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Washington State
Court of Appeals
Division Two

July 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COREAN OMARUS BARNES, Appellant.	No. 47611-8-II Consolidated With
In the Matter of the Personal Restraint Petitions of COREAN OMARUS BARNES, Petitioner.	Nos. 47171-0-II; 47621-5-II UNPUBLISHED OPINION

WORSWICK, J. — After two trials and two appeals, Corean Barnes stands convicted of unlawful imprisonment and first degree burglary with sexual motivation. He directly appeals his sentence and, by way of a personal restraint petition (PRP), he contests his convictions. In his direct appeal, Barnes argues that the sentencing court violated his due process rights by imposing a sexual motivation enhancement to his burglary sentence because the jury instruction on consent (for which we previously reversed his rape convictions) shifted the burden to him regarding the sexual motivation enhancement. We disagree and affirm his sentence.

In his PRP, Barnes makes several arguments regarding the sufficiency of the evidence and asserts various constitutional challenges. Finding no merit in any of these arguments, we deny his PRP.

FACTS

A. *Crimes, First Trial, and First Appeal*

Barnes and Christina Russell dated in 2007 and 2008 until Russell decided to end the relationship in August 2008. She began surreptitiously recording her conversations with Barnes while they were together.

On August 15, 2008, Russell met Barnes at the house of Kenneth Johnson, who had previously rented a room to Barnes. While the two were outside Johnson's house, Barnes had unwanted sexual contact with Russell. He pulled her out of her car and forcibly carried her to his nearby camper, where he raped her.

Later the same day, Russell drove Barnes to Johnson's house. Previously, Johnson told Barnes he could come onto the property on the condition that Barnes would first contact Johnson so that Johnson would be at home when Barnes arrived, but Barnes did not contact Johnson before entering the house. After they entered Johnson's house, Barnes picked Russell up, carried her into a bedroom, and forcibly raped her while she struggled. Russell secretly recorded both incidents of sexual assault.

The State charged Barnes with two counts of second degree rape by forcible compulsion, one count of first degree burglary with sexual motivation, and one count of unlawful imprisonment. During Barnes's first jury trial, the trial court admitted the entire transcript of Russell's recordings from August 15. The jury convicted Barnes of two counts of second degree rape and one count of unlawful imprisonment. But the jury did not reach a verdict on the burglary charge.

Barnes appealed, arguing that the admission of Russell's recordings violated the "Privacy Act." We reversed and remanded for a new trial, holding that the trial court erred by admitting the entire transcript of the recordings.

B. *Second Trial and Second Appeal*

Barnes proceeded to a second jury trial. After the close of testimony, the trial court instructed the jury that a "person is not guilty of rape if the sexual intercourse is consensual. . . . The defendant has the burden of proving that sexual intercourse was consensual by a preponderance of the evidence." Supplemental Clerk's Papers (Suppl. CP) at 157. Barnes objected, arguing unsuccessfully that the instruction foisted an unwanted affirmative defense on him. PRP, No. 471710 (Wash. Ct. App. Jan. 21, 2015) (Verbatim Report of Proceedings at 487).

The sexual motivation enhancement instruction for the burglary charge provided: "Sexual motivation means that one of the purposes for which [Barnes] committed the crime was for the purpose of his . . . sexual gratification." Suppl. CP at 176. The jury was also instructed that Barnes's not guilty plea "puts in issue every element of the crime charged. The State . . . has the burden of proving each element of the crime beyond a reasonable doubt. [Barnes] has no burden of proving a reasonable doubt exists." Suppl. CP at 148.

The jury convicted Barnes of unlawful imprisonment, both counts of second degree rape, and first degree burglary with sexual motivation. During sentencing, the trial court ruled that the second degree rape and first degree burglary convictions were the "same criminal conduct" and, therefore, merged for sentencing purposes. *State v. Barnes*, noted at 181 Wn. App. 1035, 2014 WL 2795968, at *3.

Barnes appealed a second time, arguing that the trial court violated his Sixth Amendment right to control his defense by providing the jury instruction on the affirmative defense of consent on the second degree rape charges over his objection. We agreed and reversed the second degree rape convictions. We affirmed the convictions for unlawful imprisonment and first degree burglary. Accordingly, we remanded to the trial court for a new trial on only the second degree rape convictions.

C. *Resentencing*

The State declined to retry Barnes on the second degree rape charges, and it instead dismissed those charges. Accordingly, the sentencing court sentenced Barnes for first degree burglary and unlawful imprisonment. Based on the jury's finding of sexual motivation, the sentencing court found that Barnes acted with sexual motivation in committing the burglary. The sentencing court also found that the burglary and unlawful imprisonment charges constituted the same criminal conduct and counted both crimes as one point in determining the offender score.

Barnes moved the superior court under CrR 7.8 to vacate his convictions for first degree burglary and unlawful imprisonment. The superior court transferred this motion to us to be considered as a PRP. Barnes also filed a PRP in this court. We consolidated these PRPs with Barnes's direct appeal. Barnes appeals his sentence and collaterally attacks his convictions.

ANALYSIS

I. SENTENCING COURT DID NOT ERR

Barnes argues that because we previously held that the consent instruction shifted the burden of proof regarding rape, the sentencing court unconstitutionally shifted the burden of

proof to Barnes to disprove consent regarding the sexual motivation enhancement because the jury must have relied on the rape to find the sexual motivation enhancement. We disagree.

"'Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense.'" *State v. Lynch*, 178 Wn.2d 487, 492, 309 P.3d 482 (2013) (quoting *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013)). We review allegations of constitutional violations de novo. *Lynch*, 178 Wn.2d at 491.

A sexual motivation enhancement requires the State to prove that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." Former RCW 9.94A.030(47) (2008). Under the statute's terms, the only relevant fact for this enhancement is whether the defendant sought sexual gratification from the crime. The victim's consent or nonconsent is not an element of this enhancement. Therefore, consent is not a defense, and logically it cannot be an affirmative defense unconstitutionally foisted on Barnes.

Furthermore, the consent instruction explained that it applied only to rape. It began: "A person is not guilty *of rape* if the sexual intercourse is consensual." Suppl. CP at 157 (emphasis added). Therefore, this jury instruction made clear that the consent defense applied only to the rape charges. We presume that juries follow jury instructions. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Thus, we presume that the jury did not mistakenly apply the consent instruction to the sexual motivation enhancement.

To the extent Barnes argues that insufficient evidence supports the sexual motivation enhancement because the rape convictions no longer exist, this claim fails. In reviewing a

challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Russell testified that Barnes raped her in Johnson's residence. From this fact, a rational trier of fact could conclude that Barnes committed the burglary with sexual motivation. That we reversed the rape charges on constitutional grounds does not undermine Russell's testimony, nor did the sexual motivation enhancement rely on the existence of a separate conviction for a sexual crime such as rape. This claim fails.

II. PERSONAL RESTRAINT PETITION

In his PRP, Barnes argues that his convictions for burglary and unlawful imprisonment must be reversed because (1) insufficient evidence supports his convictions for burglary and unlawful imprisonment for several reasons, (2) the burglary statute is unconstitutionally vague as applied to him, (3) the unlawful imprisonment conviction constitutes the same criminal conduct as and merges with the other offenses, (4) the trial court unconstitutionally shifted the burden of proof on the burglary and unlawful imprisonment charges by instructing the jury about the affirmative defense to rape of consent, and (5) he received the ineffective assistance of appellate counsel. We disagree with these arguments and deny the PRP.

A. *PRP Principles*

The petitioner in a PRP must first prove error by a preponderance of the evidence. *In re Pers. Restraint of Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if the petitioner is able to show error, he must also prove prejudice, the degree of which depends on the type of error shown. *Crow*, 187 Wn. App. at 421.

If the error is constitutional, the petitioner must demonstrate that it resulted in actual and substantial prejudice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). "Actual and substantial prejudice, which 'must be determined in light of the totality of circumstances,' exists if the error 'so infected petitioner's entire trial that the resulting conviction violates due process.'" *Crow*, 187 Wn. App. at 421 (quoting *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)). If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015).

A PRP may raise an issue that was raised and litigated on direct appeal only if the interests of justice require the issue's relitigation. *Schreiber*, 189 Wn. App. at 113. The interests of justice require relitigation where the law has changed after the direct appeal, or where some other justification exists for the petitioner's failure to have raised a critical argument in the prior appeal. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013).

If the petitioner fails to make a prima facie showing of either actual and substantial prejudice or a fundamental defect, we deny the PRP. *Yates*, 177 Wn.2d at 17. If the petitioner makes such a showing, but the record is not sufficient to determine the merits, we remand for a

reference hearing. *Yates*, 177 Wn.2d at 18. But if we are convinced that the petitioner has proven actual and substantial prejudice or a fundamental defect, we grant the petition. *Yates*, 177 Wn.2d at 18.

B. *Sufficiency of the Evidence*

Barnes makes several claims contesting the sufficiency of the evidence supporting his convictions. As stated above, we review a challenge to the sufficiency of the evidence to determine whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 221-22. We draw all reasonable inferences from the evidence in the State's favor. *Salinas*, 119 Wn.2d at 201.

1. *First-Degree Burglary*

i. Legality of Entry into Johnson's Residence

Barnes argues that insufficient evidence supports his burglary conviction because he lawfully lived at Johnson's residence. The State argues that Barnes may not raise this issue again because it was fully litigated in a previous direct appeal. We agree with the State.

Barnes argued in a previous appeal, as he does now, that insufficient evidence supported his burglary conviction because he had permission to enter the residence. We rejected that argument. Barnes does not now show that the interests of justice require this issue's relitigation. We decline to review this argument.

ii. Dismissal of Rape Convictions

Barnes challenges the sufficiency of the evidence for his burglary conviction for two new reasons. He argues that insufficient evidence supports his burglary conviction because the rape

convictions no longer support it. Specifically, he argues that the rape convictions' reversal deprived the burglary conviction of the "predicate offense" of assault, which in this case was a rape. Order Transferring Defendant's Motion as a Personal Restraint Petition as Required by CrR 7.8(c)(2) (Clallam County Super. Ct. Wash. Mar. 18, 2015) (Motion to Vacate Conviction And/Or Coram Nobis (Pet'r['s] Br. in Support at 3)). He also argues that he is "[a]ctually [i]nnocent." Order Transferring Defendant's Motion (Pet'r['s] Br. in Support at 3-4). We disagree.

First degree burglary occurs when a person (1) enters or remains unlawfully in a building (2) with intent to commit a crime against a person or property therein, and (3) the person assaults any person or is armed with a deadly weapon while "entering or while in the building or in immediate flight therefrom." RCW 9A.52.020(1). First degree burglary requires no predicate offense; it merely requires that a person commit an assault during the burglary. RCW 9A.52.020(1). Thus, this argument fails.

Barnes also argues that the rape was the only assault Barnes committed, and therefore the reversal of the rape charges undermined the State's proof on the third element of burglary—that Barnes assaulted someone while committing the burglary.[1] This claim also fails. The testimony at trial established that Barnes assaulted Russell. Russell testified that Barnes used forcible compulsion to have nonconsensual sex with her. An assault is an offensive, intentional touching. *State v. Osman*, 192 Wn. App. 355, 378, 366 P.3d 956 (2016). A rational trier of fact could find that Barnes's act of forcibly compelling Russell to have nonconsensual sex constituted an

[1] There does not appear to have been evidence that Barnes was armed with a deadly weapon. Thus, this element must have been satisfied by proof that Barnes assaulted Russell.

assault. Thus, sufficient evidence supports the element of first degree burglary that Barnes assaulted someone during the burglary. *Salinas*, 119 Wn.2d at 201. The absence of rape convictions has no effect on the sufficiency of the evidence for first degree burglary.

Barnes further argues that insufficient evidence supports his conviction for burglary because he is "[a]ctually [i]nnocent." Order Transferring Defendant's Motion (Pet'r['s] Br. In Support at 3-4). We disagree.

In support of this argument, Barnes attaches an email from the defense investigator to Barnes's trial counsel, which quotes something Johnson allegedly said to the mother of Barnes's child: "'[Johnson] got Mr. Barnes arrested for something that he did not do.'" Order Transferring Defendant's Motion (Pet'r['s] Br. In Support at 4). Because actual innocence is a doctrine that allows equitable tolling of the time limits for filing a PRP, *In re Personal Restraint of Carter*, 172 Wn.2d 917, 931, 263 P.3d 1241 (2011), and because Barnes needs no such tolling, we consider his argument to be a challenge to the sufficiency of the evidence.

Here, Johnson testified that Barnes did not have permission to be in Johnson's house on August 15, 2008, the date of Russell's encounter with Barnes. Russell testified that she and Barnes entered Johnson's house, then Barnes picked her up and carried her into a bedroom where he raped her. From these facts, viewed in the light most favorable to the State, a rational trier of fact could conclude that Barnes entered or remained unlawfully in Johnson's residence with the intent to rape Russell, and that he committed assault. In other words, a rational trier of fact could have found Barnes guilty beyond a reasonable doubt of each element of first degree burglary. This claim fails.

2. *Unlawful Imprisonment*

i. Russell's Imprisonment

Barnes argues that insufficient evidence supports his conviction for unlawful imprisonment because Russell was at liberty to leave. This claim fails. As stated above, we view the evidence and all inferences therefrom in the light most favorable to the State, and we do not reweigh the credibility of witnesses. *Salinas*, 119 Wn.2d at 201. Russell testified that during both rapes, she struggled to break free from Barnes's grasp. From this testimony, when viewed in the light most favorable to the State, a rational trier of fact could conclude that Russell was not at liberty to leave, and that Barnes was, in fact, unlawfully imprisoning her.

ii. Reversal of Rape Convictions

Barnes also argues that the reversal of the rape charges deprived the unlawful imprisonment conviction of a necessary "predicate offense." PRP, No. 471710 (Pet'r['s] Br. in Support at 7). This argument fails.

Unlawful imprisonment requires proof that the defendant knowingly restrained another person by restricting that person's movements "without consent and without legal authority in a manner [that] interferes substantially with his liberty." Former RCW 9A.40.040(1), .010(1) (1975). This crime does not require proof of any predicate offense; thus, this claim fails.

iii. State's Previous Argument Concerning Privacy Act

Barnes appears to argue that insufficient evidence supports his conviction for unlawful imprisonment because he believes that the State conceded that he was not guilty of that crime. He supports this claim by pointing to the State's argument that the hostage holder exception did

not apply.[2] The hostage holder exception to the Privacy Act authorizes the admission of a portion of a recording during a period of unlawful imprisonment. RCW 9.73.030(2)(d). The State argued in Barnes's second direct appeal that the hostage holder exception to the Privacy Act did *not* apply to the redacted portion of the transcript of Russell's recordings that the trial court admitted. But this statement does not amount to a concession that Barnes was not guilty of unlawful imprisonment. This argument by the State had nothing to do with the sufficiency of the evidence of unlawful imprisonment; it had only to do with the admissibility of the transcript of the recordings. In any event, as stated above, sufficient evidence supports Barnes's conviction for unlawful imprisonment regardless of the State's arguments about the Privacy Act. This claim fails.

C. *Unconstitutional Vagueness*

Barnes argues that the burglary statute is unconstitutionally vague as applied to him. We disagree.

The party challenging a statute has the heavy burden of proving unconstitutionality beyond a reasonable doubt. *State v. Enquist*, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011). There is a "strong presumption in favor of the statute's validity." *State v. Harrington*, 181 Wn. App. 805, 824, 333 P.3d 410 (2014). A statute is void for vagueness if it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or it "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Harrington*, 181 Wn. App. at 823.

[2] In Barnes's first direct appeal, the State argued that the entire transcript of the recording was admissible under the hostage holder exception. But in its brief on the second direct appeal, the State argued that the hostage holder exception did not apply.

As stated above, Barnes argues that he is actually innocent of burglary. Barnes appears to argue that *because* he is innocent, the statute is unconstitutionally vague as applied to him. Order Transferring Defendant's Motion (Pet'r['s] Br. In Support at 4) ("Mr. Barnes'[s] conduct does not support his conviction fo[r] First D[e]gree Burglary therefore making the statute unconstitutionally vague."). But as stated above, sufficient evidence supports his conviction for first degree burglary. He presents no other argument to carry his burden of establishing the statute's unconstitutionality. Barnes's mere claim of actual innocence does not meet his burden to show that the burglary statute is unconstitutionally vague.

D. *Merger and Same Criminal Conduct*

Barnes argues that his conviction for unlawful imprisonment should be reversed because the sentencing court determined that it constituted the same criminal conduct as, and therefore merged with, other convictions. This argument fails.

Barnes appears to misunderstand the significance of merger and a finding of same criminal conduct. Merger is a doctrine that courts use to avoid violating defendants' double jeopardy rights. "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). Therefore, at sentencing, courts merge crimes to avoid doubly punishing behavior. *State v. Whittaker*, 192 Wn. App. 395, 410-11, 367 P.3d 1092 (2016). And "same criminal conduct" is a doctrine courts use when calculating a defendant's offender score. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). But merger and "same criminal conduct" doctrines do not affect the underlying convictions' validity; they

impact only the punishment that the sentencing court may impose and the offender score calculation. *See State v. Tili*, 139 Wn.2d 107, 128, 985 P.2d 365 (1999); former RCW 9.94A.589(1)(a) (2002).

Here, the sentencing court ruled before the second appeal that the second degree rape and first degree burglary convictions were the "same criminal conduct" and, therefore, merged for sentencing purposes. *Barnes*, 2014 WL 2795968, at *3. Then, at resentencing after our decision and after the State dismissed the rape charges, the sentencing court ruled that the unlawful imprisonment conviction constituted the same criminal conduct as the first degree burglary conviction.

Barnes appears to believe that this finding of "same criminal conduct" and merger means that the unlawful imprisonment charge depended upon the existence of the rape convictions. But this is not the case. Neither merger nor same criminal conduct extinguishes a conviction; these doctrines instead prevent double punishment and govern the offender score calculation. And as stated above, neither the unlawful imprisonment conviction nor the burglary conviction depended on a separate conviction for rape. Both the burglary and unlawful imprisonment charges exist, regardless of whether any rape convictions exist and regardless of the finding that they comprised the same criminal conduct. This claim fails.

E. *Burden of Proof*

Barnes argues that the consent instruction regarding rape shifted the burden of proof to him regarding the burglary and unlawful imprisonment convictions. We disagree.

1. *Consent Instruction Applied Only to Rape*

As stated above, the consent instruction applied only to the rape charges. It read in part: "A person is not guilty *of rape* if the sexual intercourse is consensual." Suppl. CP at 157 (emphasis added). Thus, this instruction did not instruct the jury that there was an affirmative defense of consent to the burglary or unlawful imprisonment charges. It could not have shifted the burden of proof on the other charges because we presume that the jury followed the instructions and considered the affirmative defense instruction on consent only for the rape charges. *Lamar*, 180 Wn.2d at 586.

2. *Consent Instruction Did Not Confuse Jury*

Barnes also may be arguing that *other* jury instructions which mention consent or related concepts violated his due process rights by confusing the jury and therefore shifting the burden of proof to him. To the extent Barnes makes this argument, it fails. "'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and *when read as a whole* properly inform the trier of fact of the applicable law.'" *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010) (internal quotations omitted) (quoting *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). Even a potentially misleading instruction should not be reversed without a showing of prejudice. *Aguirre*, 168 Wn.2d at 364. As explored below, the trial court properly instructed the jury on the type of consent relevant to each of the charges, and the instructions regarding unlawful imprisonment and burglary did not place any burden of proof on Barnes.

Unlawful imprisonment requires proof that the defendant restrained a person's movements "without consent." Former RCW 9A.40.040(1), .010(1) (1975). The trial court

instructed the jury that a person commits unlawful imprisonment if, among other things, the restraint is "without the other person's consent or accomplished by physical force." Suppl. CP at 167. Thus, the jury instruction properly informed the jury that lack of consent was an element of unlawful imprisonment, not that Barnes bore the burden of proving consent. And for purposes of the assault in the first degree burglary charge, the jury was instructed that an "act is not an assault, if it is done with the consent of the person alleged to be assaulted," and was also instructed that "the State has the burden to prove the absence of consent beyond a reasonable doubt." Suppl. CP at 161.

Both of those instructions properly instruct the jury on consent as an element of the crimes charged. The jury was instructed that the State bore the burden of proving each element of each crime beyond a reasonable doubt. Thus, as a whole, the jury instructions made clear that the State bore the burden of proving beyond a reasonable doubt Russell's lack of consent to the unlawful imprisonment and to the assault. *Aguirre*, 168 Wn.2d at 363-64. Neither of these instructions give any suggestion that Barnes bore a burden of disproving consent.

F. *Ineffective Assistance of Appellate Counsel*

Barnes argues that he received ineffective assistance of appellate counsel because his appellate counsel did not argue that the affirmative defense consent instruction applied to the burglary and unlawful imprisonment charges. This claim fails.

To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show "'that the legal issue which appellate counsel failed to raise had merit and that [the petitioner was] actually prejudiced by the failure to raise the issue.'" *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (quoting *In re Pers. Restraint of Maxfield*,

133 Wn.2d 332, 344, 945 P.2d 196 (1997)). Barnes's ineffective assistance of appellate counsel claim requires us to consider whether his current challenge—that the consent jury instruction shifted the burden of proof on the unlawful imprisonment and burglary charges—had merit, and if so, whether Barnes was actually prejudiced by appellate counsel's failure to raise these issues on direct appeal. *Dalluge*, 152 Wn.2d at 787.

Here, the consent instruction clearly applied only to the rape charge. By its plain terms, it instructed the jury only about rape, and we presume that the jury followed this instruction. Thus, the substantive claim that the instruction shifted the burden of proof on burglary and unlawful imprisonment has no merit. Because the claim has no merit, Barnes did not receive ineffective assistance of appellate counsel due to counsel's choice not to raise this issue on direct appeal. *Dalluge*, 152 Wn.2d at 787.

Similarly, to the extent Barnes relies on the notion that the consent instruction applied to the other charges because the other charges merged and constituted the same criminal conduct as rape before resentencing, this argument fails for the reasons stated above. Merger and same criminal conduct are doctrines that protect a defendant's right to be free from double punishment. They do not substantively affect convictions, nor do they relate to jury instructions. Because this claim did not have merit, Barnes did not receive ineffective assistance of appellate counsel due to counsel's failure to raise this claim. *Dalluge*, 152 Wn.2d at 787.

III. APPELLATE COSTS

Barnes asks that we waive appellate costs if the State seeks them. Under RCW 10.73.160(1), an appellate court may order adult offenders to pay appellate costs. And the clerk or commissioner of this court "will" award costs on appeal to the State as the substantially

prevailing party if the State provides a cost bill. RAP 14.2, 14.4. However, we may direct the commissioner or clerk not to award costs. RAP 14.2. In *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016), Division One of this court held that appellate courts should use their discretion to consider an appellant's request to deny appellate costs, and that this request should be made in the briefing.

We have not yet terminated review, and the State has not filed a cost bill. Nevertheless, should the State file a cost bill after we terminate review in this case, we use our discretion to deny appellate costs. Because of Barnes's indigent status, and our presumption under RAP 15.2(f) that he remains indigent "throughout the review" unless the trial court finds that his financial condition has improved, we exercise its discretion to waive appellate costs. RCW 10.73.160(1).

In summary, we affirm Barnes's sentence and we deny his PRP. We exercise our discretion to waive appellate costs.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bjorgen, C.J.

Maxa, J.