Supreme Court No. 98952-4
COA 79893-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADAN MORALES,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Janice E. Ellis

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND COURT RULES

WASHINGTON CASES

A. IDENTITY OF PETITIONER

Mr. Adan Morales was the appellant in COA No. 79893-6-I.

B. COURT OF APPEALS DECISION

Morales seeks review of the decision issued July 27, 2020. (Appx. A).

C. ISSUES PRESENTED ON REVIEW

1. Mr. Adan Morales refused to plead guilty to indecent liberties and the charge was amended to second degree rape. At trial, there was evidence of intercourse during which the complainant expressed her lack of consent by conduct, which is third degree rape. Where the evidence in favor of a lesser offense instruction must be viewed in the light most favorable to the defendant, and where the theory as to the lesser need not be consistent with the primary defense, did the court err in refusing the defense motion for a lesser offense instruction on third degree rape?

2. Is review warranted under RAP 13.4(b)(1) and (2) where the Court of Appeals decision is in conflict with State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) and State v. McClam, 69 Wn. App. 885, 889, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993)?

D. STATEMENT OF THE CASE

1. Procedural history – initial charge of indecent liberties.

On May 21, 2016, Tukwila police officers Trenton Chapel, Carl Cronk, and Kathryn Brecht were called to the home of Moneira Curran

and Anthony Curran, to investigate a claim that Debbie Palumbo was claiming she had been victimized by Mr. Morales. CP 119-22; 2/27/19RP at 372, 395. Another investigating officer, Matthew Porter, telephoned Mr. Morales, and Mr. Morales quickly returned the officer's telephone call. Mr. Morales described that Ms. Palumbo had bumped into him in the hallway of the home, and initiated sexual contact and intercourse. CP 119. The events of the night were discussed at length during the call. Morales specifically denied that Ms. Palumbo was "asleep" – in fact, she had guided him into the room she was staying in, and began the interaction by performing fellatio on him. CP 119. The State initially charged Mr. Morales with Indecent Liberties, per RCW 9A.44.100(1)(b). 2/27/19RP at 413; see CP 119, 120-23, 124-25, 107-08. Except for Morales' *consistent* account *throughout* the case, the facts of the investigation and trial were inconsistent, and conflicting. Ms. Palumbo initially said several things to the police: First, she stated she had woken up and become aware that there was a man on top of her, and that if it had been her friend "Rob" this would have been acceptable. CP 120-21. Palumbo next stated she realized it was Mr. Morales, and that his penis was inside her, so she "tried desperately to kick the defendant off of her." CP 121. According to Palumbo, Morales continued having sex with her. CP 121. Palumbo tried to scream but could not raise her voice. CP 121. In addition,

> She [Palumbo] said that Mr. Morales was very calm and kept telling her to "Give me just another minute", as he continued having sex with her. Palumbo said she fought him for what seemed like a minute then heard her friend Curran come in the room and start to yell at Morales. Curran helped Palumbo get Morales off of her.

CP 121. For his part, Mr. Morales admitted to Officer Porter that he had been unfaithful to his fiancé, Meredy Tennison, that night, and that it started when Palumbo approached him sexually in the hallway. CP 121. When asked about the claim that Ms. Palumbo had been sleeping, Mr. Morales replied that this could not be correct, except if perhaps Ms. Palumbo "sleepwalks." CP 121. Officer Brecht stated that she responded to the house based on an alleged sexual assault against the Curran's houseguest, Mr. Morales. 2/27/19RP at 403-04. Officer Brecht, who drove Ms. Palumbo to the emergency room, and is an SFST field sobriety training officer, a drug recognition expert, and an Advanced Roadside Impaired Driving Enforcement officer, testified that Ms. Palumbo "didn't seem intoxicated to me or impaired by alcohol." 2/27/18RP at 407-08.

2. <u>Refusal to plead guilty and amendment of information</u>.

(i). Mr. Morales refused to plead guilty to Indecent Liberties, and invoked his Sixth Amendment right to trial.

Adan Morales declined the State's effort to secure a guilty plea to Indecent Liberties, and insisted on his Sixth Amendment trial rights. As a result, the charge was amended to second degree rape, alleging that Mr.

Morales "engage[d] in sexual intercourse with another person: . . . (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated" pursuant to RCW 9A.44.050(1)(b). CP 107-08. The State had also threatened to seek the high end of the standard range sentence if Mr. Morales did not plead guilty, and it did so following the verdicts, securing an indeterminate term of 102 months to Life based on an offender score of zero. CP 31-33 (judgment and sentence).

(ii). Trial.

[a] Drinking Party.

On the weekend of May 21, 2016, Adan Morales, along with his fiancé Meredy Tennison, were in Mountlake Terrace attending a memorial service for the father of Tennison's childhood friend Moneira "Minnie" Curran. Morales and Tennison, along with other friends of Curran's and her husband, were all invited to stay at the Curran home. 2/26/19RP at 267-70 (testimony of State's witness Moneira Curran), 2/27/19RP at 463-65 (testimony of Adan Morales).

Mr. Morales did not know most of the group of Meredy's and Moneira Curran's friends, including the Currans themselves, or Ms. Curran's good friend Debbie Palumbo. 2/26/19RP at 266-71, 2/27/19RP at 465. According to Minnie Curran, "families from all over" had come to

the house, and then after the memorial service, "everyone came back to my house." 2/26/19RP at 268.

When the group returned to the Curran home, they began drinking heavily. 2/26/19RP at 273. As Ms. Curran described it, various couples and friends had been told to stay in different bedrooms of the Curran family house, in beds or on air mattresses. 2/26/19RP at 273-74; State's exhibit 3, exhibit 4, exhibit 5, exhibit 6, exhibit 7, exhibit 8 (photographs of rooms and sleeping areas)). The Currans' children's rooms were used for some of the guests; they had been shunted off to other locations or were with babysitters. 2/26/19RP at 268-69, 272-74, 277. It was during that part of the night that "most of the drinking began." 2/26/19RP at 275.

At some point, Mr. Morales went into what he thought was the bedroom that he and his fiancé Meredy had been given to stay in. 2/27/19RP at 473-74. He tried to wake up Meredy by grabbing her butt and kissing her, as he often did affectionately, but to his surprise it "turned out to be Minnie" Curran. 2/27/19RP at 469-70.

Curran, who was also intoxicated, stated that she had wanted to sleep in her own bedroom of the home that night; however, it was right near an outside patio where a number of her friends were still drinking and talking noisily. Instead, she went into the room where Debbie Palumbo was sleeping, and got into that bed. 2/26/19RP at 286-88. She woke up

when she felt Mr. Morales "grabbing my bottom," and she said to him, "Adan, [it's] not Meredy. It's Minnie." 2/26/19RP at 289.

Minnie and Mr. Morales went outside to have a cigarette. 2/26/19RP at 289-90. Mr. Morales apologized and Minnie told him, "it's okay," since she felt it was an honest mistake. 2/26/19RP at 290. When she went to hug Mr. Morales, she stated that he revealed his penis. 2/26/19RP at 290-91. For his part, Mr. Morales testified that when Minnie hugged him, she pressed her breasts up against him, and then sat on his lap. 2/27/19RP at 471-72. He did pull out his penis at that time, because he thought that "she wanted some of me." 2/27/19RP at 472-73. However, Ms. Curran responded that that "was nasty," and went inside. 2/27/19RP at 472-73. Mr. Morales lingered on the patio finishing his cigarette. 2/27/19RP at 473.

[b] Varying descriptions of incident.

When Mr. Morales went inside to find his fiance's room, which Curran had now told him was in the back of the house, he encountered Debbie Palumbo in the hallway. 2/27/19RP at 473-74. The two bumped into each other, Palumbo seemed like she wanted to kiss him, and she grabbed ahold of him. 2/27/19RP at 474. Mr. Morales asked Palumbo if she "wanted to play," and when she groped him more and said yes, they went into the bedroom Palumbo was staying in. 2/27/19RP at 474-75.

Meanwhile, Minnie Curran said that she had gone to find her husband and tell him what she said happened with Mr. Morales on the patio. 2/26/19RP at 291-92. Ms. Curran, alone, then went to Debbie Palumbo's room. 2/26/19RP at 291-92. She "opened the door and saw the two of them [Mr. Morales, and Debbie Palumbo] having sex." 2/26/19RP at 293. Ms. Curran testified, "They were having sex on my son's bed." 2/26/19RP at 293. Ms. Curran's direct examination by the prosecutor continued:

> Q: What was Ms. Palumbo doing?
> A: Having sex.

2/26/19RP at 293. Ms. Curran then went and woke up Mr. Morales' fiancé Meredy, and at some point, Meredy and Morales went outside. 2/26/19RP at 293. Later, Ms. Palumbo told a nurse at Swedish emergency room that she had been "unconscious" or drunk and passed out. 2/26/19RP at 231-33. However, Curran testified that after the incident, when Ms. Palumbo went to take a shower, she "was apologizing" to Curran. 2/26/19RP at 293.

> Q: What was [she] apologizing for?
> A: I assume for having sex with Adan. She just kept saying I'm sorry.

2/26/19RP at 293. Ms. Curran told the prosecutor that she did not remember ever telling a police officer if Ms. Palumbo was sleeping when

Curran opened the door. 2/26/19RP at 294-96. She also stated that she did not remember telling people that she "assisted" Ms. Palumbo to get Mr. Morales off of her. 2/26/19RP at 296-97. Curran said that after Ms. Palumbo took a shower, she seemed sad, but calmed down. 2/26/19RP at 296-97. She then asked Ms. Curran to telephone her mother. 2/26/19RP at 297. Ms. Curran called Graziella Palumbo, and when asked about the conversation, she testified:

> Graziella answered the phone. I said, hi, this is Minnie and her - her response was, Debbie was raped, wasn't she? And Graziella told me very forcefully to call the police and that she would be over.

2/26/19RP at 297. Ms. Curran was asked by the prosecutor if she had first told Graziella Palumbo what was wrong or if Graziella had asked, but Curran did not remember, and only could answer, "possibly." 2/26/19RP at 299. Ms. Curran testified that she called the police because Graziella told her to; before that, she hadn't known if there was any reason to call the police. 2/26/19RP at 298.

Since that night, and for the subsequent several years, Debbie Palumbo had quit talking to Ms. Curran even though Curran had reached out to her after the incident, and they were "no longer friends," and Ms. Curran did not know why. 2/26/19RP at 301-02.

E. ARGUMENT

The trial court erred in denying the defense motion to instruct the jury on the lesser degree offense of third degree rape as defined in 2016, where evidence from multiple sources supported a verdict of non-consensual intercourse with lack of consent expressed by words "or conduct."

(1). Review is warranted under RAP 13.(4)(b)(1) and (2) because under *Fernandez-Medina* and *McClam*, among other authorities, the defense theory on the lesser offense need not be consistent with his primary defense.

A jury instruction on an inferior degree of an offense is proper when the information charges an offense that is statutorily divided into degrees, and there is evidence that the defendant committed only the inferior degree offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). Washington law provides: "Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto[.]" RCW 10.61.003. Here, Mr. Morales was charged with the offense of second degree rape under the theory that Ms. Palumbo was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b). In 2019, third degree rape was defined as follows:

> (1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person: (a) Where the victim did not consent

> as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct.

RCW 9A.44.060 (the statute was amended by Laws 2019 ch. 87 § 3, to remove the requirement of expression of lack of consent).

(2). Mr. Morales requested a lesser degree instruction on third degree rape and submitted the appropriate proposed jury instructions.

At the close of evidence, Mr. Morales presented briefing and argument requesting a lesser offense instruction on third degree rape by nonconsensual intercourse, which the State opposed. CP 86, 90-91; 2/28/19RP at 497-99, 501-02. Counsel emphasized, *inter alia*, that there had been evidence of intercourse with a lack of consent expressed by Ms. Palumbo's physical acts of struggling, and of Mr. Morales not ceasing the intercourse despite that lack of consent. 2/28/19RP at 501.

The trial court erroneously ruled that the evidence in the case was solely "binary" because there was evidence that intercourse "began" at a time when Ms. Palumbo was sleeping or unconscious from alcohol, but on the other hand, the "Defense's theory" was consensual sex. 2/28/19RP at 507-08.

The court recognized that there was evidence from other witnesses that Ms. Palumbo "was not unconscious, which is evidence that would tend to support a different charge." 2/28/19RP at 508. However, the court

reasoned (1) that this did not "rebut" the evidence that Palumbo was sleeping "when this started," (2) that Mr. Morales's claim was that the intercourse was consensual, and (3) that there was no evidence that Ms. Palumbo expressed a lack of consent by words or conduct "before sexual intercourse commenced." 2/28/19RP at 508.

The court's assessment of the facts necessary to require a requested lesser offense instruction was in error. On appeal, the decision whether or not to instruct the jury on an inferior degree offense, which involves application of law to facts, is reviewed *de novo*. State v. Corey, 181 Wn. App. 272, 276, 325 P.3d 250 (2014) (citing Fernandez–-Medina, 141 Wn.2d at 454).

(3). The presence of evidence from any source, viewed in the light most favorable to the requesting party, requires a lesser degree offense instruction.

A lesser degree instruction is appropriate when affirmative evidence exists that would permit the jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). "[I]t is not enough [to secure a lesser degree instruction] that the jury might disbelieve the evidence pointing to guilt [on the higher degree offense]" Fernandez–Medina, 141 Wn.2d at 456 (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)).

Importantly, however, the reviewing court views the evidence in the light most favorable to the party who requested the instruction. State v. Hampton, 182 Wn. App. 805, 829, 332 P.3d 1020 (2014) (third degree rape properly instructed upon in case of second degree rape), reversed on other grounds, 184 Wn.2d 656 (2015). Further, that evidence may come from any source. Fernandez-Medina, 141 Wn.2d at 456.

Most crucially, the issue is whether the evidence, as submitted, would permit a jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater. See, e.g., State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010); Fernandez-Medina, 141 Wn.2d at 456.

As the Fernandez-Medina Court held, it is not the defense's primary theory that controls, and the testimony of the defendant is not the only consideration which is looked at in this inquiry - instead, the court must consider all of the evidence admitted at trial in deciding whether an instruction should be given. See also State v. Bright, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996). In Fernandez-Medina, for example, the defendant testified that he was *not even present* when the crime occurred. Fernandez-Medina, at 456. The trial judge refused to give an instruction on second-degree rather than first-degree assault, saying that

this claim of denial meant the defendant was not *claiming* a "lesser" *had* occurred and thus was not entitled to that instruction. Id.

On review, the Supreme Court reversed, holding that the fact that the defendant denied the crime was not the question. Fernandez-Medina, at 456. Instead, the Court looked at the evidence as a whole and asked whether jurors "might reasonably have inferred" that the lesser crime had occurred. Id.

(4). Trial evidence from multiple sources strongly supported an offense of only third degree rape, and the trial court erred in refusing the defense motion to instruct the jury on that lesser degree crime.

In this case, evidence of non-consensual intercourse came from many sources at trial, including concessions by a reluctant Mr. Morales. In addition to his other testimony, he stated that he possibly misread Ms. Palumbo's bumping into him in the hallway, or her seeming cues, as meaning that she *wanted* to have sex with him. 2/27/19RP at 472, 474-75. He further admitted that it was odd that she would be interested in having consensual intercourse with him, a person she had just been introduced to at a memorial service. 2/27/19RP at 466, 472, 474.

The prosecutor repeatedly challenged Mr. Morales on the idea that Ms. Palumbo wanted to have sex with him after five minutes of encountering each other in the hallway. 2/27/19RP at 486-89. Mr. Morales answered the prosecutor's questioning, agreeing that he had

"thought" Ms. Palumbo "wanted" to have sex with him and that she was interested in consensual intercourse. 2/27/19RP at 486.

For her part, Debbie Palumbo testified that she had passed out in a bedroom because she had lots of drinks. 2/26/19RP at 184-85. She stated she woke up and saw that it was Meredy's fiancé, Mr. Morales, on top of her, and not "Rob." 2/26/19RP at 185, 210-11. Ms. Palumbo was unsuccessful at getting her legs out of her jeans to kick Mr. Morales off. 2/26/19RP at 185. As she stated, "I was trying to kick him and then he just said, give me one more minute." 2/26/19RP at 186.

Ms. Palumbo further testified, "I was basically just trying to push him off and kick him." 2/26/19RP at 187. She later stated that she was looking at Mr. Morales "crotch [and] I was trying to kick him." 2/26/19RP at 193. The episode ended and "chaos" ensued when Minnie Curran entered the room, jumped on Mr. Morales, whereupon he got up. 2/26/19RP at 187. Mr. Morales' fiancé, Ms. Tennison, came to the room, and Mr. Morales said "[s]omething like" "don't blame her. It's not her fault." 2/26/19RP at 186-87.

Mr. Morales left the house shortly thereafter, after Mr. Curran told him to "get the hell out of my house." 2/27/19RP at 327. Later, Ms. Palumbo told nurse Melissa Eben from the Swedish Edmonds emergency

department that "[w]e were trying to pull him off of me" while Mr. Morales said "give me one more second." 2/26/19RP at 231-32.

Given this array of evidence, the jury could easily have rejected the claim that Ms. Palumbo was sleeping during intercourse, and instead find that there was third degree rape rape by nonconsensual intercourse, with lack of consent expressed by Ms. Palumbo's conduct. Cf. State v. Charles, 126 Wn.2d 353, 355, 894 P.2d 558 (1995) (where the evidence suggested the intercourse was either forced nonconsensual intercourse or consensual intercourse, but there was no evidence of unforced nonconsensual intercourse, third degree rape instruction was properly denied). The jury is required to assess all the evidence in the case. See CP 70-72 (jury instruction no. 1). And, as to a lesser crime, the evidence to support an instruction may come from any source in the jury trial, including but not limited to the defendant. Fernandez-Medina, 141 Wn.2d at 456; State v. McClam, 69 Wn. App. at 889.

It is in this respect that the Court of Appeals decision was in error sand requires review. The Court stated, "the evidence must show that Morales committed only third degree rape, to the exclusion of second degree rape. . . .. There was no affirmative evidence that D.P. was capable of consenting when the intercourse began and expressed her lack of consent through words or actions." (Appx. A - Decision, at pp. 7-8).

Notably, the prosecutor - although the State's opening statement is of course not evidence - told the jury that Ms. Palumbo was unsuccessful at kicking Mr. Morales off of her because her pants were down, so Ms. Curran "helped Ms. Palumbo get Mr. Morales off of her" as Mr. Morales was allegedly saying, "just give me one more minute." 2/26/19RP at 157 (emphasis added). The point being that the case was replete with reasonable inferences that only non-consensual third degree rape occurred.

For comparison, in Corey, the appellate court held that a third-degree rape instruction, given at a second degree rape trial charged as intercourse with forcible compulsion, was proper where the evidence heard by the jury included facts supporting nonconsensual intercourse. Corey, 181 Wn. App. at 278-79.

And in Hampton, the complainant testified that she fell asleep in a chair after drinking beer and wine. Hampton, 182 Wn. App. at 811. The complainant stated that she was waking up, and woke up and felt the defendant penetrate her vagina; the defendant was charged with second degree rape by intercourse with a person who was incapable of consent, and that charge went forward. Hampton, at 810, 812, 814. However there was also evidence that the complainant, when fully awake, "tried unsuccessfully to push Hampton away [but] he eventually stopped on his own." Hampton, at 812. The Court of Appeals deemed a lesser degree

offense instruction required. Hampton, at 831 (lesser degree test satisfied where jury could find given all of the evidence that A.B. expressed a lack of consent, and not that she was incapable of consent) ("This supported the inference that Hampton committed only the inferior degree offense.").

Here, Officer Matt Porter testified that when he interrogated Mr. Morales, he utilized trained tactics to attempt to elicit admissions, and Morales conceded that his account that he had convinced and persuaded Ms. Palumbo, who he did not know, to agree to consensual sex with him after a brief hallway encounter would make him "quite a smooth talker." 2/27/19RP at 417-20, 424. Officer Porter also suggested that, until he began asking questions more accusatorily, Mr. Morales had not explicitly stated that the pair had consensual sex. 2/27/19RP at 418, 427. And Officer Chapel testified that he was surprised when Ms. Curran, after a description of everything she described, asserted that Ms. Palumbo was asleep. 2/27/19RP at 385-86.

All told, there was significant reason to doubt in the case that would allow a rational jury to acquit Mr. Morales of having intercourse with someone that was incapable of consent by being physically helpless or incapacitated, but instead that Ms. Palumbo and Ms. Curran together worked to push or pull Mr. Morales off of a *visibly non-consenting* Palumbo.

(5). <u>The requested lesser offense instruction need not be consistent with the defendant's primary defense, particularly given that the defendant would be unlikely to testify that he was having intercourse with the complainant while she was trying to kick or push him off of her</u>.

The evidence in this case was not "binary," but instead was wide-ranging, inconsistent, and variegated. Evidence from several sources greatly diluted the claim of sleeping or inability to consent, and supported nonconsensual intercourse without forcible compulsion. Mr. Morales said that he encountered Palumbo in the hallway when she walked into him, and that she began by performing oral sex on him and that they then had intercourse. Of course, Mr. Morales could hardly be expected to testify that he engaged in intercourse with Palumbo while she was physically indicating a lack of consent. But he did not need to do so. He stated that Ms. Palumbo was <u>not</u> asleep, but admitted multiple times that it could be considered far-fetched that she would consensually have intercourse with him. Palumbo, for her part, stated that she kicked and tried to get Mr. Morales off of her, but he did not stop having intercourse and instead said, to her, that he wanted one more minute. And Minnie Curran testified that she discovered Mr. Morales and Ms. Palumbo having sex, and she helped Palumbo in her efforts to physically stop Morales from engaging in intercourse. All of the evidence, from multiple sources, allowed a rational jury to acquit Mr. Morales of the greater degree of the crime, but find him

guilty of third degree rape. The jury could easily conclude that there was a reasonable doubt that Palumbo was sleeping or passed out when the encounter occurred, and then, turning next to a lesser offense instruction, might decide that there was enough proof that the defendant committed third degree rape by engaging in intercourse despite Palumbo's conduct expressing lack of consent.

It is true that Mr. Morales's counsel (after being denied the lesser degree instruction), argued in closing argument that there was no lack of capacity, and that there was consensual intercourse, seeking acquittal for his client on the only charge ultimately permitted to be laid before the jury. 2/28/19RP at 525-31. But significantly, the fact that the defendant's primary theory at trial is inconsistent with the lesser-included offense will not abrogate the need to give a requested instruction, where there is evidence found in the record to support a finding of guilt on that offense. Fernandez-Medina, 141 Wn.2d at 457-61 (in first-degree assault case, instructions for second-degree assault were mandated by the evidence, even though the primary defense was alibi); McClam, 69 Wn. App. at 889 (in VUCSA delivery case, simple possession instructions were warranted by the evidence, even though defendant denied both delivery and possession); see also State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998) (in reckless vehicular assault case, negligent driving

instructions were warranted, even though defendant denied both). The trial court was required to give an additional jury instruction on the third degree offense of intercourse while the complainant was expressing non-consent by conduct. On *de novo* review, the trial court erred in refusing to instruct Mr. Morales' jury on third degree rape. Review should be granted and reversal is required. Fernandez-Medina, at 456; see also, State v. Gamble, 154 Wn.2d 457, 462, 114 P.3d 646 (2005).

F. CONCLUSION

Based on the foregoing, Mr. Morales asks that this Court accept review and reverse his judgment and sentence.

Respectfully submitted this 25th day of August, 2020.

s/ Oliver R. Davis
Attorney for Petitioner
Washington Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98102
Telephone: (206) 587-2711
FAX: (206) 587-2710
E-mail: Oliver@washapp.org

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. ADAN MORALES, Appellant.	No. 79893-6-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Morales challenges his conviction for second degree rape. He contends that he was entitled to have the jury instructed on the inferior degree offense of third degree rape, and the trial court erred in declining to give such an instruction. We affirm.

FACTS

On May 20, 2016, D.P. attended a memorial service for the father of her longtime friend Minnie. Also attending the service was Minnie's friend Meredy Tennison, who brought her fiancé, Adan Morales. After Tennison introduced Morales to D.P., Morales stared at D.P. with a "blank dark stare" throughout the entire service, making D.P. uncomfortable.

After the service, many of the participants went to the home of Minnie and her husband Tony. Minnie invited D.P. to stay the night. Because Minnie and Tony's children were spending the night with relatives, D.P. was given their son's

room to sleep in. Tennison and Morales were to sleep in the children's playroom down the hall.

At the house, D.P. had several drinks and became intoxicated. Eventually, D.P. decided to go to sleep in the bedroom. She testified that she did not change out of the jeans she was wearing because she "passed out."

D.P. woke up sometime in the night and felt someone next to her. D.P. turned over, saw that it was Minnie, and went back to sleep.

Later that night, D.P. again woke up and realized that Morales was on top of her. Her jeans were pushed down to her knees and Morales had his penis inside her vagina. Once D.P. realized what was happening, she tried to push or kick Morales off, but her jeans prevented her from kicking her legs. The next thing D.P. remembered was that Minnie ran into the room, screamed "get off of her" and "jumped on" Morales. Morales said, "[J]ust give me one more second" and "don't blame her. It's not her fault."

Minnie testified that she went to sleep with D.P. in her son's room because her own bedroom was too loud with the sounds of people talking outside the window. She woke up during the night and realized Morales was grabbing her bottom. Believing Morales was confused about where he was, Minnie said "Adan, that's not Meredy. It's Minnie." She got up and went outside to smoke a cigarette. When she left, D.P. was still asleep.

Morales followed Minnie outside. He apologized and Minnie told him it was okay and gave him a hug from the side. When she turned to look at Morales, he had his penis exposed. Minnie immediately put out her cigarette and went into the house. She went into her own bedroom and told Tony what happened. Minnie then immediately went back to her son's bedroom to check on D.P. She opened the door and saw Morales on top of D.P. and "[t]hey were having sex." Minnie could not see D.P.'s face. Minnie shouted Morales's name, then went down the hall and woke up Tennison.

Minnie testified that D.P. was "crying and apologizing" and "very sad." Tony described D.P. as "hysterical." D.P. took a shower and then asked Minnie to call her mother. Minnie told D.P.'s mother that Morales said, "Don't blame her. It's my fault." (Italics omitted.) D.P.'s mother instructed Minnie to call the police. Police arrived and D.P. broke down sobbing several times while talking to them. When D.P.'s mother arrived at Minnie's house, D.P. was still "upset" and "falling apart."

The State charged Morales with second degree rape pursuant to RCW 9A.44.050(1)(b), alleging that D.P. was incapable of consent by being physically helpless or mentally incapacitated.

Morales testified that he accidentally grabbed Minnie's behind, believing she was Tennison. He stated that he and Minnie went outside and Minnie began behaving flirtatiously, sitting on his lap and pressing up against him. Morales testified that he exposed his penis to Minnie and asked "if she wanted some of me" but that Minnie got up and left, saying "it was nasty." According to Morales, he finished smoking a cigarette and went back inside, where he bumped into D.P.

coming out of the bathroom. Morales testified that D.P. grabbed ahold of him to steady herself, then tried to kiss him. Morales asked D.P., "Do you want to play?" and D.P. said yes. The two ended up in the bedroom, where D.P. performed oral sex on Morales. Morales stated he offered to perform oral sex on D.P. but D.P. said, "[N]o, let's just fuck" and "grabbed on to my member and got it in." According to Morales, the two had intercourse for about two minutes before Minnie walked in.

At the conclusion of the trial, Morales requested that the jury be instructed on the inferior degree offense of third degree rape. The court concluded there was no factual basis for the instruction, stating "there is a binary choice in front of the jury, either there was consent or there was physical helplessness." The court declined to give the instruction.

A jury found Morales guilty of second degree rape. Morales appeals.

DISCUSSION

Morales's sole claim on appeal is that the trial court erred in failing to instruct the jury on the inferior degree offense of third degree rape.[1] We disagree. Because there was no evidence that affirmatively established the elements of third degree rape, Morales was not entitled to the instruction.

[1] Morales also filed a pro se statement of additional grounds for review, contending that the State and the court refused to allow him to "tell my side of the story." Although not entirely clear, Morales appears to be challenging the denial of the inferior degree offense instruction. As this is the same argument raised by appellate counsel, we do not separately address Morales's statement of additional grounds.

A person is guilty of second degree rape, as charged here, when "the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b). A person is "physically helpless" when a person is "unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5). When a person is asleep, they are "physically helpless" within the meaning of RCW 9A.44.010(5). State v. Mohamed, 175 Wn. App. 45, 60, 301 P.3d 504 (2013).

Third degree rape, on the other hand, contemplates a lack of consent by a person who is capable of consent. Compare RCW 9A.44.060, with RCW 9A.44.050(b). For acts committed before July 28, 2019, a person is guilty of rape in the third degree "when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person . . . [w]here the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct."[2] Former RCW 9A.44.060 (2013).

RCW 10.61.003 permits, "[u]pon an indictment or information for an offense consisting of different degrees, the jury [to] find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto." A defendant is entitled to an instruction on an inferior degree offense if

[2] RCW 9A.44.060 was amended in 2019 to eliminate the requirement that the victim clearly express a lack of consent by words or conduct. LAWS OF 2019, ch. 87, § 3. It now provides that the crime is committed if the victim "did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator." RCW 9A.44.060(1)(a).

(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 to the exclusion of the greater offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000), (quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). The first two factors are the legal components of the test, while the third factor entails a factual inquiry. See id. at 454–55.

It is undisputed that the legal prong is met. Third degree rape is an inferior degree offense of second degree rape. State v. Ieremia, 78 Wn. App. 746, 753, 899 P.2d 16 (1995). Thus, the only question is whether the trial court erred in concluding there was no evidence Morales committed only the inferior degree offense to the exclusion of the greater offense.

When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court must view the supporting evidence in the light most favorable to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 455–56. A defendant is entitled to the instruction only "if 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). The evidence must affirmatively establish that the inferior degree offense was committed. Fernandez-Medina, 141 Wn.2d at 456. It is not enough that the jury might disbelieve the evidence pointing to guilt. Id.

We review the decision not to give an inferior degree offense instruction based on the facts of the case for an abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

For Morales to be entitled to a jury instruction on third degree rape, the evidence must show that Morales committed only third degree rape, to the exclusion of second degree rape. In other words, there must be evidence from which a jury could conclude that D.P. was capable of consent but objected to the rape through words or conduct. No such evidence was presented at trial. Morales testified that D.P. consented to—and enthusiastically initiated—sexual intercourse. In contrast, D.P. testified that she was asleep when Morales penetrated her vagina with his penis. The only other witness who saw what happened was Minnie. But, Minnie saw only that Morales was having sex with D.P. She acknowledged that she did not know if D.P. was sleeping or awake. There was no affirmative evidence that D.P. was capable of consenting when the intercourse began and expressed her lack of consent through words or actions. Thus, the trial court properly refused to instruct the jury on third degree rape.

Morales argues that there was ample evidence of nonconsensual intercourse. But, he supports this argument with only his speculation that he possibly misread D.P.'s cues regarding her level of interest. Such a claim was inconsistent with Morales's trial testimony that D.P. initiated the sexual encounter. And, it would require the jury to disbelieve both his testimony and that of D.P. Without evidence affirmatively establishing the elements of third degree rape,

Morales was not entitled to the inferior degree offense instruction. Morales fails to establish that the refusal to give the instruction was error.

Affirmed.

Appelwick, J.

WE CONCUR:

Chun, J.

Andrus, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79893-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine
[sfine@snoco.org]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 25, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

August 25, 2020 - 4:32 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79893-6
Appellate Court Case Title:	State of Washington, Respondent v. Adan Morales, Appellant
Superior Court Case Number:	17-1-02832-5

The following documents have been uploaded:

- 798936_Petition_for_Review_20200825163153D1134446_9003.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.082520-09.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- nancy@washapp.org
- sfine@snoco.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Oliver Ross Davis - Email: oliver@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200825163153D1134446