No. 93000-7
Court of Appeals No. 46787-9-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHAUA R. KIRBY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joshaua R. Kirby, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Kirby requests this Court grant review of the decision of the Court of Appeals, No. 46787-9-II (May 8, 2016). A copy of the decision is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. In *State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984), this Court ruled a defendant has the unqualified constitutional and statutory right to a jury instruction on a lesser-included offense where, *inter alia*, viewing the evidence in the light most favorable to the defendant, "even the slightest evidence" supports inference that the lesser offense only was committed, "regardless of its plausibility." Mr. Kirby was charged with residential burglary and requested a jury instruction on the lesser offense of criminal trespass in the first degree, which was denied. Contrary to *Parker*, the Court of Appeals ruled the trial court properly refused to give the lesser-included instruction on the grounds "substantial evidence" did not support the inference Mr. Kirby committed the lesser offense only. Opinion at 9. Does this ruling conflict with *Parker* and its progeny regarding the minimal quantum of evidence necessary to entitle a

defendant to an instruction on a lesser-included offense, raise a significant question of law under the federal and state constitutions, and involve an issue of substantial public interest that should be determined by this Court?

2. The constitutional right to present a defense, the "rule of completeness," and ER 106 permit 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 prevents a complete understanding of the facts. The prosecutor here elicited testimony regarding excerpts from Mr. Kirby's statement to investigating officers that suggested he confessed to residential burglary by theft. However, the court denied Mr. Kirby the opportunity to elicit testimony regarding additional excerpts to complete and provide context for the partial statement, in which he stated he believed the home owner had moved out and abandoned the items remaining in the house. The Court of Appeals ruled any error in excluding the additional excerpts was harmless, on the grounds Mr. Kirby testified to the omitted portions of his statement and, thus, the excerpts would have been cumulative. Does this ruling conflict with decisions by this Court regarding the rule of completeness and ER 106, raise a significant question of law under the

federal and state constitutions, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

On March 3, 2014, Captain Daniel Clemmons moved his belongings and furniture into his newly purchased house and then immediately left for two months training in another state. 8/14/14 RP 7, 33. Sergeant Hung Nguyen agreed 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, made sure it was secured, and took the garbage cans to the curb. 8/14/14 RP 37, 40. The garage door was open one time and he re-attached a window screen was on the ground one or two times, but he was not concerned. 8/14/14 RP 37, 39. On March 21, 2014, however, Sergeant Nguyen noticed the garage door was open again, the window screen was on the ground again, a sliding glass door was open, a window was broken, and broken glass was inside the house. 8/14/14 RP 41-44.

Sergeant Nguyen called 911 and went through the house with the responding officer. 8/14/14 RP 47. He noted miscellaneous items were strewn in the backyard, several boards from a wooden fence were loosened, packing boxes in the garage were opened and more items were scattered, 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 devices were missing. 8/14/14 RP 47, 49, 50, 51, 54, 55-56, 58, 64, 66-67. The officer noted two distinct sets of footprints. 8/14/14 RP 106.

Fingerprints lifted from the screen and broken window were matched to Joshaua R. Kirby and he was contacted by two detectives. 8/14/14 RP 122, 126, 129, 159-64; 8/18/14 RP 13, 41. He voluntarily gave a recorded statement in which he freely admitted he removed some edible food from the garbage cans, entered the house without permission, and took some clothing, a blanket, a backpack, cleaning products, and a power strip. 8/18/14 13, 16-17, 21, 41, 61-62, 65-67; Ex. 50. He denied loosening the fence boards or taking any electronic devices. 8/18/14 RP 21, 65-67. Mr. Kirby explained that he entered the house through the back window that was already broken, he believed the home owner had moved out and the items he took had been left behind and abandoned. 8/18/14 RP 16-17; Ex. 50 at 62-63, 64, 67, 78.

Mr. Kirby offered to return the items he had removed from the house. 8/18/14 RP 24-25. Captain Clemmons subsequently identified the items returned by Mr. Kirby, but his missing military gear, sports equipment, electronic devices, and rugs were never 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 portions 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 portions 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, 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 and the court sustained the objection on the grounds the statements were not statements by a party-opponent. 8/18/14 RP 29-30, 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.

On appeal, Mr. Kirby argued the trial court erred in denying his request for an instruction on criminal trespass in the first degree and in

excluding his complete statement to the investigating detectives. The Court of Appeals affirmed and ruled the trial court did not abuse its discretion in denying his request for the lesser included offense and any error in refusing to give the lesser-included instruction was harmless beyond a reasonable doubt. Opinion at 11.

E. ARGUMENT

1. Contrary to this Court's ruling in *Parker* that a lesser-included offense instruction must be given upon request where "even the slightest evidence" suggests the inferior offense only was committed, the Court of Appeals upheld the trial court's ruling that Mr. Kirby was not entitled to the instruction on the grounds "substantial evidence" did not warrant the instruction.

A criminal defendant has the constitutional right to a meaningful opportunity to present a complete defense and to trial by jury. U.S. Const. Art. I, § 2, amends. VI, XIV; Const. Art. I, §§ 3, 21; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). 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. *Parker*, 102 Wn.2d at 163-64. 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).

Whether a defendant is entitled to have the jury instructed on a lesser-included offense is determined by the two-prong "*Workman* test,"

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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.

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). Only the factual prong is at issue here. The Court of Appeals accepted the State's concession that criminal trespass in the first degree is a lesser included offense of residential burglary. Opinion at 7. *See State v. Southerland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987).

"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." *Parker*, 102 Wn.2d at 166. Over one hundred years ago, in the context of the statutory right to a lesser-degree instruction, this 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.

State v. Young, 22 Wash. 273, 276–77, 60 Pac. 650 (1900) (*quoted in Parker*, 102 Wn.2d at 163-64).

Contrary to these decisions, the Court of Appeals upheld the trial court finding that "substantial evidence" did not support the inference that Mr. Kirby committed criminal trespass only. Opinion at 8-9. By applying the incorrect standard, the court denied Mr. Kirby his "absolute right" to have the jury instructed on the lesser included offense.

Moreover, the court's ruling is unsupported by the evidence. The Court of Appeals specifically relied on evidence that Mr. Kirby scavenged edible food from the curb-side garbage can and the house was secured other than the broken window. Opinion at 9. Viewed in the light most favorable to Mr. Kirby, this evidence corroborated his conclusion the property in the house was abandoned by a previous owner, in that edibles are unlikely to be discarded by a person still in residence. Evidence that the house had a broken window that was not boarded over further corroborated Mr. Kirby's conclusion the property was unoccupied and that he committed trespass only.

In a footnote, the court noted Mr. Kirby did not comply with RCW 63.12.010, which sets out procedures for legally claiming abandoned property. Opinion at 9 n.3. This is irrelevant. A claim of abandonment undermines the intent element of theft. *State v. Wagner-Bennett*, 148 Wn.

App. 538, 543, 200 P.3d 739 (2009). Whether Mr. Kirby followed the procedures set out in RCW 63.12.010 has no bearing on whether he had the requisite criminal intent to commit residential burglary by theft when he removed the seemingly abandoned items from the house.

The Court of Appeals ruling is contrary to this Court's decisions regarding the minimal quantum of evidence necessary to entitle a defendant to an instruction on a lesser-included offense, and the requirement that the evidence be viewed in the light most favorable to the defendant, raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

2. Contrary to the constitutional right to present a defense, the common law rule of completeness, and ER 106, the Court of Appeals erroneously ruled the exclusion of Mr. Kirby's entire statement to investigating officers was harmless.

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. Thus, a defendant is entitled to present his version of the facts, so the fact-finder can decide where the truth lies. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). 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). 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.[2] 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

[2] 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.

> 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.

10 F.3d 1252, 1258, 1259 (7th Cir. 1993).

b. Mr. Kirby was entitled to introduce his exculpatory statements to investigating officers, when the State introduced excerpts that were out of context and misleading.

The State introduced excerpts from Mr. Kirby's recorded statement through the testimony of the investigating officers, 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 his 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 one of the officers 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 and the trial court sustained the objection, on the grounds the statements were not statements by a party-opponent, 8/18/14 RP 29, 33-35.

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. *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 the full statement was inadmissible as a "true confession," in the absence of a finding of voluntariness. *Id.* at 754. This 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.

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 erroneous exclusion of his exculpatory statements was not harmless.

The Court of Appeals ruled "any potential error" in excluding Mr. Kirby's exculpatory statements was harmless beyond a reasonable doubt, on the grounds he presented his defense through his testimony and closing argument, and the excluded portions of his statement were merely cumulative. Opinion at 10. This was in error.

The exclusion of Mr. Kirby's exculpatory statements was highly prejudicial. The admitted excerpts included only Mr. Kirby's admission that he removed items from the house, giving the wrong impression that he confessed to theft, an essential element of residential burglary as charged. The excluded portion, however, contained his explanation that he believed the items were abandoned. Thus, Mr. Kirby's trial testimony that he believed the items were abandoned was seemingly contrary to his statement of the detectives, likely leading the jury to conclude his defense theory was concocted after the fact. Accordingly, the improper exclusion

of Mr. Kirby's exculpatory statements to the detectives was not harmless beyond a reasonable doubt.

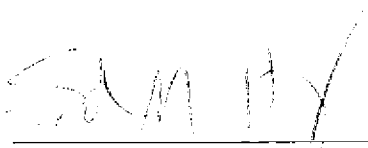
The Court of Appeals ruling is contrary to decisions by this Court and other decisions by the Court of Appeals regarding the rule of completeness and ER 106, raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (2), (3), and (4), this Court should accept review.

F. CONCLUSION

For the foregoing reasons, and pursuant to RAP 13.4(b), this Court should accept review.

DATED this 1st day of April 2016.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHAUA RYAN KIRBY, Appellant.	No. 46787-9 UNPUBLISHED OPINION

JOHANSON, C.J. — Joshaua Ryan Kirby appeals his jury trial conviction for residential burglary. He argues that the trial court erred by (1) refusing to instruct the jury on the lesser included offense of first degree criminal trespass and (2) excluding additional evidence about portions of Kirby's statement to law enforcement, thereby impeding his constitutional right to present a defense. Because Kirby does not establish he was entitled to an instruction on first degree criminal trespass and any potential error in excluding additional evidence about his statement was harmless beyond a reasonable doubt, we affirm.

FACTS

I. BACKGROUND

A. BURGLARY

On March 3, 2014, Daniel Clemons moved his belongings and some furniture into his newly purchased home. Clemons then left for two months of training in another state. Clemons's

couch and boxes containing most of his belongings were in the garage; some clothing was hanging in the master bedroom closet; his television, which was covered with a blanket or comforter, and his gaming components were in the living room; and his computer was in one of the bedrooms.

While Clemons was gone, his friend Hung Nguyen checked on the house. On March 5, Nguyen noticed that the garage door was "slightly propped open" and two window screens on the back of the house had been removed. 2 Report of Proceedings (RP) at 37. Nguyen believed that the reason the garage door was slightly open was from the house settling, so he was not initially concerned. But he took a photograph of the screens that were off the windows and put the screens back on the windows.

Ten days later, Nguyen again noticed the "propped garage door," but there was nothing else wrong with the house or the back yard—the front door and all of the windows were locked and the window screens were still in place. 2 RP at 39. He "secured" the garage door and put the garbage cans outside the house. 2 RP at 40.

Six days after that, Nguyen and another friend arrived at Clemons's house and noticed that the garage door was propped open "a little bit more than usual." 2 RP at 42. When they went inside, they found shattered glass throughout the living room area. They also found a broken window in the back of the house and saw that the sliding glass door was open. They called the Pierce County Sheriff's Office.

Officer Michael McGinnis responded to the call. Inside the house, the kitchen cabinet doors were open, the oven was open, a metal tray that had previously contained cleaning supplies was on the kitchen counter, the television and other electronics were gone, and several of the boxes had been opened and their contents had been scattered around the garage. In addition, Clemons's

clothing and other belongings were "strewn all over the [bedroom] floor," and personal hygiene items and towels were missing from the bathrooms. 2 RP at 55.

In the back yard, several fence boards had been removed from the fence and some of Clemons's belongings were scattered around the yard. Forensics investigators found fingerprints on the broken window and the windows that had previously had their screens removed; all of these prints belonged to Kirby.

B. KIRBY'S STATEMENT

Detectives Jason Tate and Mike Hayes met with Kirby, and Kirby provided a voluntary statement. Kirby admitted that he had entered the house through a broken window and that he had taken a backpack, clothing, a blanket, a power strip, and cleaning supplies. But he asserted that the window he had entered was already broken when he arrived and that he had believed the items inside the house had been left behind after someone moved out and were "abandoned." Ex. 50 at 90. He stated that he knew he was probably trespassing when he entered the residence, but he did not think he was doing anything else illegal because he thought the items inside the house had been abandoned. .

Kirby returned several items belonging to Clemons. Several items that Clemons reported stolen, including some military gear, rugs, sporting equipment, a television, some gaming systems, and a computer were never recovered.

II. PROCEDURE

The State charged Kirby with residential burglary. The trial court found that Kirby's statement to the detectives was admissible.

A. TESTIMONY

At trial, the State questioned Detectives Tate and Hayes about Kirby's statement in which he acknowledged entering Clemons's house and removing certain items. The detectives testified that Kirby had admitted entering the house through a previously broken window and taking various items from the home. Detective Hayes also testified that Kirby had stated that he entered the house intending to "steal" items. 3 RP at 43.

When cross-examining Tate, defense counsel attempted to elicit additional testimony about Kirby's statement, specifically that Kirby had stated that he thought he was taking abandoned property. The State objected on relevancy and hearsay grounds. Defense counsel argued that the rest of the statement was admissible under ER 801(d)(2) as an admission by a party-opponent.

After the trial court rejected defense counsel's ER 801(d)(2) argument, defense counsel stated,

> My purpose for asking those questions was *to put those statements he made into context*. They were offered in isolation. So these were questions that were asked by [the State], party opponent. This is -- he's still a party opponent and he can still testify to what my client said.

3 RP at 33 (emphasis added). The trial court rejected this argument, stating that "unless there is some other reason for their admission other than the truth of their matter, for example, the impeachment. . . . they're not admissible through you." 3 RP at 35.

Kirby was the only defense witness. He testified that before entering Clemons's house, he had been by the house several times and it appeared unoccupied. On the day he entered the house,

he had gone through the garbage cans outside the house looking for food or other useful items that had been thrown away.[1] He then went to the back of the house to "see if there was anything inside the house." 3 RP at 62. In the back yard, he saw items scattered around the yard, the broken window, and the broken fence. When he looked through the window, he saw a computer chair but no other furniture, and he believed that the home was vacant. Finding the sliding door and other windows secured, he climbed into the house through the broken window.

Kirby testified that once inside the house, he looked through it and did not see many items in the house, so he assumed that someone had moved out and left behind the things they could not take. Some of the boxes were already open, and there were items from these boxes on the ground. He admitted that he took some clothing, a blanket, a backpack, cleaning supplies, and a power cord. But he asserted that he "thought [he] was salvaging them from somebody that left them that couldn't take them." 3 RP at 67. And that he "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." 3 RP at 78. He also stated, however, that when he entered the home, he knew he was trespassing. Although Kirby testified that he had been by the house several times and had never seen anyone there, on cross-examination Kirby agreed that he "had no idea whether anybody was living in [the house]." 3 RP at 71.

B. Lesser Included Offense Instruction

After the testimony, Kirby proposed a jury instruction on the lesser included offenses of first degree criminal trespass. The State argued that Kirby had testified to committing burglary

[1] Kirby testified that he found, among other things, "[s]ome burritos, a Hungryman," and some other food. 3 RP at 62. He ate this food later at a friend's house.

and that abandonment is not a defense available to residential burglary or second degree burglary. Defense counsel argued that Kirby had testified that it was not his intent to steal when he entered the house but that he was looking for "salvageable items," so he did not enter the house with intent to commit a crime. 3 RP at 87.

The trial court found that Kirby had satisfied the legal prong of the *Workman*[2] test but not the factual prong and refused to instruct the jury on first degree criminal trespass. In regard to the factual prong, the trial court stated,

> The distinction for Residential Burglary, at least, is the defendant must possess the intent to commit a crime against person or property in a dwelling. Now, by the defendant's own testimony, and if I'm incorrect the record will correct me, but the defendant's own testimony, he entered this property, he did so without permission, and he was, as the defense argues, going to salvage property. 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.
>
> Simply, the defense hasn't explained to the court's satisfaction how the evidence in this case supports the inference that the defendant committed only First Degree Criminal Trespass to the exclusion of Residential Burglary, given the fact of the witness's own testimony about what he was doing, why he was doing it, what he did, what he did after he remained in the place. And I think that he has in this instance, in this case at least, failed to establish that a lesser included defense instruction was appropriate.

3 RP at 94-95 (emphasis added). In closing argument, however, defense counsel argued that Kirby had entered with intent to "salvage," not with intent to commit a crime. 3 RP at 109.

The jury found Kirby guilty of residential burglary. Kirby appeals his conviction.

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

ANALYSIS

Kirby challenges the trial court's refusal to instruct the jury on the lesser offense of first degree criminal trespass and its refusal to allow defense counsel to introduce additional evidence about Kirby's statement. These arguments fail.

I. LESSER INCLUDED INSTRUCTION

A. LEGAL PRINCIPLES

"A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong)." *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). The State concedes that Kirby met the legal prong of the test. Accordingly, we address only the factual prong of the test.

The defendant satisfies the factual prong of the *Workman* test "when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater one." *LaPlant*, 157 Wn. App. at 687. We review for abuse of discretion the trial court's decision relating to the factual prong of the test. *LaPlant*, 157 Wn. App. at 687.

B. NO EVIDENCE KIRBY COMMITTED ONLY THE LESSER CRIME

A person commits first degree criminal trespass "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). The key distinction between these two crimes is that residential burglary requires the intent to commit a crime inside the residence.

Here, the crime Kirby was alleged to have intended to commit was theft. To commit theft, Kirby had to exercise control over the property of another with intent to deprive another of the property. RCW 9A.56.020(1)(a). Kirby argues that he met the factual prong of the *Workman* test because he did not enter the property with intent to commit a crime, specifically theft, but rather with intent to take abandoned property, which is not a crime because it is not another person's property.

Kirby is correct that taking personal property that has been abandoned is not generally theft because no one has a property interest in the personal property so there is no intent to deprive anyone of the property. *See State v. Wagner-Bennett*, 148 Wn. App. 538, 543, 200 P.3d 739 (2009) (claim of abandonment goes to intent element of the offense of theft). But even assuming, but not deciding, that Kirby could have legally taken abandoned personal property from a secured residence, the trial court did not abuse its discretion when it found that the evidence did not support a rational inference that Kirby committed only the lesser offense.

Taken in the light most favorable to Kirby, the evidence showed that (1) Kirby had passed by the house several times and it appeared to be unoccupied; (2) he had entered the back yard through a latched but not locked gate; (3) he had observed that the back window had been broken, part of the back fence was broken, and items of personal property had been strewn around the back yard; and (4) once inside the house, he noticed that there was some furniture, there were some partially unpacked boxes, and some of the items from the boxes appeared to be on the ground. But

Kirby also observed that someone had filled the garbage can belonging to the house; that the garbage can contained food items that were still consumable; and that other than the broken window, the house was secured. It was not unreasonable for the trial court to conclude from these facts that substantial evidence did not support a rational inference that the property inside the home had been abandoned—particularly considering that Kirby knew someone had recently put the garbage out for collection. Thus, it was reasonable for the trial court to conclude that substantial evidence did not support a rational inference that Kirby only entered or remained unlawfully in the house and that Kirby did not enter the home with intent to commit theft. Given these unique facts, we hold that the trial court did not abuse its discretion when it concluded that Kirby had failed to establish the factual prong of the *Workman* test and denied his request for the lesser included offense instruction.[3]

II. EXCLUSION OF COMPLETE STATEMENT HARMLESS

Kirby next argues that the trial court improperly excluded additional testimony about his statement and that this impeded his constitutional right to present a defense. We hold that any potential error in excluding additional testimony about Kirby's statement was harmless beyond a reasonable doubt.

A. LEGAL PRINCIPLES

We review a trial court's decision to exclude evidence for abuse of discretion. *State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011). A court abuses its discretion if its

[3] We also note that even if Kirby had found apparently abandoned personal property, he would have been required to comply with the procedures set out in RCW 63.21.010 before he could legally claim this property as his own. There is no evidence in the record that Kirby attempted to comply with this statute.

decision is manifestly unreasonable or based on untenable grounds or its discretion is exercised for untenable reasons. *State v. Cohen*, 125 Wn. App. 220, 223, 104 P.3d 70 (2005). Evidentiary errors of nonconstitutional magnitude are not reversible if they are harmless.

A criminal defendant, however, has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rafay*, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012). A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (an error of constitutional magnitude cannot be deemed harmless unless it is "harmless beyond a reasonable doubt"); *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996); *State v. Anderson*, 112 Wn. App. 828, 837, 51 P.3d 179 (2002).

B. HARMLESS ERROR

Here, Kirby testified that he entered the residence intending to take only what he considered to be abandoned property and defense counsel argued this point in closing argument. Thus, Kirby was clearly not prevented from presenting his defense. Furthermore, the omitted portions of his statement would have repeated only his testimony and would have been cumulative. Because this additional evidence was merely cumulative, we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent this evidence and that the trial court's refusal to admit evidence about the remainder of Kirby's statement, even if error, was not harmful. *See Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994) (even when

grounds for exclusion are untenable, the exclusion of evidence that is merely cumulative or has speculative probative value is not reversible error).

Furthermore, because any potential error is harmless under the constitutional harmless error standard, it is also harmless under the nonconstitutional harmless error standard. Thus, even assuming the trial court erred by excluding evidence about Kirby's complete statement, Kirby is not entitled to relief on this ground.

Because Kirby does not establish that the trial court abused its discretion when it denied Kirby's request for an instruction on first degree criminal trespass and any potential error in excluding additional evidence about his statement was harmless beyond a reasonable doubt, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Worswick J
WORSWICK, J.

J
LEE, J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 46787-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 7, 2016

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