No. 46787-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSHAUA R. KIRBY,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The trial court applied the incorrect standard, misconstrued the evidence, and misconstrued the law, when it refused to instruct the jury on the lesser-included offense of criminal trespass.

A trial court's decision regarding the second prong of the "*Workman*[1] test" is reviewed for abuse of discretion. *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015); *State v. Walker,* 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). A court abuses its discretion when its decision is based on the incorrect legal standard. *See State v. Dye,* 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Such is the case here.

The court ruled Mr. Kirby did not satisfy the factual prong on the grounds he did not present "substantial evidence" to support the inference he committed the lesser offense only. 8/18/14 RP 93-94. This is the incorrect quantum of evidence. The factual prong is satisfied when, viewing the evidence in the light most favorable to the defendant, "even the slightest evidence" suggests the defendant committed the lesser offense only. *Henderson*, 182 Wn.2d at 742; *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

[1] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The court's ruling that Mr. Kirby admitted to residential burglary misconstrued Mr. Kirby's testimony and the law of abandonment. 8/18/14 RP 94-95. In fact, Mr. Kirby admitted he committed trespass but he believed the home owner had moved away and abandoned various items due to lack of money or storage room. 8/18/14 RP 63, 64, 67, 77-78. Regardless of whether abandonment negates the intent element of theft or is an affirmative defense,[2] Mr. Kirby's testimony presented at least "the slightest evidence" that he committed criminal trespass in the first degree only.

The State argues Mr. Kirby was not entitled to the lesser-included offense instruction because he admitted to the detectives that he entered the house to "steal" various items. Br. of Resp. at 7, 8. This argument mischaracterizes Mr. Kirby's statement, takes the word "steal" out of context, and conflates "slightest" evidence with "sufficient" evidence. Throughout the interview, Mr. Kirby maintained that he believed the property was abandoned.

> Q Okay. When you got inside the house, what did you think when you were inside the house?
> A Empty house. Somebody moved out...
> Q Okay.

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[2] *See State v. Wagner-Bennett*, 148 Wn. App. 538, 543, 200 P.3d 739 (2009) (based on the facts of the case, court declined to determine whether abandonment was an affirmative defense or negated the intent element of theft).

A Obviously left this behind.

Ex. 50 at 17-18.

Q All right. You didn't think it was gonna be burglary.
A No.
Q Okay.
A 'Cause it looked like most of the stuff was taken, what they wanted was taken and ...
Q Right.
A You know, it was somethin' that was abandoned.

Ex. 50 at 22.

The detective then told Mr. Kirby that he committed burglary.

Q Yeah, this is somebody's house. It just so happened that they were away for some work stuff. So ...
A You mean ...
Q You're in there doing a burglary basically.

Ex. 50 at 25.

Only after he was accused of burglary, Mr. Kirby stated,

Q You went in there to benefit yourself.
A Yes. I didn't intend to steal it. Actually I did, I steal it, it's still stealing, obviously, but ...
Q Right. But the stuff you took wasn't yours.
A No.

Ex. 50 at 30. In context, Mr. Kirby was attempting to be cooperative and to explain his intent, before he was interrupted by the detective.

The State further argues that Mr. Kirby admitted to theft in his trial testimony. Br. of Resp. at 8-9. Again, this argument takes Mr. Kirby's testimony out of context.

Q So what did you -- when you got to the back yard, did you make any observations about the house itself?
A It looked empty.
Q Why did you think that?
A There was nothing in through the window that was broken. All there was was a computer chair, no furniture, no -- looked like a vacant home.
Q You said you saw a broken window?
A Yes.

8/18/14 RP 63

Q What were you thinking at this point?
A That somebody moved out and they couldn't take the stuff that was left behind.

8/18/14 RP 64.

Q Why did you take these items?
A I was -- thought I was salvaging them from somebody that left them that couldn't take them.

8/18/14 RP 67.

Q Mr. Kirby, in your mind, what is the difference between salvaging something and stealing it?
A Stealing is knowing that it belonged to somebody and knowing that you're taking it from them. And salvaging, it is essentially dumpster diving, stuff that is essentially going to get thrown away, somebody left behind they couldn't take it, didn't need it anymore, didn't have room for it.
Q What were you doing in the house?
A I thought that I was salvaging anyways. Apparently, clearly, that's why I'm here. I thought the stuff was left because either they couldn't take it with them or the money to take it or enough room or that sort of thing.

8/18/14 RP 77-78.

As demonstrated by the above excerpts, Mr. Kirby consistently asserted that he believed the owner had moved out of the house and abandoned the items left inside. "Regardless of the plausibility," Mr. Kirby was therefore entitled to have the jury, not the court, determine whether he committed criminal trespass in the first degree only. *See Parker*, 102 Wn.2d at 166 ("Regardless of the plausibility ... , the defendant had an absolute right to have the jury consider the lesser-included offense on which there is evidence to support an inference it was committed.").

Failure to give the lesser-included instruction requires reversal. *See State v. Condon*, 182 Wn.2d 307, 326, 343 P.3d 357 (2015) (failure to give lesser-included instruction reversible error).

2. Mr. Kirby was entitled to introduce his entire statement to the investigating officers after the State introduced only portions of his statement that did not include his exculpatory statements.

The trial court violated Mr. Kirby's right to introduce his complete statement to the investigating officers, as guaranteed by the constitutional right to due process, the common law rule of completeness, and ER 106. U.S. Const. amend. XIV; *State v. West*, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967); *State v. Stallworth*, 19 Wn. App. 728, 734-35, 577 P.2d 617 (1978). This issue is properly before the Court. Defense counsel argued

the statements were admissible pursuant to ER 801(d)(2) and "to put those statements he made into context. They were offered in isolation." 8/18/14 RP 32-33. The State's assertion that the defense "at no time" raised the rule of completeness is simply incorrect. *See* Br. of Resp. at 10-11.

The exclusion of Mr. Kirby's complete statement to the investigating detectives was not harmless. "Where one party has introduced part of a conversation the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved." *West*, 70 Wn.2d at 754-55. Here, by omitting Mr. Kirby's repeated assertions that he believed the items were abandoned, the out-of-context excerpts presented by the State created the false impression that he confessed to residential burglary, when in fact he consistently denied committing that offense and asserted that he took possession of abandoned property. Given the out-of-context excerpts, however, his trial testimony was most likely deemed a recent fabrication.

On this record, the State cannot prove that the violation of Mr. Kirby's constitutional right to present a complete defense did not affect the outcome of the case in any way. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (States bears the burden of proving a constitutional violation harmless beyond a reasonable doubt).

The denial of Mr. Kirby's right to present a complete defense requires reversal. *See State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (constitutional error required reversal in the absence of proof beyond a reasonable doubt of harmlessness).

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Kirby requests this Court reverse his conviction for residential burglary.

DATED this 26th day of August 2015.

Respectfully submitted,

s/ Sarah M. Hrobsky
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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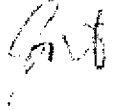

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