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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUN 30 PM 4:39

NO. 64856-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIKAFAR ADAN,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR.

The trial court erred and violated the Due Process Clause of the Fourteenth Amendment by refusing to instruct the jury on the inferior degree offenses .

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

Due process requires a trial court to instruct on an inferior degree offense when requested by the defendant, where in the light most favorable to the defendant the evidence supports an inference that only the lesser offense was committed. In a prosecution for first degree rape and first degree robbery, the State's witnesses provided testimony that supported the inference that no weapon was used in the commission of the offense of first degree rape and robbery. The State's witnesses also provide evidence that supported the inference that the sexual intercourse was not the product of forcible compulsion but simply the absence of consent. Did the trial court deny Mr. Adan due process when it refused to provide the requested instructions on the offenses of second degree rape, second degree robbery, and third degree rape?

C. STATEMENT OF THE CASE.

Hilary Dutton, a Seattle prostitute, called 911 alleging a man had raped her. RP 150-52. Ms. Dutton initially told police that when she drove up to a stop light a man got into her car and directed her to a location where he raped her. At trial, however, Ms. Dutton testified Mr. Adan was a prior client of hers. Ms. Dutton testified she went to Mr. Adan's home in the early morning hours and when he got into her car he threatened her with a large kitchen knife. RP 287. Ms. Dutton claimed Mr. Adan put the car in park while she was still driving, and demanded she get into the backseat and remove her clothes. Id. According to Ms. Dutton, Mr. Adan raped her. Id. Ms. Dutton testified Mr. Adan then went through her purse and took her night's earnings. Id.

After she reported the alleged rape to police, Ms. Dutton's pimp, Ron Wallace, told her to speak to another of his prostitutes, Estelle Strippling. RP 216. 244. After speaking with Ms. Dutton, Ms. Strippling too contacted police to allege Mr. Adan had raped her in a similar fashion. RP 189. Aside from failing to contemporaneously report the alleged assault, Ms. Strippling was unable to provide police a description of Mr. Adan's race – he is East African. RP 236. Unsurprisingly, coming as they did after the

two had spoken, Ms. Strippling's allegations bore substantial similarities to Ms. Dutton's claims.

Ms. Dutton testified that if a customer does not pay the agreed amount, any sexual contact is nonconsensual. Specifically she stated "He didn't pay me for the sex that he took, therefore it wasn't consensual. He didn't give me weed. He stole from me." RP 445. "You do not have any right to touch me in any form unless I consent. And by my consent is,[sic] you have to give me money." RP 466.

In addition to nonpayment, Ms. Dutton claimed Mr. Adan slapped her arms with the flat of the blade and poked her several times with the knife. RP 287. However, a full-body examination conducted by a nurse examiner, trained in the observation and collection of evidence of sexual assaults, did not yield any evidence to support Ms. Dutton's claim that she had been slapped and poked with a butcher knife during the incident. RP 287, 315

The State charged Mr. Adan with two counts of first degree rape and two counts of first degree robbery. CP 1-2.

A jury acquitted Mr. Adan of the two charges concerning Ms. Strippling but convicted him of the counts involving Ms. Dutton. CP 64-67.

D. ARGUMENT.

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

1. Mr. Adan properly requested an instruction on the inferior degree offense of third degree rape. 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.

2. Due process requires a court provide instructions on lesser offenses where those instructions are supported by the evidence in the case. Generally a criminal defendant may only be convicted of those offenses charged in the information, or those offenses which are either lesser included offenses, or inferior degrees of the charged offense. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989); State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1998)). However, RCW 10.61.003 and RCW 10.61.006 permit a conviction for an

offense which is an inferior degree or lesser included offense of the offense charged. 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)).

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). 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.

The factual inference required for both lesser included and inferior degree offenses is the same. State v. Fernandez-Medina,

141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In applying the factual prong 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. 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) (citing Beck, 447 U.S. at 635). In applying this factual test, if affirmative evidence supports the inference that only the lesser offense was committed, rather than merely the conclusion that the jury might disbelieve the State’s evidence, the instruction must be given. Fernandez-Medina, 141 Wn.2d at 456. Importantly, in reaching this determination the trial court cannot “limit[] its view of the evidence [to that presented by the defense] but must consider all of the evidence that is presented at trial.” Id. (citing State v. Bright, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996)).

Viewed in the light most favorable to Mr. Adan, the evidence supported the inference that only the inferior degree offenses had been committed.

3. Mr. Adan was entitled to have the jury instructed on the inferior degree offenses. With respect to both rape and robbery charges, the allegation that Mr. Adan used a knife elevated the offenses from second degree to first degree. CP 1-3; Compare, RCW 9A.44.040; RCW 9A.44.050; RCW 9A.56.190; RCW 9A.56.200; RCW 9A.56.210.

Ms. Dutton and Ms. Stripling both testified that Mr. Adan threatened them with a large kitchen knife during the alleged rape. Ms. Dutton testified he slapped her arm with the flat side of the knife blade. RP 287 Ms. Dutton told the nurse examiner that 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. The 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.

In addition, Ms. Dutton testified her allegations against Mr. Adan stemmed from a dispute over payment saying, he “Didn’t pay for the sex he took, therefore it was not consensual” She explained “[to get] my consent . . . you have to give me money.” RP 445, 466. Coupled with the medical testimony of the absence of knife wounds, Ms. Dutton’s testimony regarding payment for consent permitted a jury to find that only third degree rape was committed. Specifically that there was no forcible compulsion but instead because of the lack of payment, Ms. Dutton “did not consent . . . to sexual intercourse with [Mr. Adan] and [her] lack of consent was clearly expressed.” Compare RCW 9A.44.050 and RCW 9A.44.060.

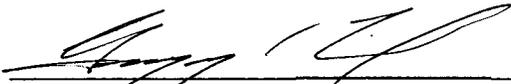
The evidence in the light most favorable to Mr. Adan supported his requested instructions on the lesser offenses. “A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Mr. Adan was entitled 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. Beck, 447
U.S. at 636-38.

E. 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 30th day of June 2010.



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64856-0-I
v.)	
)	
ABDIKAFAR ADAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ABDIKAFAR ADAN 336491 WCC PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2010.

X _____ 

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