

STATE V. WALL: A DEFENDANT’S RIGHT TO A LESSER-INCLUDED-OFFENSE INSTRUCTION WHEN USING AN ALL-OR-NOTHING DEFENSE

John R. Longley III

INTRODUCTION

In *State v. Wall*,¹ the Arizona Supreme Court unanimously held that a defendant does not forfeit his right to a lesser-included-offense instruction when he pursues an all-or-nothing defense.² Under the Arizona Rules of Criminal Procedure, a defendant is entitled to a lesser-included-offense instruction whenever the evidence in the case supports that instruction.³ Thus, a court must instruct the jury on the lesser-included crime when the facts of the case could allow a reasonable jury to find that the lesser, but not the greater offense, had been committed.⁴ When given, the lesser-included-offense jury instruction allows the jury to find the defendant guilty of the lesser offense should the prosecution fail to prove an element of the offense originally charged.⁵ This ensures that the jury does not find the defendant guilty of a crime the prosecution has failed to prove simply because the jury believes the defendant is guilty of something.⁶ The court’s ruling reaffirmed that the only questions a court should ask in determining whether to approve a lesser-included-offense instruction are (1) whether the requested instruction is a lesser-included offense of the crime charged and (2) whether the instruction is supported by the evidence.⁷

I. FACTUAL AND PROCEDURAL BACKGROUND

The charges against Emmet Wall arose out of his role in an attempted robbery of a Tucson convenience store.⁸ On July 7, 2003, Wall went to a convenience store with Berben Walker and Fernita Henry.⁹ While at the store,

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1. 126 P.3d 148 (Ariz. 2006).
 2. *Id.* at 149.
 3. ARIZ. R. CRIM. P. 23.3 & cmt.
 4. *Wall*, 126 P.3d at 150.
 5. *See* ARIZ. R. CRIM. P. 23.3 cmt.
 6. *Wall*, 126 P.3d at 151.
 7. *See id.* at 153.
 8. *Id.* at 149.
 9. *Id.*

Wall convinced the store manager to speak with him outside of the store about an incident that allegedly occurred the previous day.¹⁰ While the manager and Wall talked outside, Henry occupied the store clerk by purchasing a bottle of water and inquiring about lighters.¹¹ At the same time, the third member of the group, Walker, went into the manager's office and looked into an open safe.¹² The manager's wife walked in on Walker and screamed for help.¹³ Walker threw the woman against the door and fled.¹⁴ The manager apprehended and detained Walker until the police arrived.¹⁵ The police arrested Wall shortly after.¹⁶

The State charged Wall with robbery for his role as an accomplice.¹⁷ In his defense, Wall claimed that he had no knowledge of the robbery until after it occurred.¹⁸ His complete denial of all involvement in the crime constituted an "all-or-nothing" defense.¹⁹

At trial, the court granted the State's request to include an attempted robbery instruction.²⁰ Wall requested that the court also give the jury an attempted theft instruction.²¹ Theft constitutes a lesser-included offense of robbery since it lacks robbery's requirements that (1) the defendant take the property from another's person or in the other person's immediate presence and (2) the taking involves the use or threat of force.²² The defense argued that the record could support a finding that Wall, by distracting the manager, did not intend Walker to use or threaten force when taking the money, and that he was therefore entitled to the lesser-included-offense instruction on theft since a jury could reasonably find that the additional elements of robbery were missing.²³ The trial court rejected the request for the instruction on attempted theft, instead agreeing with the State that Walker's use of force was foreseeable and that Wall was legally responsible for all foreseeable acts of his accomplice.²⁴ The jury found Wall guilty of attempted robbery.²⁵

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* "A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." ARIZ. REV. STAT. ANN. § 13-1902(A) (2004). Under Arizona law, a defendant who acts as an accomplice to a crime may be held liable as a principal. *Id.* § 13-303(A)(3).

18. *Wall*, 126 P.3d at 149.

19. *Id.*

20. *Id.*

21. *Id.*

22. ARIZ. REV. STAT. ANN. § 13-1902(A).

23. *Wall*, 126 P.3d at 149.

24. *Id.* at 149-50.

25. *Id.* at 150.

The court of appeals upheld Wall's conviction, holding that under *State v. Van Adams*,²⁶ Wall was precluded from a lesser-included-offense instruction because he had pursued an all-or-nothing defense.²⁷ In a concurring opinion, Judge Eckerstrom agreed that under *Van Adams* an all-or-nothing defense precludes a lesser-included-offense instruction, but expressed his concern with the application of this rule against Wall, since the evidence seemed to otherwise support giving the instruction.²⁸ The Arizona Supreme Court granted Wall's request for certiorari.²⁹

II. SUMMARY OF ARIZONA LAW ON LESSER-INCLUDED-OFFENSE INSTRUCTIONS

Arizona Rule of Criminal Procedure 23.3 ("Rule 23.3") derives from Federal Rule of Criminal Procedure 31(c).³⁰ Rule 23.3 provides: "Forms of verdicts shall be submitted to the jury for all offenses *necessarily included* in the offense charged, an attempt to commit the offense charged or an offense *necessarily included* therein, if such attempt is an offense."³¹ Arizona courts have interpreted Rule 23.3 as entitling both the defendant and prosecutor to an instruction on any offense supported by the evidence.³² This ensures that a jury does not convict the defendant of a crime that the prosecution has failed to prove simply because the jury believes the defendant should be found guilty of something.³³

In *State v. Dugan*,³⁴ the Arizona Supreme Court held that the "necessarily included" offense language of Rule 23.3 is not synonymous with "lesser-included offense."³⁵ A crime is a lesser-included offense of another crime when the greater

26. 984 P.2d 16 (Ariz. 1999).

27. *Wall*, 126 P.3d at 150. In *Van Adams*, the defendant appealed a first-degree murder conviction based on the trial court's refusal to give a lesser-included-offense instruction on second-degree murder. 984 P.2d at 21. The defendant argued that, despite his mistaken identity defense, a jury could reasonably conclude that the prior sexual assault conviction offered into evidence by the prosecution showed that he intended only to sexually assault the victim without killing her, and therefore the premeditation requirement for first-degree murder was missing. *Id.* at 22. The court rejected this argument and held that a lesser-included-offense instruction is not proper when: (1) a defendant denies involvement in a murder; (2) there is no evidence supporting a lesser charge; and (3) the record "is such that defendant is either guilty of the crime charged or not guilty." *Id.* (quoting *State v. Salazar*, 844 P.2d 566, 575 (Ariz. 1992)).

28. *See Wall*, 126 P.3d at 150.

29. *Id.*

30. ARIZ. R. CRIM. P. 23.3 cmt.; *State v. Dugan*, 608 P.2d 771, 772 (Ariz. 1980).

31. ARIZ. R. CRIM. P. 23.3 (emphasis added).

32. Arizona courts must give an instruction on a lesser-included offense when: (1) the evidence supports the lesser-included offense; and (2) the prosecutor or defendant requests the instruction. *State v. Detrich*, 873 P.2d 1302, 1305 (Ariz. 1994); *see* ARIZ. R. CRIM. P. 23.3 cmt.

33. *Beck v. Alabama*, 447 U.S. 625, 633–34 (1980) (quoting *Keeble v. United States*, 412 U.S. 205, 212–13 (1973)); *Wall*, 126 P.3d at 151.

34. 608 P.2d 771 (Ariz. 1980).

35. *Id.* at 772.

crime cannot be committed without committing the lesser crime; that is, the elements of the lesser crime all find a counterpart in the elements of the greater crime.³⁶ A lesser-included offense becomes a “necessarily included” offense when there is sufficient evidence to support a finding that the defendant is guilty of the lesser, but not the greater offense.³⁷ This occurs when a jury can rationally find that the evidence fails to prove one or more of the elements of a greater offense, but does prove all the elements of a lesser offense.³⁸ On the other hand, when the jury could only find that the defendant is guilty of the crime charged or not guilty at all, the evidence does not support a lesser-included-offense instruction and it would be improper for the court to give one.³⁹

Finally, in *State v. Van Adams*, the Arizona Supreme Court held that courts should not give lesser-included-offense instructions when (1) the defendant denies all involvement in the crime, (2) no evidence supports a conviction of the lesser offense, and (3) the record supports a finding that the defendant is either guilty of the crime charged or not guilty.⁴⁰ The court of appeals in *Wall* interpreted *Van Adams* as precluding a lesser-included-offense instruction whenever a defendant pursues an all-or-nothing defense.⁴¹

III. THE COURT’S ANALYSIS

The Arizona Supreme Court unanimously held that *Van Adams* did not establish a bright-line rule that a defendant forfeits his right to a lesser-included-offense instruction when he asserts an all-or-nothing defense.⁴² The court noted that the language the court of appeals had relied upon from *Van Adams* required that the defendant deny involvement in the crime *and* that there be no evidence that provides a basis for the lesser offense.⁴³ Therefore, the court concluded that *Van Adams* is consistent with prior cases holding that Rule 23.3 entitles a defendant to an instruction on a lesser-included offense whenever the evidence supports giving the instruction.⁴⁴

The court did note that, when a defendant asserts an all-or-nothing defense, there will “usually [be] little evidence on the record to support an instruction on the lesser included offenses.”⁴⁵ Since the defendant only offers evidence that he did not commit the crime, and the prosecutor only offers evidence that the defendant did commit the crime, the record will typically only contain evidence to support a verdict of either guilty or not guilty of the crime charged.⁴⁶

36. *Id.*

37. *Id.* at 772–73.

38. *Id.*

39. *Id.* at 773; *see also* *State v. Salazar*, 844 P.2d 566, 575 (Ariz. 1992).

40. 984 P.2d 16, 22 (1999) (quoting *Salazar*, 844 P.2d at 575).

41. *State v. Wall*, 126 P.3d 148, 152 (Ariz. 2006).

42. *Id.* at 149.

43. *Id.* at 152–53.

44. *Id.* at 153.

45. *Id.* (quoting *State v. Caldera*, 688 P.2d 642, 645 (Ariz. 1984)).

46. *Id.*

Though this represents the usual result in the case of an all-or-nothing defense, the court emphasized that sometimes the record will support a lesser-included-offense instruction, despite the defendant's all-or-nothing defense.⁴⁷ As an example, the court noted that in *State v. Dugan*, though the defendant denied all involvement in a robbery, the facts were such that a reasonable jury could find that the defendant was involved in the crime, but the element of force or fear was missing.⁴⁸ Therefore, since the evidence supported the possibility of finding the defendant guilty of theft instead of robbery, the defendant was entitled to a jury instruction on the lesser-included offense of theft.⁴⁹

Likening *Dugan* to the case against Wall, the court determined that Wall's efforts to distract the manager by talking to him outside would support a finding that Wall "intended only a theft by ruse," and not a robbery by force or coercion.⁵⁰ Since Wall's intent as the accomplice governs his criminal liability,⁵¹ Wall was entitled to a jury instruction on the lesser-included offense of theft.⁵²

CONCLUSION

The Arizona Supreme Court concluded that, under Arizona Rule of Criminal Procedure 23.3, a defendant does not forfeit his right to a jury instruction on a lesser-included offense when he asserts an all-or-nothing defense.⁵³ Rather, the inquiry into whether a lesser-included-offense instruction is appropriate turns on whether a reasonable jury could find from the evidence that the defendant committed the lesser crime and not the greater.⁵⁴ Since the record in *Wall* contained evidence to support an instruction on theft, the trial court erred in denying Wall's request for a jury instruction on that lesser crime.⁵⁵ Due to the error, the court reversed the trial court and the court of appeals, and remanded the case for a new trial.⁵⁶

47. *Id.*

48. *Id.* (citing *State v. Dugan*, 608 P.2d 771, 773 (Ariz. 1980)).

49. *Id.*

50. *Id.*

51. *Id.* at 151–52. The court noted that the trial court erred in holding Wall liable for all of Walker's foreseeable acts. *Id.* at 152. Under Arizona Revised Statutes section 13-301(2), the intent of the accomplice, not the intent of the main actor, determines the accomplice's criminal liability. ARIZ. REV. STAT. ANN. §13-301(2) (2004); *State v. Phillips*, 46 P.3d 1048, 1057 (Ariz. 2002).

52. *Wall*, 126 P.3d at 153.

53. *Id.* at 149.

54. *Id.* at 151.

55. *Id.* at 153.

56. *Id.*