CB: Horny?

CR: No.

CB: No? Huh?

CR: It's

CB:

CR: What? CB:

no for an answer.

\_\_\_\_\_ Well we gonna fuck one last time. I already told you that I'm not taking

CR: You're not taking no for an answer.

CB: Mmhuh.

CR: You can't do that.

CB: Yeah I can.

CR: No you can not.

CB: Either that or I be in your life forever.

CR: No.

CB: Wouldn't it be simpler just to be like okay, fine let's get it done and over with. Don't

worry about it no more.

CR: No because I don't want to do that any more.

CB: Really. So you're telling me you would rather put up with me, have me in your life still

instead of just like you know.

CR: No, you're not gonna be in my life.

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County

Supervisor:

Dale:

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CB: Wanna bet?

CR: Why would you still be in my life?

CB: Well soon as we have sex one last time. I'll always be around. But it would be simpler

to just be like okay fine, get it done and over with.

CR: No I won't. I don't feel comfortable any more.

CB: What do you mean, you don't feel comfortable any more?

CR: Sure hope \_

CB:

CR: You know I think you should be, be happy for what we had and then ...

CB: No. No.

CR: ... that's it, bye.

CB: !. o. One last time ain't gonna kill you. May make you walk funny a little bit, but it ain't

5 .... :-~ " .. ;'.. .... -Oll.

CR: I don't want to.

CB: Well. You either let or I can just bug you for the rest of your life.

CR: No. That's harassment.

CB: That's not harassment.

CR: That is harassment iff don't want you to bug me and you bug me.

CB: Prove it.

CR: Prove what?

CB: That it's harassment.

CR: It is harassment. That's a common known harassment. I've asked you to leave me alone

forever and you won't.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy:

Supervisor: \_\_ . . . . \_ . . . . \_

Vale:

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CR: What?

CB: Mmhuh.

CR: Whatever happened to lade? Why didn't you just like stay with her?

CB: She turned out to be crazy.

CR: Well I'm crazy too.

CB: The sex is good.

CR: Oh come on, leave me. I'm crazy.

CB: The sex was good.

CR: Do you want me to crash my car to prove it?

CB: Go right ahead. It's your insurance.

CR: Well I'll crash it on your side of course.

C3: Got air bag.

CR: No it doesn't. Have one in the front, not on the side.

CB: Well, you got insurance, right, you'll be paying all the medical bills then I'll just sue your

ass.

CR: Well at least I won't have to have sex with you.

CB: Oh you still have to have sex with me. Either that or.

CR: Not when you're injured.

CB: Either that or find other way, make sure you get taken care of.

CR: What?

CB: Yeah.

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County.

Deputy: \_ \_

Date:

Supervisor: \_

Date:

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CR: Find other ways?

CB: Mmhuh. You're not gonna win this, so you might as well give up.

CR: Are you threatening me?

CB: No.

CR: Well that sounds like a threat to me. I don't want to do something and you're.

CB: Who's threatening you?

CR: You're saying that.

CB: You just threatened me how about you gonna freaking crash the car on my side.

CR: Well that's because I feel desperate. I don't want to have sex with you and you're asking

me to.

CB: Well you are gonna have sex with me. I ain't asking you, I'm telling you. You want to be done with me, that's, that's, that's the agreement. You want to be done with me? That's the agreement. Then you are out. The slate will be wiped clean. You won't ever have to see me

e'er again.

c~: I'll not do that consensually.

(Rustling sound).

CB: my dick in there, one last time. And I guarantee you I'm doing it. You always

enjoyed sex with me didn't you? Huh?

CR: Just because I enjoyed it before doesn't mean I want to do it again.

CB: It was just a couple days ago we did it. Laughs.

-----\_ ..

CR: It doesn't matter. Things chang~. Girls should never be made to do something like that,

even if they were doing it before.

CB: Well, I gave your options ma'am, what you choose with it is up to you.

CR: What's my options?

CB : You already know what your options are.

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County

Deputy:

Date:

Supervisor: -----\_.\_.\_.\_ \_ ---

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CR: You're going to continue to bother me?

CB: Mmhuh. (Affirmative). What you gonna tell your mom, he won't leave me alone. Or

\_\_\_\_. (Raises voice) Keeps bothering me, he's bothering me. Like I said, that shit won't

work. Soon as you go to the cops, the day you go you know I know about it. You'd be surprised

how I find out things. You're not gonna say anything? I hate it when you just get silent.

CR: What do you want me to say? Do you want me to argue with your something?

CB: It's not about arguing with me.

CR: You want me to agree to do what you asked?

CB: Mmhuh, right. Hello? Jump in here with some feedback any time now.

CR: I can't agree.

CB: You can't agree?

CR: I can't agree to that.

CB: Why not?

CR: Cuz I have rights. And I have a right to say no.

CB: Oh now you're acting like it's fucking rape. Seriously? So that's the way it's gonna be

now?

CR: What do you mean?

CB: You know exactly what I mean. That's the way it's gonna be?

CR: I'm not gonna have sex with you.

CB: Okay. Your choice. You sure? Cuz I can become real annoying. And so what, you

gonna get what, a harassment order? What the fuck is a piece of paper? Really. Is that what you was thinking next, just go to the courthouse tell them I'll keep harassing you and, you know, \_\_\_\_\_ Hello?

CR: Why can't I do that?

CB: Huh? No, I'm saying, was that, that what you was thinking?

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County

Supervisor: \_

Date:

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CR: No I'm just.

CB: No, I'm saying, is that what you was.

CR: I just want you to leave me alone.

CB: No, I'm saying is that what you was thinking?

CR: No. I'm just.

CB:

CR: Don't want a relationship any more. All I'm thinking. I want you to leave me alone.

CB: Well you know how to fucking do that. Grow the fuck up. Get a backbone. Like I said,

so what. You go to the courthouse, get a piece of fucking paper. What the hell's that supposed to mean? Nothing. It means nothing sweetheart. Like I say, I have witnesses already, on speed dial mind you, that's ready to say otherwise. And then turn around, I probably could even do a suit against you for slander. So you know. And I'll win that one. Because like the other attorney I have now, it's not a public defender. She's a private attorney. She's pretty fucking good. Lost me about fifteen hundred bucks but he's pretty good. So. I would strongly urge you to think about your actions. See? See how you put me here? I don't like that. I don't like to be

; - is type of situation, you know what I mean?

CR: 'What type of situation?

CB: That situation. To where I have to, you know, be irrational to prove a point. And I'm

starting to really get pissed off just thinking about it. Christina, Christina, Christina. You just don't learn. Bad. There's a old saying uh, a beaten dog may fear you but you turn your back motherfucker will strike. And like so many other people have learned, when it comes to dealing with me, just like the person who killed my cousin learned. When it comes to dealing with fucking with my family, revenge is best served cold.

CR: Why are you gonna get revenge on me just because I don't want to have sex with you?

CB: Who said I would get revenge on you? I was just explaining some things.

CR: I haven't done anything.

CB: Hm. Like I said, revenge is best served cold. I'm taking my shit straight outta the

fucking freezer. Just you uh, when you start running your mouth to your mom again, for every action there is a reaction. Is that clear?

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: \_ .~ \_

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--\_ . ~---- .-~

Supervisor: . . . \_

Oak:

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CR: Yeah.

CB: But. Yeah, I do have love for you and I do care for you. I'm gonna tell you what I'm

gonna do. Because you are a pretty good friend, I consider you a damn good friend. Considered you good ass girlfriend too until now.

CB: No. I'm just letting you know what I am capable of doing. I mean not saying I would

ever do anything. Like I said. Don't underestimate people, you know it turns out bad. Very bad. Underestimating me is something that would not be smart. Comprende?

CR: Yeah.

CB: I love you enough to kill you.

CR: You what?

CB: Love you enough to kill you.

CR: To kill me?

CB: Mmhuh. (Affirmative).

CR: \hat does that mean? CB: If I can't have you, nobody can. You are going very slow. That damn car just illegally

went around you.

CR: I \_\_ going 55.

CB: Yeah.

CR: My fault.

CB: I love you enough to kill you.

CR: Don't say that.

CB: Rather me lie?

CR: I don't understand what you mean by that. Is that a threat?

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy \_\_

Datr:

Supervisor . \_

Dale

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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#2008-8578

CB: No. I don't make threats.

CR: Well what do you mean?

CB: I love you enough to kill you. If I can't have you nobody can. If I find out you talked to

somebody that motherfucker's dead too.

CR: About what?

CB: About anything. If I find out you having sex with somebody, male or female, that

motherfucker's dead too. I might just kill your cat, just for fun. Don't have to skin him.

Laughs. I'm just joking, God, you know, loosen the fuck up. Tina, loosen up. Loosen up.

Loosen up, loosen up. Loosen up. Loosen up, babe. Okay? Christina. Loosen up, baby, loosen up on the steering wheel. Loosen up, relax, relax, relax. Relax baby, all right? Relax.

Rustling.

CB:

Rustling.

CR: :\0.

CB: Yeah.

CR: No.

CB:

Rustling.

CR: Uh. Uh. Gasping. No. No. Uh. Uh. Uh. Uh. Uh. Stop. Uh. Uh. Uh. Stop.

CB: Laughs. Wrestlemania.

CR: Uh. Uh. No. Stop. Uh. Uh. I don't want to. Uh. Uh. No. No.

CB: Is this what you really want?

CR: Uh. Stop. Uh. Stop. Stop.

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County.

Deputy .. \_

Date:

Supervisor: \_

Date:

J

LALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT NARRATIVE

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CB: I'm just making sure.

CR: Stop. I don't want to.

Rustling.

CR: Stop. Dh. No. I don't want to. Dh.

CB:

CR: What? Uh. No. Uh. Uh. Dh. Uh. Gasping. Ow. Whimpering. No.

CB: Will you calm down.

CR: I don't want to do it any more. Ow. Stop. Uh. Uh. Gasping and whimpering.

CB: Seriously dude. You don't want it any more?

CR: No. Dh. No. Dh. Dh.

CB: You don't want it any more?

-

CR: No, Ow, I don't want to do this.

CB: Why?

CR: Because, I just don't.

CB: Why?

CR: I don't have to have a reason.

CB: Yeah you do.

CR: No I don't. No. Vh. Dh. Dh. Ow. Dh. Vh. Dh. Crying out.

CB: Chris.

CR: Breathing heavily.

CB: Why you acting like that?

----

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County.

Deputy . \_ \_ \_ \_ . . . . .

Supervisor: \_ . . \_

Date:

CLALLAM COUNTY SHERIFF'S DEPARTMENT  
CASE REPORT ~ARRATIVE

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CR-

- \_ . at me. Look at me. You really really know how to kill a brother. Not funny.

=- =~ ::::;. Come here. So you really don't want me to do it?

CR: No, I don't want you to do that.

End of recording.

I certify under penalty of perjury that the forgoing is true and correct.  
Written and signed in Clallam County.

Deputy' \_ . . \_

Oak:

Supervisor:

Date:: \_

\_.I

# ELLNER LAW OFFICE

**April 22, 2013 - 10:51 AM**

## Transmittal Letter

Document Uploaded: 440750-Appellant's Brief~2.pdf

Case Name: statev.Barnes

Court of Appeals Case Number: 44075-0

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: [liseellnerlaw@comcast.net](mailto:liseellnerlaw@comcast.net)

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