IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COREAN OMARUS BARNES, Appellant.	No. 39479-1-II UNPUBLISHED OPINION

Worswick, J. — Corean Omarus Barnes appeals his convictions for two counts of second degree rape and one count of unlawful imprisonment. He argues that the trial court erred in admitting a recorded conversation between him and the victim under the "Privacy Act," chapter 9.73 RCW, and that trial counsel was ineffective for failing to seek a lesser included instruction for third degree rape.[1] He also raises several additional claims pro se in a Statement of Additional Grounds (SAG). We hold that the admission of recorded conversations violated the Privacy Act, and we reverse and remand for a new trial.

[1] He also argues that the trial court's "knowledge" instruction created an impermissible mandatory presumption that denied him due process. The instruction used by the trial court has been updated in the 2008 amendments to the Washington Pattern Jury Instruction 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02, at 206-08 (3d ed. 2008). On remand, the trial court is instructed to consider using the amended version.

FACTS

Corean Barnes and Christina Russell began dating in the fall of 2007. On August 13, 2008, Russell told Barnes she wanted to end the relationship. Nonetheless, Russell agreed to drive Barnes from Sequim to Port Townsend for a meeting on August 15. Because Barnes had made recent threats to blow up Russell's house and car, she feared for her safety. She purchased a digital audio recorder so that she could secretly record any conversations she had with Barnes on August 15.

According to Russell, when she arrived at Barnes's house, he came to the car, tried to kiss her, and raped her. Russell said that Barnes then removed her from the car and took her inside the camper, where he again raped her. These events were recorded.

Barnes and Russell returned to Russell's car and drove to Port Townsend. During the drive, she repeatedly stated that she did not "want to do any more sexual things with him." Report of Proceedings (RP) (May 5, 2009) at 30. He told her that he would continue to bother her until they had sex one last time. He was angry, saying things like, "I'm so sick and tired of you simple-minded f***ing white f***ing female. Always trying to make it seem like somebody's actually gonna f***ing do something to your ass. Now you f***ing should be worried." Ex. 10 at 18. These conversations were also recorded.

After dropping Barnes off at his meeting in Port Townsend and while she was alone in the car, Russell made multiple narrative recordings describing what had happened to her.

After his meeting, Russell picked up Barnes and they returned to Sequim. During the drive, he made more sexual comments and again insisted that they have sex before their relationship could end. He then made a series of threatening remarks, including that she should not underestimate him, that he would kill her cat, and that he would kill her because he loved her. Russell became very afraid at this point.

When they returned to Sequim they went to a friend's home and began kissing. According to Russell, when she began resisting his advances, he picked her up off the couch and carried her to a bedroom, and raped her there. The digital device recorded all of the events during the trip from Port Townsend to Sequim and also at the home in Sequim. Several days later, Russell went to a health care provider. The health care provider referred Russell to an advocate and Russell called the police.

The State charged Barnes with two counts of second degree rape, one count of first degree burglary, and one count of unlawful imprisonment. Before trial, Barnes moved to suppress the contents of the digital recording as inadmissible hearsay, not the best evidence, and inadmissible under the Privacy Act. The trial court admitted all of the recording except for Russell's narratives. The trial court ruled that the recording of the conversations was admissible under the exception in RCW 9.73.030(2)(b) for unlawful threats of bodily harm. The trial court determined that other parts of the conversations provided "context." Clerk's Papers (CP) at 70-71. The trial court left open the possibility to challenge portions of the transcript on "other

evidentiary rule reasons," which apparently did not occur.[2] CP at 70-71. In light of the trial court's ruling to admit excerpts of the recording, Barnes moved the trial court to admit the narrative portions of the recording under ER 106 for purposes of completeness. The State did not object and the trial court granted the request.

The trial court admitted the entire digital recording made by Russell on August 15 and played it for the jury. Russell also testified regarding the events surrounding the August 15 recording. Barnes testified that Russell consented to the sexual encounter in the bedroom.

A jury convicted Barnes of unlawful imprisonment and both counts of second degree rape. The jury did not reach a verdict on the burglary charge. Barnes appeals.

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[2] The specific language of the trial court's memorandum opinion on the motion to suppress is as follows:

> The request in this case is to suppress certain recordings made of private conversations between the Defendant and the alleged victim. The Court has been provided a transcript of the taped material.
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> RCW 9.73.030 makes it unlawful for "any individual . . . to intercept or record private conversations by electronic devices."
>
> RCW 9.73.030 (Subsection II) however, states that conversations which convey threats of extortion, blackmail, bodily harm or other unlawful requests or demands may be recorded with the consent of one party to the conversation.
>
> To the extent that the Defendant is involved in these conversations it would appear that the conversations fall within the exemptions. Certainly parts of the conversation are likely not relevant except for purposes of context.
>
> There are some long narratives which are contained at pages 32 through 36 which are not conversations with the Defendant. It would appear to the Court that those particular conversations would not fall within the ambit of the statute in that they are single party recordings. There may be individual portions of the transcript which should be excluded from testimony for other evidentiary rule reasons. In general however, the conversations between the defendant and the alleged victim appear to meet the exceptions requirement of the private recording act and therefore will not be suppressed by the Court.

CP at 70-71.

ANALYSIS

I. Privacy Act

Barnes first contends that the trial court erred in admitting an illegally recorded conversation that did not fit within any of the Washington Privacy Act's exceptions. Barnes argues that the trial court erroneously admitted the entire recording, instead of limiting the admitted portion to clear threats.[3] The State disagrees with that narrow supposition and counters that the entire recording, including any implied threats, is admissible because the recording is "replete with explicit and implicit threats to extort sex or inflict body harm." Br. of Resp't at 14-15.

The Privacy Act requires that all parties consent before a private conversation is 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, 200, 102 P.3d 789 (2004). And except in limited circumstances, recordings made in violation of the Privacy Act are inadmissible in a criminal proceeding. RCW 9.73.050. Interpretation of a statute is a question of law that we review de novo. *Christensen*, 153 Wn.2d at 194.

A. Threats Exception

Recordings "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands . . . may be recorded with the consent of one party to the conversation." RCW 9.73.030(2). Courts strictly construe this exception. *See State v. Williams*, 94 Wn.2d 531,

[3] Barnes concedes to two overt threats: his statement that he planned to have sex with Russell whether she wanted to or not, and that he might kill her and her cat.

548, 617 P.2d 1012 (1980). Our Supreme Court has defined "convey" in this context as "'to impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance.'" *State v. Caliguri*, 99 Wn.2d 501, 507-08, 664 P.2d 466 (1983) (quoting Webster's Third New International Dictionary 499 (1971)).

A number of Barnes's recorded remarks that went before the jury were clearly not threats, and did not fall under the exceptions to the Privacy Act. For example, Barnes said, "A threesome is something to spice up the freaking sex life. It's not to compare you to a [sic] other girl. Because the girl after the threesome is done, you'll still be there, the other girl won't." Ex. 10 at 36. And, "Apparently there's a lot of things you don't make a commitment to. That's why you're divorced. That's why your f***ing wetback f***ing over the border boyfriend is wherever the f*** he at." Ex. 10 at 50. Or, "I am gonna miss the sex though cuz Lord knows it was f***ing _____. You know. Any man [would] be lucky to have you. Cuz you are truly an amazing woman. And I'll kick anybody else's ass that says differently." Ex. 10 at 64.

In light of the narrow construction we afford the threats exception coupled with the guidance on what actually constitutes a threat under the statute, the trial court erred in admitting the entire recording here. Admitting certain statements that otherwise do not fall under one of the Act's exceptions, simply to add context is not proper. The trial court should have conducted a more detailed analysis of the recording before admitting those selected portions that met the threats exception to the Privacy Act. Thus, Barnes's argument prevails.

B. Hostage Holder Exception

The State also argues that the hostage holder exception authorizes the admission of

statements Barnes made in the commission of the rapes. Any communications "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." RCW 9.73.030(2)(d). RCW 70.85.100 defines a "hostage holder" as someone who commits unlawful imprisonment under RCW 9A.40.040.

A plain reading of this hostage holder exception clearly authorizes the admission of the portion of the recording during the period of unlawful imprisonment. But the trial court again erred in admitting the entire recording instead of limiting the admission of the recording to statements subject to the statutory exceptions. Barnes's argument prevails.[4]

C. Reasonable Expectation of Privacy

The State also claims the Privacy Act was not violated because Barnes did not have a reasonable expectation that the conversation was private. Privacy Act protections only apply to private communications or conversations. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). "A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." *Christensen*, 153 Wn.2d at 193. "Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting

[4] The State also suggests that the Privacy Act is inapplicable to sounds of an event. Barnes does not dispute this argument and there is sufficient authority for this proposition. *See State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975). Thus, on remand the trial court may consider whether certain sounds do not fall under the Privacy Act's protections.

party." *Christensen*, 153 Wn.2d at 193. There is nothing to suggest Barnes did not intend for the conversation to be private. Most of the conversation occurred in a car and related to personal matters between Barnes and Russell. The State's argument here is without merit.

D. Harmless Error

Finally, the State argues that even if the trial court erred in admitting the conversation in violation of the Privacy Act, any error was harmless. "Failure to suppress evidence obtained in violation of the privacy act is prejudicial 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). There can be little question that the erroneous admission of the entire recording materially affected the outcome. The recording included offensive language and presented Barnes in an exceedingly poor light and unduly prejudicial manner. The error was not harmless.[5]

II. Sufficient Evidence

Barnes finally contends that insufficient evidence exists to sustain his second degree rape conviction. We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it.

[5] Because we reverse on Barnes's Privacy Act claims, we do not reach his ineffective assistance of counsel claims.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences in favor of the State and most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Both circumstantial evidence and direct evidence are equally reliable. *Bencivenga*, 137 Wn.2d at 711; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In order to convict Barnes of two counts of second degree rape, the jury had to find beyond a reasonable doubt (1) that on or about August 15, 2008, he engaged in sexual intercourse with Russell; (2) that the sexual intercourse occurred by forcible compulsion; and (3) that the acts occurred in the state of Washington.

Russell testified in great detail regarding the events leading up to and surrounding the rapes in this case. The evidence is more than clear that on August 15, 2008, Barnes engaged in sexual intercourse with her against her will by force, all of which occurred in Sequim, Washington. Because we admit the truth of the State's evidence and all inferences that can reasonably be drawn from it in the State's favor, Barnes's argument fails.

Reversed and remanded for a new trial.

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

Worswick, J.

We concur:

Penoyar, C.J.

Schindler, J.