

NO. 64856-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

2010 NOV 12 PM 14:53  
COURT OF APPEALS  
CLERK

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STATE OF WASHINGTON,

Respondent,

v.

ABDIKAFAR ADAN,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY.

THE TRIAL COURT'S REFUSAL TO INSTRUCT  
THE JURY THAT IT COULD CONVICT OF LESSER  
OFFENSE DENIED MR. ADAN DUE PROCESS.

Mr. Adan requested the trial court instruct the jury on the inferior degrees of second and third degree rape as well as second degree robbery. RP 580. The trial court concluded the lesser offense instruction were improper because the court concluded there was no factual basis on which the jury could find Mr. Adan guilty of only the lesser offenses. RP 580-81.

Due process requires a court provide instructions on lesser offenses where those instructions are supported by the evidence in the case. State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1998)).

An instruction for an inferior degree is proper where:

(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense;" (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only inferior offense.

(Citations omitted.) Tamalini, 134 Wn.2d at 732.

In applying the factual prong, a court must view the supporting evidence in the light most favorable to the party

requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Id. at 455-56. The instruction should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)

Viewed in the light most favorable to Mr. Adan, the evidence supported the inference that only the inferior degree offenses had been committed. While Ms. Dutton claimed Mr. Adan put a knife to her chest, RP 315, a factual basis supports the instructions without requiring the jury to simply disbelieve Ms. Dutton’s claims. Nurse examiner performed a full body exam and “skin assessment” of Ms. Dutton. RP 322-23. That exam revealed no blood and nothing out of the ordinary. RP 316, 323. In the light most favorable to Mr. Adan, the nurse examiner’s testimony allowed a reasonable juror to conclude that Mr. Adan did not use a knife in the alleged rape and robbery of Ms. Dutton. That inference establishes the factual basis necessary to support the instructions of the lesser degrees of rape and robbery. Mr. Adan was entitled to have the court instruct the jury on the inferior degree offenses of second degree rape and robbery.

The State response boils down to a claim that because it presented sufficient evidence to convict Mr. Adan of the greater crimes the factual for instructions on lesser offense could not be met. Thus, the State claims that because Ms. Dutton testified Mr. Adan used a during the incident, Mr. Adan cannot meet the factual prong for the lesser degree of rape and robbery. Brief of Respondent at 12. The State's claim ignores the conflates the legal standard for assessing the factual prong of a lesser offense with that of assessing the sufficiency of the State evidence to support a conviction. But the question is not whether a jury could convict Mr. Adan of the charged offenses, but rather whether a rationale juror could find him guilty of only the lesser offenses. It is simply not necessary for a defendant to disprove the State's case before he is entitled to an instruction on a lesser offense. The State fails to appreciate this distinction.

The evidence in the light most favorable to Mr. Adan supported his requested instructions on the lesser offenses. "A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Mr. Adan was entitled to the requested instructions in this case. Fernandez-Medina, 141

Wn.2d at 461-62. The trial court's failure to instruct the jury on the lesser offenses violated the Fourteenth Amendment.

B. CONCLUSION

Because the trial court erred in refusing to instruct the jury on the lesser offenses of second and third degree rape and second degree robbery, this Court must reverse Mr. Adan's sentence and remand for a new trial.

Respectfully submitted this 12<sup>th</sup> day of November 2010.



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DIVISION ONE**

STATE OF WASHINGTON,                    )  
  )  
  Respondent,                    )  
  )  
  v.                                    )  
  )  
ABDIKAFAR ADAN,                        )  
  )  
  Appellant.                        )

NO. 64856-0-I

2010 NOV 12 PM 4:50  
COURT OF APPEALS

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2010.

X \_\_\_\_\_ 

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