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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's refusal to instruct the jury on the offense of criminal trespass in the first degree, a lesser-included offense of residential burglary, violated Mr. Kirby's right to present a complete defense, secured by the Sixth Amendment, the Fourteenth Amendment, his right to trial by jury, secured by the Sixth Amendment and Article I, section 21, and his statutory right to have the jury instructed on a lesser-included offense, secured by RCW 10.61.006.

2. When the prosecutor introduced parts of Mr. Kirby's statement to police, the trial court's refusal to admit his complete statement to provide context violated Mr. Kirby's right to present a complete defense, secured by the Sixth Amendment, the Fourteenth Amendment, and Article I, section 22, and further violated the rule of completeness, secured by ER 106.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has the right to have the jury consider a lesser-included offense of the charged crime when each element of the lesser offense is a necessary element of the charged crime and the evidence taken in the light most favorable to the defendant supports an inference that the lesser offense only was committed. Mr. Kirby was charged with residential burglary. Criminal trespass in the first degree is a lesser-

included offense of residential burglary, and is committed by unlawfully entering a building. Mr. Kirby admitted that he committed trespass by entering a residence without permission and that he took various items from the house. But he denied that he intended to commit a crime therein because he believed the owner had moved out of the house and abandoned the items left behind. Where, based on his testimony, a rational jury could find Mr. Kirby committed the lesser offense only, did the court's denial of Mr. Kirby's request to instruct the jury on the offense of criminal trespass in the first degree violate his constitutional right to present a complete defense and to trial by jury, as well as his statutory right to a lesser-included instruction?

2. The constitutional right to present a defense and the "rule of completeness" permits a party to complete and supply context for a statement with otherwise inadmissible hearsay, where an opposing party introduces a partial statement that has the tendency to mislead the jury and prevent a complete understanding of the facts. The prosecutor elicited testimony from two detectives regarding parts of Mr. Kirby's statement made during a police interview that suggested he confessed to residential burglary. However, the court denied Mr. Kirby the opportunity to elicit testimony regarding additional portions of his statement to complete and provide context for the partial statement. Did the trial court's exclusion of

Mr. Kirby's other statements to the police made during the same interview deny Mr. Kirby his right to present a defense and violate the rule of completeness?

C. STATEMENT OF THE CASE

In March 2014, United States Army Sergeant Hung Nguyen helped his friend, United States Army Captain Daniel Clemmons, move Clemmons' personal belongings into his newly purchased house. 8/14/14 RP 33. Captain Clemmons left the state for two months of training on the same day without unpacking. 8/14/14 RP 7. He asked Sergeant Nguyen to watch the house while he was away. 8/14/14 RP 7.

Over the next few weeks, Sergeant Nguyen checked the house several times and made sure it was secured. 8/14/14 RP 37. The garage door was open one time, but he was not concerned. 8/14/14 RP 37. A back window screen was on the ground one or two times and he put it back on, but again he was not concerned. 8/14/14 RP 37, 39. On March 21, 2014, however, Sergeant Nguyen noticed the garage door again was open, a previously-secured sliding glass door was open, a back window was broken, and broken glass was inside the house. 8/14/14 RP 41-44. He called 911 and went through the house when Deputy Michael McGinnis arrived. 8/14/14 RP 47.

Inside, Sergeant Nguyen found packing boxes in the garage were opened and items were scattered around, the back window screen was on the ground and trampled, more items were strewn in the backyard, several boards from a wooden fence were loosened, the kitchen cabinets were rifled, the oven door was open, clothes that previously were in the closet were tossed around the bedroom, and personal hygiene items, towels and numerous electronic items were missing. 8/14/14 RP 47, 49, 50, 51,54,55-56, 58, 64, 66-67. Deputy Michael McGinnis noticed one set of footprints from work boots and a second set of footprints from tennis shoes. 8/14/14 RP 106.

Fingerprints lifted from the screen and broken window were subsequently matched to Joshaua R. Kirby. 8/14/14 RP 122, 126, 129, 159-64. Mr. Kirby was contacted by Detective Jason Tate and Detective Mike Hayes and he agreed to give a recorded statement. 8/18/14 RP 12-13, 41; Ex. 50. In his statement, he freely admitted that he entered the house without permission, but he denied loosening the fence boards. 8/18/14 16-17. He also freely admitted that he took some clothing, a blanket, a backpack, cleaning products, and a power strip, but he denied taking any electronic items. 8/18/14 RP 21, 65-67. Mr. Kirby explained that he entered the house through the back window that was already broken. 8/18/14 RP 16-17. He also explained that he believed the home

owner had moved out and the items he took had been left behind and abandoned by the owner. Ex. 50 at 62-63, 64, 67, 78.

Mr. Kirby voluntarily took the detectives to the apartment where he was staying to return the items he removed from the house. 8/18/14 RP 24-25. Mr. Clemmons identified the recovered items, but he was also missing military gear, sports equipment, and rugs, in addition to the electronic items, none of which were recovered. 8/18/14 RP 28; Ex. 3.

Mr. Kirby was charged with residential burglary. CP 1. At trial, the prosecutor elicited testimony from the detectives regarding the parts of Mr. Kirby's statement in which he acknowledged he entered the house and removed certain items. 8/18/14 RP 16-17, 21, 65-67. The State did not, however, elicit testimony regarding the parts of his statement in which he explained items were strewn around the back yard, the house seemed unoccupied, and it appeared that the owners had moved out, taking what property they wanted and leaving behind the remaining items. Ex. 50 at 14, 17-18, 22. On cross-examination of Detective Hayes, defense counsel attempted to elicit Mr.Kirby's explanation as a statement by a party-opponent and to put the partial statement into context. 8/18/14 RP 29, 32-33. The prosecutor objected on hearsay grounds. 8/18/14 RP 29-30. The court sustained the objection on the grounds the statements were not statements by a party-opponent. 8/18/14 RP 33-35.

Mr. Kirby requested the court instruct the jury on the lesser-included offense of criminal trespass in the first degree. 8/18/14 RP 83, 85-93; CP 7-9. The trial court denied the request, finding Mr. Kirby admitted he committed residential burglary. 8/18/14 RP 93-95.

Mr. Kirby was convicted as charged. CP 32.

D. ARGUMENT

1. The trial court erroneously refused to instruct the jury on the lesser-included offense of criminal trespass in the first degree.

a. A defendant has the constitutional and statutory right to have the jury instructed on a lesser-included offense when the evidence taken in the light most favorable to the defendant supports an inference that the lesser offense only was committed.

A criminal defendant has the constitutional right to a meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). In addition, a criminal defendant has the constitutional right to trial by jury. U.S. Const. Art. I, § 2, Amend. VI; Const. art. I, § 21; *Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Thus, a "defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case," including a lesser-included offense. *State v. Fernandez-Medina*, 141 Wn.2d 448,

461, 6 P.3d 1150 (2000) (quoting *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)).

> Giving juries this option [of a lesser-included offense] is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts.

State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207, 1208 (2015); *see also Keeble v. United States*, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.").

In addition, Washington provides the "unqualified" statutory right to have a jury instructed on a lesser included offense. *State v. Parker*, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984). RCW 10.61.006 provides:

> In all other cases[1] the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

Accord State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

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[1] "Other cases" refers to lesser degree offenses governed by RCW 10.61.003, which 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, or of an attempt to commit the offense.

Whether a defendant is entitled to have the jury instructed on a lesser-included offense is determined by the two-prong "*Workman* test," that is, whether 1) legally, each element of the lesser offense is a necessary element of the charged offense, and 2) factually, the evidence supports the inference that the lesser offense only was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *accord State v. Witherspoon*, 180 Wn.2d 875, 886, 329 P.3d 888 (2014).

b. Mr. Kirby was entitled to have the jury instructed on the lesser-included offense of criminal trespass in the first degree under the "*Workman*" test.

i. Legally, criminal trespass in the first degree is a lesser-included offense of residential burglary.

A person commits residential burglary when he or she enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.025. A person commits criminal trespass in the first degree when he or she enters or remains unlawfully in a dwelling. RCW 9A.52.070. Criminal trespass in the first degree is a lesser-included offense of residential burglary. *State v. Southerland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987). "Residential burglary is a criminal trespass with the added element of intent to commit a crime against a person or property therein." *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215, 219 (2005). Because every element of criminal trespass in the

first degree is a necessary element of residential burglary, the trial court properly found Mr. Kirby's proposed instructions on criminal trespass satisfies the legal prong of the *Workman* test. 8/18/14 RP 93.

> *ii. Factually, viewing Mr. Kirby's testimony and recorded statement in the light most favorable to the defense, the evidence affirmatively supported the inference that he committed criminal trespass only.*

The factual prong of the *Workman* test is satisfied when the evidence viewed in the light most favorable to the defendant supports an inference that only the lesser offense was committed. *Henderson*, 344 P.3d at 1211; *Fernandez-Medina*, 141 Wn.2d at 455-56. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser 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); *accord State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)). The right to an instruction on a lesser-included offense attaches where "even the slightest evidence" suggests the defendant may have committed the inferior offense only. *Parker*, 102 Wn.2d at 164 (quoting *State v. Young*, 22 Wash. 273, 276–77, 60 P. 650 (1900)).

Contrary to the above standard, the trial court stated, "the defendant must show substantial evidence in the record that supports a

rational inference that he committed only the lesser included offense to the exclusion of the greater offense." 8/18/14 RP 93-94. This was an incorrect standard. As discussed, the correct standard requires only "the slightest evidence," not "substantial evidence."

The court concluded Mr. Kirby admitted he committed residential burglary, and not criminal trespass, because he admitted trespassing and taking property. 8/18/14 RP 94-95. This, too, was incorrect. Mr. Kirby testified he knowingly and unlawfully entered and remained in the residence of another person, thus acknowledging that he committed criminal trespass in the first degree. 8/18/14 RP 73. However, numerous items were strewn about the back yard and a window was broken, giving the appearance that the house was unoccupied. 8/18/14 RP 62-63. Inside the house, more items were strewn about, boxes were opened, and the house "looked ransacked." 8/18/14 RP 67, 76. Mr. Kirby believed the home owner had moved out of the house and "couldn't take the stuff that was left behind." 8/18/14 RP 64. Accordingly, he took various items, believing such items were salvageable. 8/18/14 RP 78. Mr. Kirby testified, "I thought I was salvaging [items] from somebody that left them that couldn't take the." 8/18/14 RP 67. "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 78.

The trial court stated, "Well, I don't care whether you call it salvage, whether you call it pilfer, I don't care whether you call it convert, you can call it whatever you want, but it was a trespassory entry and he took other people's stuff, to put it in pedestrian terms." 8/18/14 RP 95. Again, this was incorrect. Abandonment of property is a defense to theft because the original owner has relinquished his or her ownership interest in such property.

> Abandonment is the voluntary relinquishment of ownership of property without reference to any particular person or purpose, whereby the thing so dealt ceases to be the property of any person and becomes the property of the finder who reduces it to possession.

170 A.L.R. 706 (Originally published in 1947).[2]

Viewing the facts in the light most favorable to Mr. Kirby, his testimony supported the inference that he committed criminal trespass only because he did not enter the house with the intent to commit a crime therein, thus satisfying the factual prong of the *Workman* test.

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[2] The prosecutor argued abandonment is not a defense to residential burglary. 8/18/14 RP 84. The State relied on *State v. Jensen*, in which Division Two ruled the statutory defense of abandonment of a building applies to criminal trespass only, and not to residential burglary. 149 Wn. App. 393, 399-400, 203 P.3d 393 (2009). RCW 9A.52.090(1) provides:

> Criminal trespass—Defenses. In any prosecution under RCW 9A.52.070 [(criminal trespass in the first degree)] and 9A.52.080 [(criminal trespass in the second degree)], it is a defense that:
> (1) A building involved in an offense under RCW 9A.52.070 was abandoned; ....

However, Mr. Kirby did not contend the house was abandoned. Rather, he believed the items inside the house had been abandoned when the owner moved. *Jensen* is inapposite.

c. The proper remedy is reversal.

The court's erroneous refusal to give Mr. Kirby's proposed instruction on criminal trespass in the first degree denied him his constitutional right to present a defense and to a jury trial, as well as his statutory right to a lesser-included instruction. "The erroneous failure to instruct the jury on a lesser included offense necessitates reversal." *State v. Condon*, 182 Wn.2d 307, 326, 343 P.3d 357 (2015). The state Supreme Court "has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless." *Parker*, 102 Wn.2d at 164. "Regardless of the plausibility" of the defendant's testimony, he has "an absolute right to have the jury consider the lesser-included offenses on which there is evidence to support an inference it was committed." *Id.* at 166. Over one hundred years ago, in the context of the statutory right to a lesser-degree instruction, the Court stated:

> Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. If there is even the slightest evidence that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.

Young, 22 Wash. at 276–77 (*quoted in Parker*, 102 Wn.2d at 163-64).

Taking Mr. Kirby's testimony in the most favorable light, he had the "absolute right" to have the jury consider his theory of the case. *Parker*, 102 Wn.2d at 166. The improper denial of his request for an instruction on the lesser-included offense of criminal trespass in the first degree requires reversal. *See Warden*, 133 Wn.2d at 564.

2. The trial court erroneously barred Mr. Kirby from eliciting statements he made to the detectives to fully present his theory of the case and to put into context the parts of his statement elicited by the prosecutor.

a. A defendant has the constitutional, common law, and statutory right to present a complete defense, including the right to introduce a complete statement, when the State introduces a partial statement that excludes exculpatory information or misleads the trier of fact.

As discussed, the constitutional right to due process guarantees a criminal defendant a meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; *Holmes*, 547 U.S. at 324. A defendant must be able to present his version of the facts, so the fact-finder can decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

In addition, pursuant to the common law rule of completeness:

> when a confession is introduced, the defendant has the right to require that the whole statement be placed before the jury. This rule is designed in part to cover cases where the defendant, after admitting commission of the crime, is prevented from going further and saying anything which might explain or justify his act.

State v. Stallworth, 19 Wn. App. 728, 734-35, 577 P.2d 617 (1978) (citing *United States v. Wenzel*, 311 F.2d 164 (4th Cir. 1962)). This is so even when the evidence would not be otherwise admissible. *State v. West*, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967).

In Washington, the common law rule has been partially codified in ER 106 provides, which provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

Although ER 106 codified the common law rule in part, the common law rule of completeness continues to have full force and effect. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

Under ER 106, a statement is admissible under either of two tests. Pursuant to the "*Alsup*" test, a partial statement may be completed where the partial statement distorts the meaning of the whole statement or excludes information that is substantially exculpatory. *State v. Larry*, 108

Wn. App. 894, 909, 34 P.3d 241 (2001) (citing *State v. Alsup*, 75 Wn. App. 128, 133-34, 876 P.2d 935 (1994)). Pursuant to the "*Velasco*" test, a statement is admissible if it 1) explains the admitted evidence, 2) places the admitted portions in context, 3) avoids misleading the trier of fact, and 4) helps insure fair and impartial understanding of the evidence. *Larry*, 108 Wn. App. at 910 (citing *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cit. 1992)).

The Washington rule is substantially similar to the federal rule.[3] Comment 106. Therefore, federal case law is persuasive. *Alsup*, 75 Wn. App. at 133. In *United States v. Haddad*, the court discussed Federal Rule of Evidence 106 and the rule of completeness:

> Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and parcel of the very statement a portion of which the Government was properly bringing before the jury....
>
> ...
>
> The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence.

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[3] Federal Rule of Evidence 106 provides:

When a writing of recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

10 F.3d 1252, 1258, 1259 (7th Cir. 1993). Moreover, "[t]here is no general independent rule that out-of-court statements are inadmissible if they are self-serving." K. Tegland, 5B *Washington Practice*, Evidence Law and Practice, 359 (2007).

b. The trial court erroneously denied Mr. Kirby the right to place his entire statement before the jury.

The State introduced portions of Mr. Kirby's recorded statement through the testimony of Detectives Tate and Hayes, specifically referring to various pages from the transcript of the interview in which Mr. Kirby freely admitted removing various items from the house, thereby leaving the false impression that Mr. Kirby confessed to theft. 8/18/14 RP 13-24, 42-43; Ex. 50. The State never elicited testimony regarding the portions of Mr. Kirby's statement in which he explained that items were strewn around the back yard, the house seemed unoccupied, and it appeared that the owners had taken what they wanted, and "left things behind." Ex. 50 at 14, 17-18, 22.

Defense counsel attempted to correct the impression, beginning his cross-examination of Detective Tate by asking, "You already talked about two questions, I believe that you asked Mr. Kirby, and then just to put those into context, can you read both the questions and answers from [page 16]?" 8/18/14 RP 29. The prosecutor objected on hearsay grounds.

8/18/14 RP 29. Defense counsel argued the statements were admissible as statements by a party-opponent, 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 court sustained the prosecutor's objection, on the grounds the statements were not statements by a party-opponent, 8/18/14 RP 33-35. This was in error.

In *West*, the defendant was convicted of robbery of a loan company. 70 Wn.2d at 751. He made a statement to an officer, but that statement was not mentioned during the officer's direct examination by the prosecution at trial. *Id.* at 753. On cross-examination, defense counsel elicited that the defendant admitted to the officer that he had some connection to the crime of robbery, but he did not admit to entry into the loan company, the taking of the money, or running from the building. *Id.* On redirect examination, the prosecution elicited the balance of the defendant's statement to the officer, and the defendant was convicted as charged. *Id.* at 751, 753-54. On appeal, the defendant argued, in the absence of a finding of voluntariness, the full statement was inadmissible as a "true confession." *Id.* at 754. The Court disagreed, and stated:

> 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. This is true though the evidence might have been inadmissible in the first place.

Id. at 754-55 (citing 22A C.J.S. Criminal Laws 660(c) at 655).

Similarly, here, once the prosecutor elicited parts of Mr. Kirby's statement to the detectives, he was entitled to elicit additional parts of his statement that related to the same subject matter and were substantially exculpatory.

c. The proper remedy is reversal and remand with directions to allow Mr. Kirby to present his complete statement to the detectives.

The court's erroneous exclusion of Mr. Kirby's statement violated his constitutional right to present his defense. *Holmes*, 547 U.S. at 324. Constitutional errors regarding the exclusion of evidence are reviewed *de novo* and are presumed prejudicial. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2007). To overcome the presumption, the State bears the burden of proving beyond a reasonable doubt that the error was trivial, formal, or merely academic, not prejudicial top the defense, and did not affect the outcome of the case in any way. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

The exclusion of Mr. Kirby's statement also violated ER 106. Evidentiary errors are reviewed for abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Such errors require reversal when it results in prejudice such that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Smith,* 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

The error here was prejudicial because it excluded evidence that directly supported Mr. Kirby's theory of the case. *See Jones*, 168 Wn.2d at 724. Pursuant to ER 106, his entire statement "ought in fairness" have been admitted for contemporaneous consideration with the parts of the statement introduced by the State. The excluded portion of his statement was admissible under *Alsup*, because the partial statement distorted the meaning of Mr. Kirby's statement and the excluded portion was substantially exculpatory. *See* 75 Wn. App. at 133-34. The excluded portion of his statement was also admissible under *Velasco*, because it explained the admitted partial statement and placed it in context. *See* 953 F.2d at 1475. The partial statement included only Mr. Kirby's admission that he removed items from the house. The excluded portion, however, included his explanation that he believed the items were abandoned. Accordingly, the improper exclusion of Mr. Kirby's exculpatory

statements to the detectives was highly prejudicial, prevented him from presenting his version of facts, and requires reversal.

E. CONCLUSION

The trial court erroneously refused to give Mr. Kirby's proposed instruction on the lesser-included offense of criminal trespass in the first degree. The court also erroneously refused to let Mr. Kirby elicit his entire statement to investigating detectives to put the admitted partial statement into context. For the foregoing reasons, Mr. Kirby requests this Court reverse his conviction for residential burglary.

DATED this 2nd day of June, 2015.

Respectfully submitted,

s/ SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 46787-9-II
v.	)	
	)	
JOSHAUA KIRBY,	)	
	)	
Appellant.	)	

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