

NO. 64856-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIKAFAR ADAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

**BRIEF OF RESPONDENT**

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**A. ISSUE**

A defendant is only entitled to jury instructions on inferior degree offenses when: 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 the inferior offense. State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998). Abdikafar Adan (hereafter “the defendant”), being charged with first degree rape and first degree robbery of Hillary Dutton (hereafter “the victim”), requested jury instructions on second and third degree rape and second degree robbery. The trial court denied the request, noting that there was no evidence that supported an inference that only the inferior degree offenses were committed. Did the trial court properly deny the defendant’s request for inferior degree offense jury instructions, when the evidence presented at trial, when viewed in a light most favorable to the defendant, included testimony from the victim that the defendant threatened her with a knife, slapped her with the flat side of the blade, acted like he was going to stab her, and held the knife up to her throat while he raped and robbed her?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

Defendant Abdikafar Adan was charged by way of Information with Count I: first degree rape (E.Stripling); Count II: first degree robbery (E.Stripling); Count III: first degree rape (H.Dutton); and Count IV: first degree robbery (H.Dutton). CP 1-3. The State alleged that these crimes occurred during two separate incidents on August 7, 2008 (Cts. I and II) and August 15, 2008 (Cts. III and IV). CP 1-3.

On November 30, 2009, a jury was convened and trial commenced before the Honorable Ronald Kessler in King County Superior Court. 2RP 75. Subsequently, the jury returned a verdict of not guilty as to Counts I and II, and guilty as to Counts III and IV. CP 64-67. [*The verbatim report of proceedings will be referred to in this brief as follows: 1RP (Aug. 20, 2009, Aug. 28, 2009, Sept. 29, 2009, Nov. 24, 2009); 2RP (Nov. 30, 2009); 3RP (Dec. 1, 2009); 4RP (Dec. 2, 2009); 5RP (Dec. 3, 2009, Dec. 7, 2009, Jan. 11, 2010).*]

## 2. SUBSTANTIVE FACTS.

On August 15, 2008, at approximately 4 a.m., victim Hillary Dutton drove by the home of defendant Abdikafar Adan, who was known to Ms. Dutton. Mr. Adan got into Ms. Dutton's car and she began to drive. 3RP 287. During the time Ms. Dutton was driving, the defendant pulled out a huge kitchen knife and began threatening Ms. Dutton. 3RP 287. According to Ms. Dutton, the defendant slapped Ms. Dutton's arm with the flat side of the knife and almost cut her several times. 3RP 287, 347-8. The defendant told her he wasn't playing games and threw her car into its park gear when her car was still moving forward. 3RP 287.

The defendant grabbed Ms. Dutton and tried to make her get in the back seat, but she did not want to do so. 3RP 287, 349. The defendant started acting like he was going to stab Ms. Dutton in her chest with the knife. 3RP 287, 349. When the defendant threatened her in this way, Ms. Dutton got in the back seat of her car. 3RP 287, 349. The defendant then told Ms. Dutton to take off her clothes or he was going to hurt her. 3RP 287. Fearing that the defendant would stab and kill her, Ms. Dutton took off her clothes as directed. 3RP 287, 348-9.

The defendant climbed on top of Ms. Dutton and started having sex with her, while he held the large knife to her throat with the tip right at her chest. 3RP 287, 346. While wielding the knife at Ms. Dutton at one point, the defendant cut his own hand with the knife and ended up bleeding on Ms. Dutton's shirt and shorts. 3RP 340, 353. Ms. Dutton was frightened, crying hysterically, and told the defendant she had STDs and was pregnant, so he would wear a condom and not kill her. 3RP 350, 352.

At trial, Ms. Dutton's testimony included the following statement about the effect that the defendant's use of a knife had on her during the commission of the rape and robbery:

"He had a knife at my throat the whole time he was doing it. He had this big, long knife and he had it pushed to my throat like this when he was on top of me and I just didn't move. I couldn't do anything. All you can do is sit there and cry when somebody else is in control.... [h]e could have told me to do jumping jacks and I would have done jumping jacks with a knife at my throat."

3RP 351, 353.

After forcing sex upon Ms. Dutton at knifepoint, the defendant went to the front seat area and started going through her car. 3RP 350. The defendant took numerous items belonging to Ms. Dutton from her car, including her iPod, camera, and money.

3RP 287, 354. The defendant got out of the car, dropped the condom he had just used on the ground, and took off running back towards his home. 3RP 355.

The defendant's DNA was later found in the sperm on that used condom that Ms. Dutton pointed out to police. 2RP 121-23. Based on DNA tests, it was also determined that the defendant's blood was on Ms. Dutton's shorts and shirt. 2RP 121-23.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY DENIED ADAN'S REQUEST FOR JURY INSTRUCTIONS ON THE INFERIOR DEGREE OFFENSES.**

The defendant contends that the trial court erroneously refused to instruct the jury on rape in the second and third degree, as well as robbery in the second degree. He argues that these inferior degree offense instructions should have been included because of the testimony by the nurse examiner and the victim, Ms. Dutton. When considering all of the evidence presented at trial, as is required, this claim fails.

Under the facts of this case, the trial court properly denied the defendant's request for jury instructions on these inferior degree offenses because the evidence presented at trial in no way raises

an inference that inferior degree offenses were committed to the exclusion of the charged offenses, first degree rape and first degree robbery. State v. Fernandez-Medina, 141 Wn.2d 448, 456; 6 P.3d 1150 (2000).

a. Relevant Facts.

At trial, defense counsel, on behalf of the defendant, made a request "given the credibility issues in the case", that the court provide the jury with instructions on rape in the second degree, rape in the third degree, robbery in the second degree, and assault in the fourth degree. 5RP 580.

The trial court acknowledged that rape in the second degree, rape in the third degree, and robbery in the second degree were lesser degree offenses of the charged offenses. However, the trial court concluded that it would not provide these instructions to the jury because it "just [didn't] see that there's any evidence that supports an inference that only the lesser were committed", even when considering the defendant's point about potential credibility issues. 5RP 580-1.

b. The Evidence Presented At Trial Does Not Raise an Inference That The Inferior Degree Offenses Were Committed.

A defendant may be found not guilty of a charged offense and guilty of an inferior degree or lesser included offense of the offense charged. RCW 10.61.003; RCW 10.61.006. The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense violates the Fourteenth Amendment. Beck v. Alabama, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

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). However, certain conditions must be met before instructions on a lesser included or an inferior degree offense are permitted.

A defendant is only entitled to an instruction on a lesser-included offense if two conditions are met: 1) each element of the lesser offense must be an element of the charged offense (legal prong); and 2) the evidence in the case must support an inference that *only* the lesser crime was committed (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); Fernandez-Medina, 141 Wn.2d at 455.

A defendant is entitled to instruction on an inferior degree offense only when: 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 the inferior offense. Tamalini, 134 Wn.2d at 732; State v. Peterson, 133 Wn.2d 885, 948 P.2d 381 (1997). This third component sets forth the factual test for a defendant’s entitlement to an instruction on an inferior degree offense.

The purpose of test’s factual component is to ensure that there is evidence to support the giving of the requested instruction. Fernandez-Medina, 141 Wn.2d at 455 – 56. In applying the factual test for either type of lesser offense, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. Id.; State v. Cole, 74 Wn. App. 571, 579, 874 P.2d 878 (1994).

The factual component of the test includes a requirement that there be a factual showing more particularized than that required for other jury instructions; specifically, the evidence must raise an inference that *only the inferior degree offense was*

*committed to the exclusion of the charged offense.* Id. at 456, emphasis added. The instructions for the lesser offenses 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) (citing Beck, 447 U.S. at 635).

When making this determination, the trial court cannot limit its view of the evidence to that presented by the defense or to any certain portion of evidence, but rather “*must consider all of the evidence that is presented at trial.*” Id, emphasis added (citing State v. Bright, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996)). The possibility that the jury might disbelieve the State’s evidence pointing to guilt is not sufficient. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990); State v. Speece, 115 Wn.2d 360, 798 P.2d 294 (1990).

Rape in the first degree, as charged against the defendant under RCW 9A.44.040(1)(a) in count III of the Information, is committed if a person engages in sexual intercourse with another by forcible compulsion where the perpetrator or an accessory uses or threatens to use a deadly weapon or what appears to be a deadly weapon. CP 1-3; CP 40. Forcible compulsion means

physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself. RCW 9A.44.010(6); CP 43.

Robbery in the first degree, as charged against the defendant under RCW 9A.56.200(1)(a)(ii) in count IV of the Information, occurs when, in the commission of the robbery or of immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon, here a knife. RCW 9A.56.190; CP 1-3; CP 48. To commit robbery in the second degree, the robbery must have occurred "by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone", but not with a deadly weapon or by actually inflicting bodily injury. RCW 9A.56.190; RCW 9A.56.210.

- i. The nurse examiner's testimony does not raise an inference that second or third degree rape or second degree robbery were committed, to the exclusion of first degree rape and first degree robbery.

Upon appeal, the defendant first contends that the testimony of the nurse examiner supports an inference that only the inferior degree offenses of second and third degree rape and second

degree robbery were committed, to the exclusion of first degree rape and first degree robbery. The defendant argues that instructions on these inferior degree offenses should have been given because, based on the nurse examiner's testimony, a reasonable juror could have concluded that no weapon was used in the rape and robbery of the victim.

In her testimony, the nurse examiner said that she conducted a full body exam and skin assessment of the victim after the incident and that nothing out of the ordinary, including blood, was found on the victim. 3RP 322-23. According to the defendant, this portion of the evidence raises an inference that a knife was not used in the commission of the rape and robbery, and that therefore inferior degree offense instructions would have properly been given to the jury.

The defendant's arguments are without merit and reversal is not required. The evidence, when viewed in a light most favorable to the defendant, it is not such that it would support the request for inferior degree offenses instructions because there was no affirmative evidence supporting the inference that only these offenses were committed, to the exclusion of the charged offenses.

Fernandez-Medina, 141 Wn.2d at 455 – 56.

The nurse examiner's testimony does not allow a reasonable juror to conclude that the defendant did not use a knife in the rape and robbery of the victim. The victim described that the defendant slapped her with the flat side of the knife, held the knife up to her throat, and acted like he was going to stab her with it. 3RP 287, 347-9. Under these facts, a reasonable juror would not expect a nurse examiner to find blood or anything out of the ordinary on the victim, in terms of wounds or scarring of the victim's skin. The nurse examiner's testimony is thus consistent with the description of the rape and robbery provided by the victim.

Moreover, the nurse examiner provided testimony at trial that actual injuries from sexual assaults only occur in a small percentage of rapes or sexual assaults. 3RP 316-17. She added that it is possible to have a very violent and traumatic sexual assault occur without any injuries whatsoever. 3RP 316-7. Therefore, the nurse examiner's inability to find evidence of the knife's usage is not affirmative evidence that no knife was used in the commission of these crimes.

Furthermore, in making its factual determination, a court must consider all of the evidence that is presented at trial and the possibility that the jury might disbelieve the State's evidence

pointing to guilt is not sufficient. State v. Warden, 133 Wn.2d at 563; State v. Fowler, 114 Wn.2d at 67. However, the defendant's argument ignores a substantial amount of evidence that the defendant used a knife during the commission of the rape and robbery, and thus that the charged first degree offenses were committed.

As previously noted, the victim provided specific and extensive testimony about the defendant's use of the knife during the rape and robbery, as well as the impact it had upon her. 3RP 340, 351-353. The victim told the nurse examiner that the defendant had threatened her with a large kitchen knife and told her "hold still or I will stab you". 3RP 315.

Additionally, the victim testified that the defendant cut himself on the side of his hands with the knife he was using and DNA tests later confirmed that his blood was indeed found on the victim's shirt and shorts. 2RP 121-2; 3RP 340. (Contrary to the representations in Appellant's Brief, pg. 3, the victim never claimed that the defendant 'poked' with her a knife several times.)

In the present case, some of the evidence mentioned above would have to be disbelieved or discounted entirely for an inference to be raised that only the inferior degree offenses were committed

to the exclusion of the charged offenses. This is underscored by the fact that, at trial, the defendant's request for inclusion of the inferior degree offense instructions was made "given the credibility issues in the case." 5RP 580. The evidence in this case supports an inference that the defendant was carrying and threatening the victim with a knife during the commission of these crimes, that is, that the charged offenses were committed.

The defendant's argument that the nurse examiner's testimony raises the inference that the inferior degree offenses were committed, to the exclusion of the charged offenses, fails because the nurse examiner's testimony does not raise that inference and because the defendant's argument does not take into account all of the evidence presented at trial.

- ii. The victim's testimony does not raise an inference that third degree rape was committed, to the exclusion of first degree rape.

Secondly, the defendant argues that the testimony of the victim, coupled with the medical testimony from the nurse examiner, raises an inference that only the inferior degree offense of rape in the third degree was committed, to the exclusion of the

charged offense of rape in the first degree. The defendant therefore asks this court to find that an instruction on the inferior degree crime of third degree rape should have been provided to the jury at trial. RCW 9A.44.040; RCW 9A.44.060.

Specifically, the defendant notes that the victim stated in her testimony that the defendant “didn’t pay for the sex he took, therefore it was not consensual” and that “[to get] my consent... you have to give me money.” 4RP 445, 466. The defendant argues this portion of the victim’s testimony raises an inference that the victim having sex with the defendant was only nonconsensual, as opposed to also being the product of forcible compulsion with a deadly weapon.

With respect to the defendant’s second argument, the trial court properly denied the defendant’s request for an instruction on rape in the third degree. Once again, when reviewing all of the evidence presented at trial in a light most favorable to the defendant, this evidence does not support the inference that rape in the third degree was committed, to the exclusion of rape in the first degree. Fernandez-Medina, 141 Wn.2d at 455 – 56.

There is no dispute that the victim’s testimony relied upon by the defendant in making his argument suggests that the victim did

not consent to having sex with the defendant. However, the defendant's argument fails to address the possibility that the sex the defendant had with the victim was both nonconsensual, as well as the result of forcible compulsion where the defendant used or threatened to use a deadly weapon. Whether the victim consented to sex with the defendant is not the ultimate question.

Rather, the ultimate question is whether all of the evidence presented at trial raised an inference that the sex was only nonconsensual, instead of also being the result of the defendant's physical force and threats with a knife overcoming the victim's resistance, that is that only rape in third degree had been committed *to the exclusion* of rape in the first degree.

The defendant suggests that this Court focus only on specific portions of the victim's testimony demonstrating lack of consent as proof that rape in the third degree was committed, instead of rape in the first degree. However, this specious argument should be rejected because it runs contrary to well-established case law, requiring that all of the evidence presented at trial be considered. When doing so, substantial evidence shows that the defendant committed rape in the first degree and not an inferior degree of rape.

At the defendant's trial, the victim described in detail the manner in which the defendant used a knife during the commission of the rape. The defendant slapped her with the flat side of the knife, almost cut her, acted like he was going to stab her with the knife, and held the tip of the knife to her throat while having sex with her. 3RP 287, 346-49.

The victim also testified about the effect that the use of the knife had on her, including stating, "He had this big, long knife ... pushed to my throat like this when he was on top of me and I just didn't move. I couldn't do anything. All you can do is sit there and cry when somebody else is in control." 3RP 351, 353. The defendant's possession and wielding of the knife during commission of the rape and robbery is what forced Ms. Dutton to comply with his demands.

Overall, the evidence presented at trial demonstrates that, not only did the victim not consent to having sex with the defendant, but the defendant committed the rape using a knife and using physical force which overcame the victim's resistance, or a threat, express or implied, that the victim in fear of death or physical injury

to herself. RCW 9A.44.010(6). Such circumstances constitute rape with forcible compulsion using a deadly weapon, or rape in the first degree.

There is no evidence which raises the inference that only rape in the third degree occurred, to the exclusion of rape in the first degree. Therefore, the trial court properly denied introducing the third degree rape instruction to the jury and the defendant's due process rights were not violated.

- iii. Even if the trial court had erred, the outcome of the trial would not have been different if the error had not occurred.

An error is not harmless beyond a reasonable doubt if there is a reasonable probability that the outcome of the trial would have been different if the error had not occurred. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). Here, even if it had been error for the trial court to decline providing the jury with instructions on the inferior degree charges of rape in the second and third degrees and robbery in the second degree, which it is not, there is no reasonable probability that the outcome of the trial would have been different. This is so because of strength of the State's

evidence in this case, as outlined above, that the defendant used a knife, threats, and force during the commission of both the rape and robbery of the victim.

In summary, the factual component of the test for entitlement to an inferior degree offense instruction is not satisfied in this case because the evidence presented at trial does not support a rational inference that the defendant committed only the inferior degree offenses to the exclusion of the greater offenses. Fernandez-Medina, 141 Wn.2d at 461. Rather, the evidence demonstrates that he raped the victim using a deadly weapon and with forcible compulsion. These actions warrant an instruction on first degree rape and robbery, as opposed to instructions on any inferior degree offenses.

The instructions for the inferior degree offenses were justifiably not given to the jury and the trial court cannot be found to be in error for failing to provide such instructions. Therefore, this court should deny the defendant's request to reverse and remand on these grounds, and affirm the trial court's ruling.

**D. CONCLUSION**

For all of the foregoing reasons, the State requests that this Court reject Adan's arguments and affirm his convictions.

DATED this 27<sup>th</sup> day of September, 2010.

Respectfully submitted,

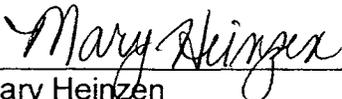
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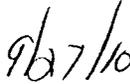
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C Link, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ABDIKAFAR ADAN, Cause No. 64856-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Mary Heinen  
Done in Seattle, Washington

  
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