

70244-1

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NO. 70244-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ABDIKADIR KHALIF,

Appellant.

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

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REPLY BRIEF

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 APR 25 PM 4:54

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A. ARGUMENT

MR. KHALIF DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY'S FAILURE TO REQUEST THE LESSER INCLUDED INSTRUCTION HAD NO LEGITIMATE STRATEGIC PURPOSE.

1. The lesser included offense of assault in the fourth degree was consistent with the defense. Because the sole predicate for the second degree assault charge was the "intent to commit a felony" as charged in RCW 9A.36.021(1)(e), once he was acquitted of child molestation, the jury could have rationally found that Mr. Khalif had committed only an assault in the fourth degree. RCW 9A.36.021(1)(e); RCW 9A.36.130(1)(a); RCW 9A.36.041.<sup>1</sup>

The State concedes here that Mr. Khalif was "legally entitled" to the lesser included instruction of fourth degree assault. Brief of Respondent at 16. The State likens this case to State v. Breitung, however, arguing that the defense was that "nothing had occurred that evening," so that defense counsel's decision not to seek the assault-four instruction was strategic. 173 Wn.2d 393, 399, 267 P.3d 1012 (2011).

This case is different from Breitung in important respects. First, in Breitung, the defendant was accused of threatening an individual

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<sup>1</sup> CP 21-22, 84.

with an object that was either – depending on whose testimony was believed – a firearm or a microscope. Id. As the Court noted, if the jury had believed the defendant had been wielding only a microscope lens, they would have been forced to acquit, and “pursuing an all or nothing strategy in this case was a legitimate approach in defense.” Id. at 394. In fact, the Breitung Court held, “Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy.” Id. at 399-400.

Mr. Khalif’s case is quite different from the Breitung matter, in that in no way could the failure to request the lesser included instruction be “reasonable” or strategic.

2. Because he was entitled to the lesser included offense of assault in the fourth degree, his representation was constitutionally ineffective, requiring reversal. In determining if the defendant is entitled to a lesser included instruction, the court must review the entire record in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Here, the State has conceded that Mr.

Khalif was legally entitled to the lesser included instruction. Resp. Brief at 16.

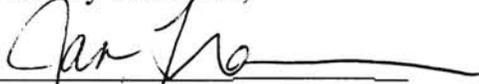
As discussed in previous briefing, Mr. Khalif was denied his right to a correct statement of the law and to have the jury instructed in a manner supported by substantial evidence, causing prejudice. State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987) (counsel's failure to request jury instruction constituted ineffective assistance); State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). For this and the additional reasons argued in the opening brief, reversal is required.

B. CONCLUSION

For the reasons stated above, Mr. Khalif respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 25<sup>th</sup> day of April, 2014.

Respectfully submitted,

  
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF APRIL, 2014.

X \_\_\_\_\_ 

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