

NO. 46540-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHAD C. BASS

Appellant.

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

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
<u>Jury Instructions</u>	5
C. <u>ARGUMENTS</u>	6
1. THE STATE FAILED TO PROVE BEYOND A REASONBLE DOUBT THAT BASS TRAFFICKED IN STOLEN PROPERTY; COMMITTED THEFT IN THE THIRD DEGREE AND BURGLARY IN THE SECOND DEGREE	6
a. <u>Theft and Trafficking in Stolen Property</u>	7
b. <u>Burglary in the Second Degree</u>	10
2. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUBMIT DEFENSE PROPOSED LESSER INCLUDED JURY INSTRUCTIONS	10
a. <u>Trafficking</u>	12

b.	<u>Abandonment</u>	13
c.	<u>The Constitutional Error</u> <u>Was</u> <u>Prejudicial</u>	15
3.	UNDER <i>WORKMAN</i> BASS HAD A STATUTORY RIGHT TO PRESENT THE LESSER INSTRUCTIONS ON TRAFFICKING IN STOLEN PROPERTY	16
D.	<u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>STATE CASES</u>	
<i>City of Bremerton v. Widell</i> , 146 Wn.2d 561, 51 P.3d 733 (2002).....	14
<i>State v. Barnes</i> , 153 Wn.2d 378, 103 P.3d 1219 (2005).....	11, 12
<i>State v. Buzzell</i> , 148 Wn.App. 592, 200 P.3d 287, <i>review denied</i> , 166 Wn.2d 1036, 218 P.3d 921 (2009).....	12
<i>State v. Cuthbert</i> , 154 Wn.App. 318, 225 P.3d 407 (2010).....	12
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	14, 17-20
<i>State v. Herman</i> , 138 Wn.App. 596, 158 P.3d 96 (2007).....	7
<i>State v. Jensen</i> , 149 Wn.App. 393, 203 P.3d 393 (2009).....	14, 15
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	16
<i>State v. Koch</i> , 157 Wn.App. 20, 237 P.2d 287 (2010).....	11, 12, 15
<i>State v. Killingsworth</i> , 166 Wn.App. 283, 269 P.3d 1064 (2012).....	7
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	11

TABLE OF AUTHORITIES

	Page
<u>STATE CASES, continued</u>	
<i>State v. May</i> , 100 Wn.App. 478, 997 P.2d 956 (2000).....	12
<i>State v. Olson</i> , 182 Wn.App. 362, 29 P.3d 121 (2014).....	15
<i>State v. Ponce</i> , 166 Wn.App. 409, 69 P.3d 408 (2012).....	10
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6
<i>State v. Warden</i> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	18
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	16
<u>FEDERAL CASES</u>	
<i>Chapman v. California</i> , 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	15
<i>California v. Trombetta</i> , 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).....	11
<i>Crane v. Kentucky</i> , 476 U.S. 683, 106 S.Ct. 2142, 90L.Ed.2d636 (1986).....	11
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	12

TABLE OF AUTHORITIES

Page

STATUTES, RULES AND OTHERS

RCW 9A.52.070.....	14
RCW 9A.52.090.....	14
RCW 9A.56.050.....	7
RCW 9A.82.050.....	7
RCW 10.61.006.....	16
WPIC 10.....	13, 18
11 Washington Practice: Washington Pattern Jury Instructions: Criminal 19.08, at 319 (3d ed.2008).....	8
U.S. Const. amend. XIV.....	11
Const. art. I, § 22.....	12

B. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt burglary in the second degree.
2. The state failed to prove beyond a reasonable doubt theft in the third degree.
3. The state failed to prove beyond a reasonable doubt trafficking in stolen property in the first degree.
4. Appellant was denied his right to present his defense theory of the case by the trial court's refusal to provide a lesser included jury instruction on trafficking in stolen property in the second degree.
5. Appellant was denied his right to present his defense theory of the case by the trial court's refusal to provide an "abandonment" instruction which is a defense to criminal trespass in the first degree.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt burglary in the second degree when the defendant had permission to

enter the abandoned house?

2. Did the state fail to prove beyond a reasonable doubt theft in the third degree when the defendant had permission to remove all recyclables from the property?
3. Did the state fail to prove beyond a reasonable doubt trafficking in stolen property in the first degree when the defendant had permission to take recyclables from the property?
4. Was Appellant denied his right to present his theory of the case by the trial court's refusal to provide a lesser included jury instruction on trafficking in stolen property in the second degree when he presented evidence that he had permission to take the recyclables from the property?.
5. Was Appellant denied his right to present his defense theory of the case by the trial court's refusal to provide a jury instruction on abandonment where he presented evidence that the house was uninhabitable and scheduled for demolition?

B. STATEMENT OF THE CASE

Chad Bass was charged and convicted by a jury of theft in the third degree, trafficking in stolen property in the first degree, and burglary in the second degree. CP 7-12; 79-89. Bass removed wire from inside David Boss's house and from the power pole leading to the house. Id

Bass grew up next door to David Boss on Seminary Hill Rd. RP 135, 162-63. Bass has learning disabilities and works for his step-father's tree farm business. RP 163. Bass also does recycling work. RP 135. Boss's house, inside and out, was in a terrible state of disrepair when he moved out in June 2014. RP 136. There were animal feces inside, black mold on the walls and trash everywhere. RP 136-137. The house was uninhabitable. RP 43.

In June 2014, Boss told Bass he could remove all of the recyclables in the house before it was demolished so that the valuable recyclable material would not end up in the land fill. RP 135, 142. The doors to the house were left open and there were no signs of any sort indicating that a bank or realtor might be involved in the property. RP 152,158. There was a real estate lock box near one of the doors but the doors were not locked. Bass began

removing wire from the Boss home in July 2014, shortly after Boss left, and continued until the police came to arrest him in December. RP 136, 152.

Bass did not get renewed permission in December to take wire but believed that he could continue to take wire as he had done since June because Boss had given him permission, and Bass understood the house was to be demolished in January. RP 136, 151. The neighbors, Bass's mother, and deputy Taylor all agreed that the house was in deplorable condition when Boss left in June and thereafter. RP 75, 136-37, 157, 164.

Before Taylor arrested Bass, Bass believed that he had permission to take the wire. Bass believed that Boss owned the house and told this to Taylor. RP 78-80, 10-104. Bass did not think he was in trouble until Taylor told him on the phone he was to be arrested. RP 81, 96, 142. After Bass was arrested, he told the Taylor that "he screwed up" and got "greedy". Bass told Taylor that Boss told him to take whatever he wanted because "they" were taking house. RP 81, 96, 106. Taylor not Bass believed that "they" meant the bank. RP 80, 81, 96. Bass testified that Taylor told him that the bank owned the house and that he had not known this prior to Taylor's statement. After learning this information from Taylor, Bass reiterated what Taylor told him

regarding the bank probably owning the house. RP 143.

During entire time between July and December no one ever came to the house and no one ever told Bass that he could not take the recyclable wire. RP 143-44, 152, 158. Bass believed that Boss owned the wire he took from the house and a wire that connected the house to the power line, and would not have taken the wire if he had not been given permission. RP 144-45, 153-55. Bass was convicted as charged of trafficking in stolen property in the first degree, theft in the third degree and burglary in the second degree. CP 79-89. This timely appeal follows. CP 90.

Jury Instructions

Bass excepted to the trial court's refusal to give an instruction on abandonment and the lesser included trafficking in stolen property in the second degree. RP 175, 177, 179; CP 21-68. The trial court also refused to give a second degree criminal trespass instruction. RP 169. Bass excepted to instructions 5 (definition of trafficking in stolen property in the first degree) and 7 (to-convict instruction for trafficking in stolen property in the first degree). RP 179. The trial court refused to give the abandonment instruction because there was no "direct testimony that the property is abandoned[]" and

because the trial court believed that “the abandoned property situation is more for a totally derelict building that somebody who is perhaps homeless or curious, either enters to see what’s there or enters to seek shelter...” RP 174-75, 181.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BASS TRAFFICKED IN STOLEN PROPERTY; COMMITTED THEFT IN THE THIRD DEGREE AND BURGLARY IN THE SECOND DEGREE.

The state failed to prove that Boss knew he was unlawfully entering the Boss home; that he stole wire when he removed it from Boss’s home; or that he was trafficking in stolen property when he sold it to a recycle center.

Evidence is sufficient if, when viewed in a light most favorable to the state, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficient evidence admits the truth of the evidence and all reasonable inferences that can be drawn from that evidence. *Salinas*, 119 Wn.2d at 201.

a. Theft and Trafficking in Stolen Property.

Under this standard, the state failed to prove that Bass stole the wire and knowingly sold stolen wire because the uncontroverted testimony indicated that Boss, the owner in June 2014, told Bass that he could take all of the recyclables.

Trafficking in stolen property under RCW 9A.82.050 requires proof beyond a reasonable doubt of the following elements.

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree. *Id.*

Accordingly, to prove that Bass trafficked in stolen property, the State had to prove Bass knew the property he pawned was stolen. RCW 9A.82.050; RCW 9A.82.010(9); *State v. Killingsworth*, 166 Wn.App. 283, 287, 269 P.3d 1064 (2012) (*citing*, *State v. Herman*, 138 Wn.App. 596, 604, 158 P.3d 96 (2007)).

Theft in the third degree under RCW 9A.56.050 is committed as follows:

(1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not

exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

Id.

Bass raised the affirmative defense that he took the wire under a good faith claim of title. Once Bass raised this defense, the state was required to disprove this defense beyond a reasonable doubt. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 19.08, at 319 (3d ed.2008).

This WPIC provides:

It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

Id. (Alterations in original.)

The state failed to prove beyond a reasonable doubt that Bass did not take the property openly and avowedly under a good faith claim of title or that he

knowingly sold stolen wire.

Bass worked openly, avowedly and steadily removing recyclables from July to December when he was arrested. RP 143-44, 152, 158. Taylor called Bass on the telephone and told him he was going to arrest him for taking the wire. After hearing this statement, Bass said “he screwed up” and got “greedy”. RP 77-80, 10-104. Bass explained that he only realized he was in trouble after Taylor told him he was to be arrested. Bass made clear that he would not have taken anything if he did not believe he had permission from the owner. RP 81, 96, 142, 143.

Boss told Bass that he could take anything because “they” were going to demolish house, and Boss did not want the recyclables to end up in the landfill. RP 135, 136, 142. Taylor testified that Bass said a bank probably owned the house and Taylor testified that he, not Bass assumed “they” meant the bank. RP 80, 81, 96. Bass testified that Taylor told him that the bank owned the house and that he had not known this prior to Taylor’s statement. After learning this information from Taylor, Bass reiterated what Taylor told him regarding the bank probably owning the house. RP 143.

When viewed in the light most favorable to the state, the state failed

to prove that that Bass did not take the property openly and avowedly under a good faith claim of title, which also precluded the state from proving beyond a reasonable doubt that Bass knowingly trafficked in stolen property when he sold it to the recycle shop.

b. Burglary in the Second Degree.

RCW 9A.52.030 provides:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

Permission to enter a building negates the element of remaining unlawfully in a building. *State v. Ponce*, 166 Wn.App. 409, 412, 69 P.3d 408 (2012). As stated hereinabove, Boss gave Bass permission to enter the house and take anything he wanted. This evidence is uncontroverted and when viewed in the light most favorable to the state does not establish that Bass unlawfully entered or remained in Boss's house for the purpose of committing a crime. All three crimes must be reversed for insufficient evidence.

2. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S

DENIAL OF HIS MOTION TO SUBMIT
DEFENSE PROPOSED LESSER
INCLUDED JURY INSTRUCTIONS.

Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. U.S. Const. amend. XIV; *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *State v. Koch*, 157 Wn.App. 20, 33, 237 P.2d 287 (2010).

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.”

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); Const. art. I, § 22.

“In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury.” *State v. May*, 100 Wn.App. 478, 482, 997 P.2d 956 (2000). “A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from *presenting his theory of the case*.” *Cuthbert*, 154 Wn.App. at 342 (quoting, *State v. Buzzell*, 148 Wn.App. 592, 598, 200 P.3d 287, review denied, 166 Wn.2d 1036, 218 P.3d 921 (2009)).

To guard against false convictions, a structural commitment of our criminal justice system, the trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is *completely* unsupported by evidence. *Barnes*, 153 Wash. At 382, 103 P.3d 1219. At the very least, the instructions must reflect a defense arguably supported by the evidence. *Id.*

Koch, 157 Wn.App. at 33.

a. Trafficking

For the trafficking in the second degree instruction Bass needed only present some evidence that he acted recklessly rather than with intent. It is well settled that trafficking in stolen property in the second degree is a lesser included offense to first degree because the only difference between first and second degree trafficking in stolen property is the *mens rea*: knowing versus reckless, and reckless is a lesser degree of knowingly. RCW 9A.08.010; WPIC 10.

Bass presented evidence that he had permission to enter and remain in the Boss house and to take the wire. The state's witnesses were not able to refute that Boss had given Bass permission or that the house was to be demolished. Rather, the state argued that by December Boss did not have the authority to give Bass permission. Regardless of this proposal, Boss presented sufficient evidence to establish that at most he acted recklessly in taking the wire and that because he was given permission to enter the house, he never intended to commit a theft or any other crime therein.

b. Abandonment

Similarly for the abandonment instruction, Bass needed only present some evidence of abandonment, rather than the trial court's erroneous belief

that there must be “direct” evidence of abandonment. RP 174-75. In making this determination, the court must consider all evidence presented at trial by either party. *Fernandez-Medina*, 141 Wn.2d at 456.

The legislature enacted statutory defenses for the crimes of criminal trespass in the first degree and criminal trespass in the second degree. RCW 9A.52.090. RCW 9A.52.090 provides, in pertinent part:

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; or
- (2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
- (3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.¹

Id. In *City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3d 733 (2002), the State Supreme Court held that because the statutory defenses to criminal trespass negate the unlawful presence element of the crime of criminal trespass, the statutory defenses are not affirmative defenses. *Widell*, 146 Wn.2d at 570. The court in *State v. Jensen*, 149 Wn.App. 393, 400-01, 203

P.3d 393 (2009) held that under the plain and unambiguous language of the statute, the defense of abandonment applies “to prosecutions for first degree criminal trespass. *Id. Accord, State v. Olson*, 182 Wn.App. 362, 377, 29 P.3d 121 (2014).

Here, Bass asserted that the house was abandoned and presented substantial evidence in support of that assertion. Specifically, that the house was full of black mold, feces, uninhabitable, empty for six months and scheduled to be demolished in January 2015. RP 43, 136-137. Once Bass provided this evidence, the trial was required to provide the abandonment instruction and erred as a matter of law for failing to give the abandonment instruction because “[b]y its terms, the statutory abandonment defense applies [] to first degree criminal trespass. *Jensen*, 149 Wn.App at 395.

c. The Constitutional Error Was Prejudicial.

Under Washington law, it is established that where a defendant is denied his right to present a defense, the error is prejudicial. *Koch*, 157 Wn.App. 20, 33. A constitutional error is prejudicial unless the State proves beyond a reasonable doubt that the error did not affect the outcome of the case. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705

(1967); *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The State cannot meet this burden here.

Bass was prejudiced because without the lesser included instruction and the abandonment instruction, he was precluded from arguing that he committed only the lesser offense of trafficking and was denied the statutory defense to criminal trespass. The jury was only able to consider an all or nothing approach, rather than having the opportunity to consider that Bass may have acted recklessly and without intent to commit a crime in the house.

Id.

3. UNDER *WORKMAN* BASS HAD A STATUTORY RIGHT TO PRESENT THE LESSER INSTRUCTION ON TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE.

In Washington, under RCW 10.61.006, a defendant also has a statutory right to a lesser included jury instruction if the following conditions are met. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). A defendant is entitled to an instruction on this lesser degree crime if: “(1) the statutes for both the charged offense and the proposed inferior degree offense ‘proscribe but one offense’; (2) the information charges an offense that is

divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Generally, “substantial evidence” is “[e]vidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla.” Black’s Law Dictionary at 640 (9th ed.2009). A trial court’s decision to give an instruction must be based on all of the evidence presented at trial. *Fernandez-Medina*, 141 Wn.2d at 456. The evidence supporting a lesser included offense instruction need not come from the defendant; it may come from the state. *Id.*

Further, the trial court may not deny a request for an instruction because the theory underlying the instruction is inconsistent with another theory supported by the evidence. *Fernandez-Medina*, 141 Wn.2d at 459-61. But the “evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Fernandez-Medina*, 141 Wn.2d at 456. This Court examines the evidence in the light most favorable to the party seeking the instruction.

Fernandez-Medina, 141 Wn.2d at 455-56.

The first two legal prongs are easily satisfied here. It is well settled that trafficking in stolen property in the second degree is a lesser included offense to first degree because the only difference between first and second degree trafficking in stolen property is the *mens rea*: knowing versus reckless, and reckless is a lesser degree of knowingly. RCW 9A.08.010; WPIC 10.

Having satisfied the legal prongs, the issue is whether the factual prong was also met so as to warrant the lesser included instructions. The question is not whether there was sufficient evidence to support the greater degree crime. Rather, “[a] requested jury instruction on a lesser included or inferior degree offense should be administered ‘if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.’” *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

In other words, the instruction on the inferior crime should be given when evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense. *Id.* at 455. In making this determination, the court must consider all evidence presented at trial by either party. *Id.* at

456. And the evidence must be viewed in a light most favorable to the party requesting the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56 (evidence viewed in light most favorable to defendant who requested instruction below).

Here, Bass presented evidence that if anything he might have been reckless rather than knowing when entering the Boss home and taking the wire. Bass had been given permission, the house was to be demolished and it had been abandoned during the entire time Bass removed recyclables. RP 179. There was no evidence that Bass knew the bank owned the property or had any reason to believe that he was not authorized to take the wire from the abandoned house that was soon to be demolished.

Viewing the evidence viewed in light most favorable to Bass, he established that he was entitled to the lesser instruction because if the requested instructions had been given, the jury might reasonably have inferred from all of the evidence that Bass did not intend to commit a crime inside the Boss home and that, if anything he acted recklessly in selling the property to the Recycle shop. *Fernandez-Medina*, 141 Wn.2d at 455-61. Bass was entitled to have the jury fully instructed on the defense theory of

the case.” *Fernandez-Medina*, 141 Wn.2d at 461-62 (citing, *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)).

D. CONCLUSION

Bass respectfully requests this Court reverse his convictions and dismiss with prejudice based on insufficient evidence or in the alternative remand for a new trial with the lesser included instructions.

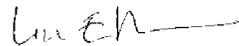
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Respectfully submitted,



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