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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ABDOUL HAKOU KAFANDO,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 16-1-04456-7  
The Honorable Garold Johnson, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to meet its burden of proving the absence of self-defense beyond a reasonable doubt.
2. The trial court's improper answer to the jury's question failed to make the relevant legal standard manifestly clear to the average juror.
3. The trial court's improper answer to the jury's question misstated the law of self-defense and implied that the defense had the burden of proof.
4. Trial counsel rendered deficient representation when he failed to object to the trial court's improper answer to the jury's question.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the evidence showed that Abdoul Kafando only stabbed the alleged victim after the victim had attacked and beaten Kafando a few days earlier, and after the alleged victim confronted Kafando inside a small carport and appeared to be moving aggressively towards Kafando to attack him again, did the State fail to meet its burden of proving the absence of self-defense beyond a reasonable doubt? (Assignment of Error 1)

2. Where the trial court told the jury that it must be in “100% agreement” that Abdoul Kafando acted in self-defense, but where proof beyond a reasonable doubt that a defendant acted in self-defense is not required to acquit a defendant of an assault charge, did the trial court prejudicially misstate the law and improperly suggest that Kafando was required to prove that he acted in self-defense? (Assignments of Error 2 & 3)
3. Did trial counsel render deficient representation when he failed to object to the trial court’s improper answer to the jury’s question? (Assignments of Error 2, 3, & 4)

### **III. STATEMENT OF THE CASE**

#### A. PROCEDURAL HISTORY

The State charged Abdoul Hakou Kafando with one count of first degree assault or in the alternative second degree assault. (CP 17-18) The State also alleged that the assault was committed with a deadly weapon (knife) and against a family or household member. (CP 17-18)

The jury found Kafando not guilty of first degree assault but guilty of second degree assault. (CP 91-92; RP 448) The jury also found that Kafando was armed with a knife and that the victim was

a family or household member. (CP 95-96; RP 448)

The defense filed a motion for arrest of judgment, for a new trial, or relief from judgment pursuant to CrR 7.4, 7.5 and 7.8. (CP 98, 99-115, 125-44, 155-83) Kafando argued that his trial counsel was ineffective for failing to properly investigate and failing to call certain defense witnesses, and for not allowing him to testify at trial. (CP 99-115, 125-44, 155-83; RP 470-80) The trial court denied the motion as untimely, but also noted that the motion did not present substantive grounds for relief either. (CP 251-54; RP 482-86)

The trial court rejected Kafando's request for an exceptional sentence below the standard range, and sentenced Kafando to a total of 18 months of confinement. (CP 190; RP 519-20) Kafando timely appealed. (CP 244, 250)

#### B. SUBSTANTIVE FACTS

In November of 2016, Abdoul Kafando and Yasha Bolton had been married for about five years. (RP 295) They shared an apartment with Bolton's three teenaged daughters. (RP 295) They were all at the apartment, along with two of Bolton's friends, on November 5th, when Kafando and Bolton began arguing. (RP 296) According to Bolton, Kafando was acting "belligerent." (RP 296) At one point, Kafando moved close to Bolton's friend Amber and

began yelling at her. (RP 296)

Bolton stepped between them and led Kafando to the bedroom so they could talk. (RP 296) Kafando was still angry and yelled at Bolton. (RP 296) Bolton testified that she put her hand on Kafando's chest, but Kafando grabbed her hand and pulled it behind her back, then pushed her against the wall. (RP 297)

Kafando then left the bedroom and "stormed" out of the house. (RP 297) Bolton's children yelled at Kafando as he walked out, and Bolton's daughter called Bolton's brother to tell him what had just happened. (RP 297-98) Bolton locked the door but did not call the police. (RP 298)

However, Kafando soon realized he did not have his car keys or personal items, so he returned and began banging on the door, asking to be let back in. (RP 298) Kafando reminded Bolton that it was his home too and he paid rent so she should not lock him out. (RP 298) Eventually Bolton threw a set of car keys out of the window. (RP 299) Kafando picked them up and left. (RP 299)

Bolton's brother, Alto Powell, came to the apartment the next day. (RP 277, 299) Bolton told Powell what had happened. (RP 299) A short time later, Kafando knocked on the door. (RP 270, 299) Powell decided to open the door and confront Kafando. (RP

270, 299)

What happened next was recorded by Kafando, and the recording was provided to police and played at trial. (Exh. D24) On the recording Powell can be heard angrily saying to Kafando “Did you put your f----- hands on my sister, n-----?” (Exh. D24 at 1:02; RP 271, 301) Kafando says he did not, and Powell then says, “Put your hands on me, n-----.” (Exh. D24 at 1:04, 1:22-1:24; RP 271, 301) Kafando says, “No,” then Powell repeats, “Put your mother-f----- hands on me.” (Exh. D24 at 1:24-1:26; RP 271, 301) In a threatening and angry voice, Powell then says, “Come here n-----. Come here! Come here! Don’t make me come to you.” (Exh. D24 1:27-1:35; RP 301)

Kafando can be heard saying, “OK, you know what, I don’t want to have a....” (Exh. D24 at 1:37-1:39) But Kafando is cut off, and then there are sounds of a prolonged scuffle. (Exh. D24 at 1:39-2:35) Powell continues to yell angrily at Kafando, while Kafando tries to say that he does not want to fight. (Exh. D24 at 1:39) Female voices can be heard saying “hit him” or “get him.” (Exh. D24 at 1:49-1:50; RP 291, 323) Finally, Bolton can be heard repeatedly yelling, “stop” and “that’s enough.” (Exh. D24 at 1:52-2:35; RP 291, 302) Eventually the fight ends and Bolton can be

heard telling Powell to “calm down.” (Exh. D24 at 2:30-2:50)

Bolton claimed she did not know who threw the first punch and that both men were hitting each other. (RP 302, 303) Powell also claimed he could not remember who first made contact, but knows that he definitely wrestled Kafando to the ground and punched him in the face. (RP 272, 291-92) Powell testified he got the better of Kafando and that he “won” the fight. (RP 272) A police officer who responded to the disturbance noted visible swelling on Kafando’s cheek. (RP 367; CP 55)

The next day, Monday November 7, Bolton obtained a protective order restricting Kafando from coming to the apartment or contacting her. (RP 303-04; Exh. P7) She also decided she wanted to end the marriage, so she began the process of transferring accounts into her name only, including removing Kafando from their joint bank account. (RP 304-05)

Kafando received text messages from the institutions and was upset to learn that Bolton was taking these steps without consulting him. (RP 305) Kafando also wanted to go to the apartment so that he could collect his personal belongings and laptop computer. (RP 305)

Bolton and Kafando communicated the next day, Tuesday

November 8, but Bolton did not tell Kafando about the protective order. (RP 305) She figured the order was not valid until Kafando was served and given notice of its existence and terms so she could just wait to serve him until she wanted or needed to. (RP 327-28, 329) So instead, Bolton told Kafando he could collect his belongings on Friday, when she would not be working and could be there to help him move out. (RP 305) Kafando said no because he needed his possessions sooner, and he told Bolton he would go to the apartment that day. (RP 305)

When she learned from her daughters that Kafando was at the apartment gathering his things, Bolton decided this was the moment to notify Kafando of the protective order. (RP 309-10) And she decided that Powell, the man who just two days earlier had attacked and beaten Kafando, should be the one to surprise him with it. (RP 273, 310) She called Powell and asked him to go to the apartment, and also called 911 because she was concerned for the safety of her daughters. (RP 309-10)

Powell and his then-girlfriend, Alexa Rodriguez, went to the apartment complex to give the order to Kafando. (RP 237, 334) When they arrived, Kafando was outside moving boxes into his car. (RP 274, 335) Powell approached Kafando, told him he did not

want to fight him, handed Kafando a copy of the protective order, and began to walk back to the car. (RP 275, 293)

According to Powell, Kafando became angry and called him names and said he would “beat [Powell’s] ass.” (RP 276) Powell turned around and moved back towards Kafando, and said, “What did you say to me?” (RP 276, 293) Kafando then lunged towards Powell and stabbed him in the abdomen with a knife. (RP 276, 284)

Powell stumbled backwards and grabbed his abdomen because he could feel that he was bleeding. (RP 276, 336) He walked quickly back to the car and got in. (RP 276) Powell testified that Kafando continued to yell and threaten him as they drove away. (RP 277, 279, 340) Rodriguez drove Powell to the hospital, where he received three stitches to close his wound. (RP 279, 289, 336; CP 54) Powell has a small scar on his abdomen, but did not suffer any serious injuries. (RP 280, 280; CP 54)

Rodriguez recorded the incident on her cellular phone. (RP 335; Exh. P9) The recording provided to police and played at trial is just seven seconds long and does not show Powell and Kafando’s initial contact. (Exh. P9) The recording begins with Powell standing by the back of a car parked under a carport. (Exh.

P9) Powell moves slightly in the direction of the front of the car, then he suddenly jumps backwards. (Exh. P9) Kafando walks quickly out from behind the car, stands in the driveway, and yells angrily at Powell. (Exh. P9)

Tacoma Police Officer Thomas Perry was dispatched to the apartment to serve the protection order shortly after Bolton called 911. (RP 237-38, 252, 260) As he approached the area, he was flagged down by Kafando, who told the officer that he was being followed. (RP 239) As Officer Perry talked to Kafando, another car pulled alongside them and told the officer that Kafando had stabbed someone. (RP 241)

Kafando explained to Officer Perry that he had gone to the apartment to collect his belongings, and he did not know about the protection order. (RP 242) Kafando told the officer that Powell had given him the order and had insisted he leave immediately. (RP 243)

Kafando told Officer Perry that Powell had attacked him and beaten him up a few days earlier. (RP 243-44) He said Powell threatened to beat him up again, then rushed at him. (RP 243) Kafando was afraid so he grabbed a knife and stabbed Powell. (RP 243-44) Kafando told Officer Perry where to find the knife.

(RP 249, 264) Officer Perry eventually formally served Kafando with notice of the existence and terms of the protection order. (RP 252)

#### **IV. ARGUMENT & AUTHORITIES**

Due process requires the State to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const.. art. I, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); City of Seattle v. Norby, 88 Wn. App. 545, 554, 945 P.2d 269 (1997). Where a defendant presents evidence that he reasonably believed the victim was about to harm him and he acted in self-defense, the State must prove the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983); State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004); State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). The absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

Kafando told Officer Perry that he was afraid of Powell because he attacked him a few days earlier, and he stabbed Powell because he thought Powell was about to attack him again. (RP

243-44) At trial, Kafando argued to the jury that he thought Powell was going to attack him and, remembering how Powell was able to overpower him in hand-to-hand fighting, he felt he had to stab Powell to protect himself. (RP 410)

The trial court instructed the jury that Kafando was entitled to use force to defend himself if he reasonably believed he was about to be injured. Instruction 17 stated:

It is a defense to a charge of Assault that the force used was lawful as defined in the instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty to this charge.

(CP 78) The jury sent several questions to the court asking for clarification of this instruction, but eventually found Kafando guilty of second degree assault. (CP 88, 89, 92) However, the jury's

verdict should be reversed because the State failed to meet its burden of disproving Kafando's self-defense claim and because the court's answer to the jury's question regarding self-defense misstated the law and shifted the burden of proof to the defense.

A. THE STATE FAILED TO MEET ITS BURDEN OF PROVING THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The State bears the burden of disproving self-defense in a second degree assault prosecution. Acosta, 101 Wn.2d at 619. Evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wash.2d 220, 238, 850 P.2d 495 (1993). This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the

facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. Janes, 121 Wn.2d at 238.

The evidence in this case established that Powell attacked and beat Kafando just a few days before the charged incident. (RP 243-44, 272; Exh. D24) Powell acknowledged that he “got the better” of Kafando and “won” the fight. (RP 272) Kafando had a noticeably swollen cheek after the beating. (RP 367; CP 55) Then, as Kafando is trying to peacefully move his personal belongings out of his apartment, the same man who beat him appears unexpectedly and demands that he leave immediately. (RP 242-43) As Powell starts to leave, Kafando says something, and Powell turns and moves towards Kafando and says “What did you say to me?” (276, 293) Powell may not have intended to start another fight, but that could not have been clear to Kafando. What Kafando knows is that the man who “got the better” of him is angry and moving towards him again. (RP 243-44; Exh. P9) Kafando’s response, to use a weapon to stop an attack, is both objectively and subjectively reasonable.

The evidence unequivocally showed that Powell

aggressively attacked Kafando just a few days before he confronted Kafando with a protection order, and aggressively moved towards him as Kafando attempted to pack his car and leave. The State's theories about Kafando's anger at the situation do not overcome the evidence and do not prove, beyond a reasonable doubt, that Kafando's decision to defend himself in that moment was not a reasonable use of force.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Kafando's conviction must therefore be reversed and dismissed.

B. THE TRIAL COURT MISSTATED THE LAW AND IMPROPERLY SUGGESTED THAT KAFANDO WAS REQUIRED TO PROVE THAT HE ACTED IN SELF-DEFENSE.

The jury was correctly instructed that Kafando was entitled to use force to defend himself if he reasonably believed he was about to be injured. RCW 9A.16.020(3); State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005). However, the jury needed and requested clarification of this instruction. The jury asked, "Do we

have to be 100% in agreement to say that it was or was not self defense (i.e. instruction 17)?" (CP 88) After consultation with the prosecutor and defense counsel, the court responded with a simple "yes." (CP 88; RP 432-36) The court's answer misstated the law and improperly heightened the requirements for acquittal.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). However, self-defense instructions are subject to heightened appellate scrutiny: "Jury instructions must more than adequately convey the law of self-defense." State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). "Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Further, "[a] jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." LeFaber, 128 Wn.2d at 900.

When faced with a question from a deliberating jury, a trial court commits reversible error by giving an answer that is

“misleading, unresponsive, or legally incorrect.” United States v. Anekwu, 695 F.3d 967, 986 (9th Cir. 2012) (internal quotation marks and citations omitted). When the jury “makes explicit its difficulties,” the court should “clear them away with concrete accuracy.” Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S. Ct. 402, 90 L. Ed. 350 (1946). The court’s answer to the jury’s question about Instruction 17 did not clear away the jury’s difficulties “with concrete accuracy.” Bollenbach, 326 U.S. at 612-13.

Instead, the court erroneously informed the jury about what it had to find to reach a verdict. The court told the jury that it had to be “100% in agreement” that Kafando was or was not acting in self-defense. This is not an accurate statement of the law.

“Whether the defense has presented evidence of self-defense is a question for the trial court to address when deciding whether to instruct the jury on the law of self-defense.” State v. McCreven, 170 Wn. App. 444, 471, 284 P.3d 793 (2012) (citing Walden, 131 Wn.2d at 473). Once the trial court has found evidence sufficient to require a self-defense instruction, the inquiry into the sufficiency of proof of self-defense ends. McCreven, 170 Wn. App. at 471. The entire burden shifts to the prosecution to

prove the *absence* of self-defense beyond a reasonable doubt. See McCullum, 98 Wn.2d at 496. But the trial court's response in this case would lead a juror to believe that it must find proof beyond a reasonable doubt that Kafando acted in self-defense in order to acquit.

The defendant is not required to prove self-defense beyond a reasonable doubt, and to instruct or suggest otherwise is error. See McCreven, 170 Wn. App. at 470-71; see also State v. Redwine, 72 Wn. App. 625, 629, 865 P.2d 552 (1994) ("a jury instruction that improperly shifts the burden of proof to the defendant violates due process"). To acquit, a jury is not required to be "100% in agreement" that a defendant was acting in lawful self-defense. It need only be convinced that the State *did not* prove that a defendant *was not* acting in lawful self-defense. The jury may acquit even if it has doubts that a defendant's use of force was justified. All that is required is agreement that the State did not meet its burden of proving beyond a reasonable doubt that the force used was unjustified.

When read together, the court's answer to the jury's question is inconsistent with Instruction 17, and it is an erroneous statement of the law of self-defense and improperly implied that the defense

bore the burden of proving self-defense. Instead of clarifying the law, the court's answer misled the jury into thinking it needed to unanimously agree to a particular fact in order to acquit. This violated Kafando's due process right to a fair trial. U.S. Const. Amend. XIV; State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000); State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).

"A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." LeFaber, 128 Wn.2d at 900. Courts can review such a claimed error for the first time on appeal. RAP 2.5(a)(3); State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing State v. L.B., 132 Wn. App. 948, 952, 135 P.3d 508 (2006)). Nevertheless, the State may argue that the doctrine of invited error precludes Kafando's challenge to the trial court's answer to the jury's question because the defense agreed to it. (CP 88; RP 436) The invited error doctrine generally forecloses review of an instructional error, but does not bar review of a claim of ineffective assistance of counsel based on such instruction. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); see also State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (review of instructional error "is not precluded where invited error is the result of ineffectiveness of counsel").

Kafando had the right to effective assistance of counsel at trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22. A reviewing court must start with the presumption that counsel's representation was effective. Studd, 137 Wn.2d at 551. In order to find that trial counsel was ineffective, the defendant must show that counsel's performance was deficient in some respect, and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant must also demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336.

Deficient performance is performance “below an objective standard of reasonableness based on consideration of all the circumstances.” Studd, 137 Wn.2d at 551 (quoting McFarland, 127 Wn.2d at 334-351). Reasonable attorney conduct includes a duty to investigate the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, 466 U.S. at 690-91. Proposing or agreeing to a detrimental instruction may constitute ineffective assistance of counsel. See Aho, 137 Wn.2d at 745-46 (counsel ineffective for offering instruction that allowed client to be

convicted under a statute that did not apply to his conduct).

The prejudice prong of the test requires the defendant to prove there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (adopting test from Strickland, 466 U.S. at 687).

There is a reasonable probability in this case that the outcome would have been different had counsel objected to the trial court's answer to this question from the jury. The jury was clearly struggling with the concept of self-defense as applied in this case. First, the jury sent a note to the court stating that they could not reach agreement on the second degree assault charge. (CP 87) After they were told to continue deliberating, the jury sent two more notes asking for clarification of Instruction 17. (CP 87-89) The jury asked whether they needed to be "100% in agreement" about self-defense, and asked how to define a "reasonably prudent person." (CP 88, 89) Any answer that misled or incorrectly described the law of self-defense very likely impacted the jury's discussion of the self-defense question and very likely impacted the jury's verdict.

The trial court's misstatement of the law and trial counsel's failure to object to this misstatement was prejudicial and denied

Kafando his due process right to a fair trial. U.S. Const. Amend. XIV.

**V. CONCLUSION**

The State failed to meet its burden of proving beyond a reasonable doubt the absence of self-defense. This failure requires that Kafando's conviction be reversed and dismissed. Alternatively, the trial court's answer to the jury's question about self-defense was a misstatement of the law, implied that the defense had to prove that the force used was legally justified, and likely misled the jury into misunderstanding the requirements for conviction and acquittal. For this reason, Kafando's conviction should be reversed and his case remanded for a new trial.

DATED: May 31, 2018



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STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for Abdoul H. Kafando

**CERTIFICATE OF MAILING**

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**Appellate Court Case Title:** State of Washington, Respondent v. Abdoul H. Kafando, Appellant  
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