NO. 46787-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSHAUA R. KIRBY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Jack Nevin

No. 14-1-01605-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion by declining to give a jury instruction on the lesser included offense of first degree criminal trespass when the defendant admitted he was not permitted to enter the home, that he intended to remove items, and that he knew he was stealing those items by removing them?

2. Is the defendant precluded from challenging the exclusion of his statements to detectives on a different theory of admissibility than what was argued to the trial court?

B. STATEMENT OF THE CASE

1. Procedure

The State charged Joshaua R. Kirby with one count of residential burglary (RCW 9A.52.025) on April 28, 2014, under cause number 14-1-01605-2. CP 1.

Prior to trial, the trial court held a hearing pursuant to CrR 3.5 to determine the admissibility of a statement Mr. Kirby had provided to detectives from the Pierce County Sheriff's Department. RP1 5-35. After testimony from both detectives and Mr. Kirby, the trial court found the statement admissible under CrR 3.5. CP 50; RP1 34-35.

Defense counsel requested a jury instruction on first degree criminal trespass as a lesser included offense of residential burglary. RP3 83. After hearing argument from both sides on the issue of this instruction,

the trial court declined to instruct the jury on first degree criminal trespass. RP3 93-95. Mr. Kirby failed to identify for the trial court a factual basis from which to infer that *only* criminal trespass had been committed. RP3 95.

Mr. Kirby was found guilty of residential burglary and sentenced to a standard range sentence of 61 months. RP4 18-19. Mr. Kirby filed a timely notice of appeal. CP 51.

2. Facts

Daniel Clemons is a captain in the United States Army. RP2 4. Captain Clemons purchased a home located at 20405 12th Avenue Court East in Spanaway, Washington on March 3, 2014, and began moving in that same day. RP2 5-6. Captain Clemons had received orders to attend training at Fort Rucker in Alabama and left for this assignment the same day he finalized his purchase of the house. RP2 7. Captain Clemons was in Alabama for two months. RP2 7.

While Captain Clemons was away in Alabama, he had his friend and fellow service member, Hung Nguyen, watch his new home for him. RP2 7-8. The first day Sergeant Nguyen checked on the house was March 5, 2014. RP2 37. On that day, Sergeant Nguyen noticed that the garage door was propped open and the screens on two windows on the back of the

house had been removed and were laying in the yard. RP2 37-38. Sergeant Nguyen placed the screens back on the windows before leaving. RP2 39.

The next time Sergeant Nguyen checked on the house was on or around March 15, 2014. RP2 39. During this visit, Sergeant Nguyen did not notice anything suspicious about the house. RP2 39-41.

Sergeant Nguyen's next visit to the house was on March 21, 2014. RP2 41. During this visit, Sergeant Nguyen again noticed that the garage door was propped open. RP2 42. Upon entering the house, Sergeant Nguyen discovered shattered glass strewn across the floor and noticed that the sliding glass door on the back of the house was wide open. RP2 43. Sergeant Nguyen also noticed a broken window on the back side of the house. RP2 44. Additionally, several of the boards from the fence surrounding the backyard had been removed to create a gap and items were scattered in the yard. RP2 50.

In addition to the broken window and shattered glass, several of the boxes inside the house were opened and their contents were scattered throughout the various rooms in the home. RP2 47-49. Sergeant Nguyen called the Pierce County Sheriff's Department to report the break-in. RP2 47. Officer Michael McGinnis arrived on the scene and inspected the house. RP2 93. Officer McGinnis noted two sets of footprints leading from the sliding door into the rest of the house. RP2 106. Upon inspecting

the windows on the back of the house, Officer McGinnis noticed fingerprints on the glass of the broken window. RP2 99. Officer McGinnis contacted forensics so they could collect the prints for analysis as a means of identifying a suspect. RP2 103.

Forensic investigator Loree Barnett arrived on the scene and collected fingerprints from the broken window. RP2 121-136. These fingerprints were then analyzed at the sheriff's department and matched to Joshaua Kirby. RP2 159. Ms. Barnett also collected prints from the other windows that had their screens removed when Sergeant Nguyen checked on the house on March 5. RP2 122. Those prints were also matched to Mr. Kirby. RP2 122.

After matching the prints to Mr. Kirby, detectives Jason Tate and Mike Hayes contacted him and set up a meeting where Mr. Kirby gave a voluntary recorded statement. RP3 10. In this statement, Mr. Kirby admitted to entering the house without permission and stealing clothing, a backpack, a blanket, cleaning products, and a power strip. RP3 43; RP3 65-67. Mr. Kirby then took the detectives to the location where he was staying and returned several items. RP3 27. However, Captain Clemons was missing some military gear, rugs, sporting equipment, a flat-screen

television, two Xbox gaming systems, and a computer that were never returned. RP3 37; Ex. 3.[1]

After the State rested its case at trial, Mr. Kirby testified in his own defense. RP3 59. Mr. Kirby testified that he discovered the house with items strewn throughout the backyard and that the fence and window were already broken when he arrived. RP3 62-63. Mr. Kirby also testified that the house looked abandoned. RP3 63-64. Finally, Mr. Kirby testified that he took items from the home. RP3 77-78.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE CRIMINAL TRESPASS WHEN THERE WAS NO FACTUAL BASIS THAT ONLY THE LESSER CRIME HAD BEEN COMMITTED.

Criminal defendants in Washington may have the jury instructed on a lesser included offense if the offense is "necessarily included within that with which he or she is charged in the indictment or information." RCW 10.61.006. To determine whether a party is entitled to a jury instruction on a lesser included offense, courts are to conduct a two-prong test. The legal prong of the test involves determining whether the lesser included offense consists solely of elements that are necessary for conviction of the greater offense. ***State v. Condon,*** 182 Wn.2d 307, 316,

[1] Exhibit 3 is a theft inventory list compiled by Captain Clemons and the Pierce County Sheriff's Department.

343 P.3d 357 (2015) (citing ***State v. Workman,*** 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). The factual prong of the test requires the court to ask "whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense." *Id.* (emphasis in original). Both prongs of this test must be satisfied for a defendant to receive a jury instruction on the lesser included offense. ***Condon,*** 182 Wn.2d at 316.

In this case, the legal prong of the *Workman* test is satisfied as criminal trespass includes all of the elements of residential burglary except for the intent to commit a crime against a person or property in the dwelling. ***State v. J.P.,*** 130 Wn. App. 887, 895, 125 P.3d 215 (2005). The trial court properly recognized that criminal trespass is a lesser included offense of residential burglary, and that the legal prong of the *Workman* test was not an issue in this case. RP3 93. However, the court declined to read the jury Mr. Kirby's proposed instruction based on the factual prong of the *Workman* test. The trial court was not satisfied that there was sufficient evidence from which to infer that he had only committed criminal trespass to the exclusion of residential burglary. RP3 95.

Regarding the factual prong of the *Workman* test, "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser included offense and acquit him of the greater, a lesser included offense instruction should be given." ***State v. Berlin,*** 133 Wn.2d 541, 551,

947 P.2d 700 (1997) (citing ***Beck v. Alabama,*** 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). For the purposes of this case, the key principle to be extracted from this rule is that a jury must be able to rationally acquit a defendant of the greater charge in order for an instruction on a lesser included offense to be warranted. No rational jury would have acquitted Mr. Kirby of residential burglary because he admitted to entering the house to "steal" items in his recorded statement to detectives Tate and Hayes, and that statement was presented to the jury. RP3 43.

A person commits criminal trespass in the first degree "if he or she knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1). A person commits residential burglary "if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). Thus, the key distinction between criminal trespass and residential burglary is that to convict a defendant of residential burglary, the State must prove that the defendant entered or remained in the building with the intent to commit a crime inside.

During the testimony of Detective Hayes, the State had him read from a transcript of the recorded statement Mr. Kirby provided to both detectives at their meeting on April 25, 2014. RP3 42-44. During direct examination, the State inquired into questions the detectives posed to Mr. Kirby

regarding his intent in entering the house. RP3 42-43. In his recorded statement, Mr. Kirby admitted that he was "stealing" items by removing them from the home. RP3 43. He also admitted that he entered the house intending to remove items. RP3 42. Mr. Kirby also testified at trial that he took several items from the house. RP3 66.

The evidence contained in the record would not allow a rational jury to conclude that Mr. Kirby only committed first degree criminal trespass. As outlined above, Mr. Kirby admitted that he knew he was "stealing" items when he removed them from the house. This admission was presented to the jury during Detective Hayes's testimony. No jury could rationally acquit Mr. Kirby of residential burglary when he admitted that he knew removing items from the house was stealing, yet he also admitted to entering the house with the intent to remove items.

Mr. Kirby's defense focused on negating the intent element of his residential burglary charge. Mr. Kirby claims he did not possess the necessary intent to be convicted of residential burglary as he claims he entered the house after it had already been broken into and removed items he thought had been abandoned. RP 63-64.

Mr. Kirby's claim that he believed the items in the house to be abandoned is contradicted by his statements to the detectives and his testimony at trial. Though Mr. Kirby asserts that he believed the owner of

the house had moved away, on cross-examination he admitted he had no idea whether anyone was living there at the time he trespassed. RP3 71. He also admitted that the items he took were not his and that they belonged to someone else. RP3 77. These admissions contradict Mr. Kirby's claim that he was "salvaging" what he believed to be abandoned property and corroborate his admissions to the detectives in his recorded statement.

The legal prong of a request for a jury instruction on a lesser included offense is reviewed de novo. ***State v. Walker,*** 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The factual prong of a request for a jury instruction on a lesser included offense is reviewed for abuse of discretion. *Id.* at 771-72. A trial court abuses its discretion if its decision is "manifestly unreasonable or based upon untenable grounds or reasons." ***State v. Powell,*** 126 Wn.2d 244, 258, 893 P.2d 615 (1995). As the factual prong is the only part of the test at issue in this appeal, the applicable standard of review is abuse of discretion.

Mr. Kirby admitted to all of the elements of residential burglary in his recorded statement to the detectives and in his trial testimony. No rational jury would acquit him based on that evidence. The factual prong of the *Workman* test is not satisfied and the court properly exercised its

discretion by declining to instruct the jury on first degree criminal trespass.

2. MR. KIRBY IS PRECLUDED FROM CHALLENGING THE EXCLUSION OF HIS STATEMENTS TO DETECTIVES ON A DIFFERENT THEORY OF ADMISSIBILITY THAN WHAT WAS ARGUED TO THE TRIAL COURT.

a. Mr. Kirby is precluded from challenging the exclusion of his statements to detectives under ER 106 because that theory of admissibility was not argued in the trial court

Even if a defendant objects to the introduction of evidence at trial, he or she "may assign evidentiary error on appeal only on a specific ground made at trial." ***State v. Higgs,*** 177 Wn. App. 414, 423, 311 P.3d 1266 (2013) (quoting ***State v. Kirkman,*** 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). A theory of admissibility not presented to the trial court may not be considered on appeal. ***State v. Price,*** 126 Wn. App. 617, 637, 109 P.3d 27 (2005) (citing ***State v. Kilponen,*** 47 Wn. App. 912, 918, 737 P.2d 1024 (1987)).

At trial, both detectives who had interviewed Mr. Kirby were called to testify. RP3 8; RP3 38. During the cross-examination of Detective Jason Tate, defense counsel attempted to have him read part of Mr. Kirby's statement for the jury. RP3 29. The State objected on the grounds that the statement was hearsay. RP3 29. Defense counsel

responded by arguing that the statements were admissible as admissions by a party-opponent. RP3 32. When given the chance to clarify, defense counsel specifically identified the exception in ER 801(d)(2) as the theory of admissibility he was presenting to the trial court:

> [DEFENSE COUNSEL]: I agree that they are out-of-court statements made by Mr. Kirby. I don't believe they are hearsay because I think they fall under the exception under 801(d).
>
> [THE COURT]: Explain.
>
> [DEFENSE COUNSEL]: Because they're his statements, that is, the defendant.
>
> [THE COURT]: Well –
>
> [DEFENSE COUNSEL]: These were questions that Ms.--
>
> [THE COURT]: I'm sorry, did you say 801(d)(1)?
>
> [DEFENSE COUNSEL]: Yes – excuse me, 801(d)(2).

RP3 32.

The trial court heard argument from both sides outside the presence of the jury on whether the statement was admissible as an admission by a party-opponent under ER 801(d)(2). RP3 30-36. At no time did defense counsel bring up ER 106 or the rule of completeness as a theory of admissibility. RP3 30-36.

The trial court eventually ruled that the statement was inadmissible as it was self-serving hearsay and did not qualify as an admission by a party-opponent. RP3 35.

On appeal, Mr. Kirby is assigning error on the basis that the trial court abused its discretion by not admitting the statements under the rule of completeness, now codified as ER 106. Br. of App. at 13-14. Mr. Kirby may not change his theory of admissibility on appeal. As Mr. Kirby argued for the admission of his statements under ER 801(d)(2) at trial, but now alleges they are admissible under ER 106, he is arguing a theory that was not presented to the trial court, and therefore it is not properly before this court on appeal.

b. There is no reasonable probability that the outcome of Mr. Kirby's trial would have been different had his statements been admitted

An error is harmless when there is no reasonable probability that the outcome of the trial would have been different had the error not occurred. ***Powell,*** 126 Wn.2d at 267. A reasonable probability exists when confidence in the outcome of the trial is undermined. *Id.*

There is no reasonable probability that the outcome of Mr. Kirby's trial would have been different had he been able to introduce the statements that were excluded by the trial court. All of the information defense counsel sought to present to the jury by attempting to admit the

challenged statements was ultimately provided to the jury when Mr. Kirby testified at trial.

Mr. Kirby testified that he discovered the house with items strewn throughout the backyard and that the fence and window were already broken when he arrived. RP3 62-63. Mr. Kirby also testified that the house looked abandoned. RP3 63-64. Finally, Mr. Kirby provided testimony on his theory of the case. Specifically, Mr. Kirby testified that he went in the house to "salvage" abandoned items. RP3 77-78. This testimony contains the same information as the statements Mr. Kirby attempted to introduce during his cross-examination of Detective Hayes. The jury heard this testimony, yet still convicted Mr. Kirby of residential burglary. Mr. Kirby presented his entire defense to the jury. The simple fact that it was unsuccessful does not mean he was prejudiced by any error in the trial court.

There is no reasonable probability the outcome of Mr. Kirby's trial would have been different had the trial court admitted his statements to the detectives, and therefore any error committed by excluding them was harmless and does not warrant reversal.

D. CONCLUSION

For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: August 3, 2015.

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Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-3-15
Date Signature

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