

No. 46540-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHAD C. BASS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the State present insufficient evidence to sustain Bass' convictions for Trafficking in Stolen Property in the First Degree, Theft in the Third Degree and Burglary in the Second Degree?
- B. Did the trial court err when it refused to give Bass' proposed jury instruction for the lesser included offense of Trafficking in Stolen Property in the Second Degree?
- C. Was Bass denied his due process right to present a defense due to the trial court's refusal to submit a lesser included jury instruction for Trafficking in Stolen Property in the Second Degree and a jury instruction for Abandonment?

II. STATEMENT OF THE CASE

Peter Stoeckler works for the City of Centralia dealing with their outage management systems, meters, communication with meters and is involved with the maintenance of the power lines. RP 32. On December 19, 2013, Mr. Stoeckler came into work and found out that they could not communicate with the meter located at 2520 Seminary Hill Road. RP 33. Mr. Stoeckler did a field visit and found that the line to the house was cut off at the pole and a foot of the line was missing. RP 34, 53-54. It was clear that the wire had been cut with a hatchet or a machete. RP 35. Mr. Stoeckler took a piece of the wire and went to Hand-in-Hand Recycling, located at 206 Flower in Centralia, to show them the wire and the cut marks and ask them if any wire came in looking like it to please

call him. RP 37, 55. There was approximately 100 feet of missing line. RP 37. Mr. Stoeckler also contacted law enforcement about the theft. RP 35-36.

Jason Blankenship is the head buyer at Hand-in-Hand Recycling. RP 55. Mr. Blankenship receives "all types of ferrous and non-ferrous metal from the public on a pay service." RP 550 On December 19, 2013 Mr. Blankenship came into contact with Bass at Hand-in-Hand Recycling. RP 55-56. Bass brought in

predominantly non-ferrous -- a copper wire insulated aluminum wire. There was some miscellaneous sheet kind of regular run of stuff that he had everyday for a while, and on that particular day was some what we call poly-insulated aluminum, usually was wire for power regulators running to your house or your barn.

RP 55-56; Ex. 6, 7. Mr. Blankenship described the wire Bass brought in to him on December 19, 2013:

Well, the wire itself instead of normally when you are doing like a remodel, the wires is cut, you may have wire cutters. It is kind of clean into the links. This type was actually for lack of a better word chopped, as if swung with a hammer to break it away, wiggle it. It wasn't a clean wire most people bring in. The edges of the wire were burnt. They had observation from as if it was in a fire, not your normal clean wire we get.

RP 56. Bass had told Mr. Blankenship when he cut the wire it was hot, as in, he hacked it three times and there were sparks coming off it. RP 57-58.

Between December 16, 2013 and December 20, 2013 Bass brought in a large amount of Romex wiring, the kind that is used as standard house wire, so much that they had to pay him by check. RP 58; Ex 6, 7. Bass said he got the wire from the same place he had been cleaning up, Angela's Ashes, a dog or horse boarding place. RP 57-58.

When Mr. Stoeckler came in to speak to Mr. Blankenship about the wire Mr. Blankenship showed Mr. Stoeckler the line he received from Bass and "the hatch marks from the cuts were identical." RP 57.

The hatch marks from the cuts were identical. I mean the -- both ends were cut in the same spot. If you would have twisted the wires, put them back together, like Lego, they would fit back together, if it was whole. The same burn mark from being burnt were prevalent on both sets of wire.

RP 57.

As part of their business Hand-in-Hand Recycling gives receipts and does purchase orders for the aluminum wire. RP 59. Bass was given a standard purchase order and a receipt for the items on December 19, 2013. RP 60; Ex. 5.¹ Bass used his own name, address and identification when he did business with Hand-

¹ The State will file a supplemental Clerk's papers designating exhibits.

in-Hand Recycling. RP 62. The total for the items was for \$10.48.
RP 61.

Deputy Brady Taylor works for the Lewis County Sheriff's Office and responded to Hand-in-Hand Recycling on December 21, 2013 regarding the theft of the wire. RP 69-70. After contacting Mr. Stoeckler, Deputy Taylor went out to the residence at 2520 Seminary. RP 74. The property had garbage in the yard. RP 93; Ex. 10. Deputy Taylor discovered one door at the residence had a little blue plastic realtor's box and another door was unlocked and partially opened. RP 74-75; Ex. 13. Deputy Taylor went inside and could see the walls, the dry wall had been torn out; there was insulation all over. RP 75; Ex. 8, 9, 10, 14, 15, 17. It appeared that somebody had torn out the walls to get at the wiring inside the walls as there was no wiring left inside the walls. *Id.*

Deputy Taylor attempted to locate and contact Bass. RP 77. Deputy Taylor went to Bass' house which was located down the hill from 2520 Seminary. RP 77. Bass' mother, Sue Anders, gave Deputy Taylor Bass' cellphone number. RP 77, 162. Bass answered the phone and agreed to speak with Deputy Taylor. RP 78. Deputy Taylor informed Bass that he wanted to speak to him

about his recycling and Bass asked if they were just going to talk or was Deputy Taylor going to arrest him? RP 78.

Bass met Deputy Taylor on December 22, 2013 and admitted he screwed up. RP 79. Bass spoke to Deputy Taylor about cutting wire and having permission to take things out of the house. RP 79. Bass told Deputy Taylor he knew who owned the house. RP 79. Bass told Deputy Taylor that Davis Boss previously owned the house. RP 80. Bass then told Deputy Taylor that the bank now probably owned the house. RP 80. Bass explained to Deputy Taylor that Mr. Boss told Bass he could take whatever he wanted out of the house because "they" were taking the house. RP 81. Bass admitted he took Romex wire from inside the walls. RP 82.

Bass explained he cut the power line with a machete. RP 82. Bass admitted he never asked Centralia City Light for permission to take the power line. RP 82. Bass said he recycled the power line. RP 82. Bass denied knowing that he needed to get permission from Centralia City Light to take the power line. RP 101.

When asked if he knew who owned the house, Bass replied, "No, probably a bank." RP 100. "I was told by Dave that I could take whatever I wanted. I got greedy. I'm - - I'm screwed." "I have no

idea. Like I said I was stupid.” RP 104. Bass admitted to taking all of the chain link from the dog kennels. RP 104-05. The only type of permission Bass got was from Mr. Boss back in June 2013. RP 105.

The State charged Bass with Count I: Trafficking in Stolen Property in the First Degree, Count II: Theft in the Third Degree, and Count III: Burglary in the Second Degree. CP 10-12. Bass elected to have his case tried to a jury. See RP.

Bass testified during the jury trial. RP 134-153. Bass explained he was getting his recycling material from Mr. Boss’ place. RP 135. “I talked to the original owner, Dave [B]oss, and he said he was moving and just to take the recycles out, so it wouldn’t go to the land fill.” RP 135. Bass started recycling on the property in early July. RP 136. According to Bass, Mr. Boss left the property June 1, 2013. RP 136. Bass stated, “There was garbage everywhere. They left old animal carcasses everywhere. There was dog crap everywhere. It was just - - the place was a dump.” RP 136. Bass admits he took most of the recycles out of the house. RP 137. Bass explained he cut the power line at 3:00 a.m. because he could not sleep and wanted to work on the scrapping before he went to work for his step-father’s tree farm. RP 135, 145.

Bass said he was given permission in June and the only reason he took the property six and a half months later was the permission he was given in June. RP 146-47. Bass admitted to cutting the power line from the top of the house. RP 150. Bass acknowledged he did not own the line or the wiring inside of the house. RP 150. Bass admitted someone else owned those items. RP 150-51. December 16 through 20, 2013, Bass did not get permission from anyone to take the wiring from inside the house. RP 151. Bass also admitted he sold the items to Hand-in-Hand Recycling. RP 151.

Bass explained that when Deputy Taylor arrested him he was scared and nervous. RP 141. Bass testified he only became aware that Boss had been evicted after he was arrested. RP 142. According to Bass he did not know when he cut the power line that Mr. Boss did not own it and only found out after he was arrested. RP 142. But Bass also admitted he possibly knew the bank owned the house. RP 144. Bass explained he told Deputy Taylor he screwed up because he was in jail so obviously he must have done something wrong. RP 143. Bass also testified he said he got greedy because, "If I wouldn't have kept taking the scrap metal out of there, I probably wouldn't have got in trouble, and I was trying to

get it out of there before it got demolished.” RP 143-44. According to Bass he did not intend to wrongfully take anyone else’s property. RP 146.

Bass was convicted as charged. CP 69-72. Bass was sentenced to a residential DOSA. CP 79-89. Bass timely appeals his convictions. CP 90.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY’S FINDING THAT BASS TRAFFICKED IN STOLEN PROPERTY IN THE FIRST DEGREE, COMMITTED THEFT IN THE THIRD DEGREE AND COMMITTED BURGLARY IN THE SECOND DEGREE.

Bass argues the State did not present sufficient evidence to sustain the jury’s verdict of guilty on all three counts, Count I: Trafficking in Stolen Property in the First Degree, Count II: Theft in the Third Degree, and Count III: Burglary in the Second Degree. Brief of Appellant 9-10. The State presented sufficient evidence to sustain the jury’s guilty verdicts on all three counts.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have

found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not

subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

a. The State presented sufficient evidence to sustain Bass’ conviction for Theft in the Third Degree.

To convict Bass of Theft in the Third Degree the State was required to prove, beyond a reasonable doubt, that Bass, on or about or between December 16, 2013 and December 20, 2013, wrongfully obtained or exerted unauthorized control over the property of another, or the value thereof, not exceeding \$750 in value, with the intent to deprive that person of such property. RCW 9A.52.020(1); RCW 9A.52.050; CP 50-53.

Bass asserted the statutory affirmative defense that he appropriated the property “openly and avowedly under a claim of title made in good faith, even though the claim be untenable.” RCW 9A.56.020; CP 55; Brief of Appellant 8-10. Bass argues that the State did not meet its burden to prove beyond a reasonable doubt that he did not take the property openly and avowedly under a good

faith claim of title as required. Brief of Appellant 8-10. The State did prove beyond a reasonable doubt that Bass did not take the property openly and avowedly under a good faith claim of title. There was sufficient evidence presented that Bass committed Theft in the Third Degree.

i. The theft of the Romex wiring was not made under a claim of title made in good faith.

In regards to the wiring inside the house, Bass destroyed the sheet rock and took the house down to the studs at points to remove the Romex wire inside the walls. RP 75, 82; Ex. 8, 9, 14, 15, 17. Bass testified that he received permission from Mr. Boss in June 2013 to take out the recyclables. RP 81, 105, 135. Mr. Boss moved out of the house and off the property on June 1, 2013. RP 136. Bass took the Romex wire and turned it over to Hand-in-Hand Recycling between December 16, 2013 and December 20, 2013. RP 55-56, 143-44, 151; Ex. 5.

Bass told Deputy Taylor that the bank probably now owned the house. RP 80. Bass even told Deputy Taylor that Mr. Boss told him to take whatever he wanted out because “they” were taking the house. RP 81. Bass then testified that he only said the bank probably owned the property because Deputy Taylor told him the

bank owned it, contradicting Deputy Taylor's testimony. RP 143. On July 23, 2013 the property was conveyed to U.S. Bank National Association, as Trustee for Citigroup Mortgage Loan Trust, Inc. Ex. 3. When Deputy Taylor went out to the residence on December 21, 2013 he found the front door had one of those blue plastic realtor's box for the key. RP 74. The house had been unoccupied since Mr. Boss moved out in June. RP 158.

Bass claims he was taking the property openly as he had been removing recyclables from the property on a continuous basis since July 2013. Brief of Appellant 9. The property must be taken under a claim of title made in good faith. RCW 9A.56.020. Mr. Boss allegedly gave Bass permission in June to take recyclables out of the residence before "they" take it. This is not a claim of title made in good faith. The wiring inside the house did not belong to Bass. RP 150-51. Bass took the wiring six months after Mr. Boss allegedly told him to take the recyclables because the bank was going to take the house. RP 146-47, 151. Bass was at a minimum under notice that Mr. Boss was not going to be the owner of the house much longer, as he was leaving it and the bank was taking over. Bass even stated that he wanted to get the last of the recyclables out of the house before it was demolished and that is

why he was busy taking the Romex wiring in December. RP 143-44. This would indicate that Bass knew the bank now owned the house and was going to potentially demolish it and sell the property. The State sufficiently proved, beyond a reasonable doubt, that the Romex wiring stolen from inside the house was not taken under a claim of title made in good faith.

ii. The theft of the Centralia City Light power cable was not made openly and avowedly under a claim of title made in good faith.

Bass went over to the residence to cut the Centralia City Light power cable by cutting it with a machete at 3:00 a.m. RP 145. Mr. Stoeckler explained that they lost contact with the line after 4:00 a.m. and before 5:00 a.m. RP 33. There is nothing open and avowedly about cutting a power cable in the hours of darkness.

Further, it is inconceivable that any person would believe they could cut a power line from a house to the Centralia City Light power pole and recycle it under the permission of the previous home owner. “[A] juror is expected to bring his or her opinions, insights, common sense, and everyday life experiences into deliberations.” *State v. Peterson*, 174 Wn. App. 828, 855, 301 P.3d 1060 (2013), *citing State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). Yes, Bass used his own name and information at

Hand-in-Hand Recycling to obtain the money for the recyclables, but that is required by law and he was not going to get paid without providing that information. RP 62, 67. This does not make his conduct openly and avowedly. There was certainly no claim to good faith in his claim of title. The State sufficiently proved, beyond a reasonable doubt Bass' affirmative defense and this Court should confirm Bass' conviction for Theft in the Third Degree.

b. The State presented sufficient evidence to sustain Bass' conviction for Trafficking in Stolen Property in the First Degree.

To convict Bass of Trafficking in Stolen Property in the First Degree the State was required to prove, beyond a reasonable doubt, that Bass, on or about and between December 16, 2013 and December 20, 2013, knowingly initiated, organized, planned, financed, directed, managed or supervised the theft of property for sale to others, or knowingly trafficked in stolen property. RCW 9A.82.050; CP 46-49.

"Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy receive possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19); CP 47.

Bass knowingly sold to Hand-in-Hand Recycle property belonging to another person. RP 35-36, 55-56, 146-47, 150-51. Bass admittedly did not own the items from inside the house and acknowledged someone else owned the items. RP 150-51. Bass also admitted he did not own the line and that between December 16 and December 20, 2013 did not get permission from anyone to take the wiring from inside the house. RP 150-51. Bass further admitted and Mr. Blankenship also testified that Bass brought the Romex cable and the power line to Hand-in-Hand Recycling. RP 151, 55-56; Ex. 5. This evidence presented to the jury is sufficient to sustain the conviction for Trafficking in Stolen Property in the First Degree and this Court should affirm the conviction.

c. The State presented sufficient evidence to sustain Bass' conviction for Burglary in the Second Degree.

To convict Bass of Burglary in the Second Degree the State was required to prove, beyond a reasonable doubt, that Bass, on or about and between December 16, 2013 and December 20, 2013, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building, other than a vehicle or a dwelling. RCW 9A.52.030; CP 56-59, 63.

Bass admitted that the bank probably owned the house. RP 80, 144. Bass did not simply cut and remove the wire, he tore out the walls and ripped the Romex cabling from the walls. RP 56, 75; Ex. 8, 9, 14, 15, 17. Bass admitted during his testimony that he did not receive permission between December 16 and December 20, 2013 to go inside the house and remove the wiring. RP 151. Bass also testified that he removed the wiring from the house that week in the early morning hours. RP 145. While Bass did state he did not intend to wrongfully take someone else's property, the jury determines credibility of the witness and this determination is not subject to review by the reviewing court. *Myers*, 133 Wn.2d at 38. In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Bass committed Burglary in the Second Degree and this Court should confirm his conviction.

B. BASS WAS NOT ENTITLED TO A JURY INSTRUCTION FOR TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE.

Bass asserts that the trial court erred when it refused to give his proposed jury instruction for the inferior degree offense of Trafficking in Stolen Property in the Second Degree. Brief of Appellant 17-20. Bass argues the trial court erred when it concluded factually there was no evidence that Bass had only

recklessly trafficked in stolen property. Brief of Appellant 18-20. The State respectfully disagrees with Bass' analysis and argues to this Court that the trial court did not err because the evidence does not support the inference that Bass only committed Trafficking in Stolen Property in the Second Degree to the exclusion of the charged crime of Trafficking in Stolen Property in the First Degree.

1. Standard Of Review.

This Court reviews refusals to give lesser or inferior offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

2. Bass Was Not Entitled To Have The Trial Court Instruct On His Proposed Lesser Included Jury Instruction For Trafficking In Stolen Property In The Second Degree.

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case but it is not absolute. *Gamble*, 154 Wn.2d at 462-63. The party seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense or an inferior degree offense is broken into two inquiries, one legal and one factual. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The analysis whether an offense is an inferior charged offense as applied to the law is:

- (1) The statutes for both the charged offense and 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...

Fernandez-Medina, 141 Wn.2d at 454 (citations and internal quotations omitted). When dealing with a crime such as Trafficking in Stolen Property in the First Degree, it is clear that Trafficking in Stolen Property in the Second Degree meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary analysis is factual. RCW 9A.82.050; RCW 9A.82.055; *Fernandez-Medina*, 141 Wn.2d at 454-55.

The factual prong of the analysis for an inferior degree offense requires, “there is evidence that the defendant committed **only** the inferior offense.” *Id.* at 454 (emphasis added). This necessitates that the inference must be that inferior or lesser offense was the only crime committed to the exclusion of the crime charged by the State. *Fernandez-Medina*, 141 Wn.2d at 455. This standard is more particularized than the factual showing required for other jury instructions. *Id.*

The reviewing court evaluates the sufficiency of the evidence in support of the lesser included or inferior degree offense in the light most favorable to the party that requested the jury instruction. *Id.* at 455-56. The evidence is not sufficient if it simply shows the jury may disbelieve the State’s evidence that points towards guilty.

Id. at 456. “The evidence must firmly establish the defendant’s theory of the case.” *Id.* If the trial court errs by failing to give a properly requested lesser or inferior included offense instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The only difference between Trafficking in Stolen Property in the First Degree and Trafficking in Stolen Property in the Second Degree is the mens rea required to commit the offense. RCW 9A.82.050; RCW 9A.82.055. Trafficking in Stolen Property in the First Degree requires the person to knowingly traffic the stolen property while Trafficking in Stolen Property in the Second Degree only requires the person act recklessly. *Id.*

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

WPIC 10.02. While recklessness requires,

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

WPIC 10.03.

Bass argues he presented evidence that he might have been reckless rather than knowing when he entered the residence and took the Romex wiring. Brief of Appellant 19. Bass goes on to assert that “[t]here was no evidence that Bass knew the bank owned the property or had any reason to believe he was authorized to take the wire from the abandoned house that was soon to be demolished.” Brief of Appellant 19. This is simply not true. While Bass did testify that he had been given permission by Mr. Boss to take the recyclables out of the house, he acknowledged that permission was given in June, some six months before he took the Romex wiring. RP 135, 142, 146-47. Bass testified that he had not received permission from anyone between December 16 and December 20, 2013 to go inside the house and take the wiring. RP 151. Bass admitted he did not own the wiring and it belonged to another. RP 150-51. Bass told Deputy Taylor that the bank was probably the owner of the house. RP 80. Bass knew that “they”

were taking the house. RP 81. Bass admitted he did not get permission to take the wires. RP 101. Bass was taking items out of the house in the middle of the night. RP 145. Bass then went and sold the Romex to Hand-in Hand Recycling. RP 151.

Bass' actions, taken in the light most favorable to Bass, do not establish the inference that the inferior offense, Trafficking in Stolen Property in the Second Degree, was the only crime committed to the exclusion of the crime charged by the State, Trafficking in Stolen Property in the First Degree. RCW 9A.82.050; RCW 9A.82.055; *Fernandez-Medina*, 141 Wn.2d at 455; WPIC 10.02; WPIC 10.03. The evidence has to be that Bass only committed the inferior offense. Further, the evidence was not simply in regards to the Romex wiring, Bass also stole and trafficked the Centralia City Light power line, and those actions, given that he cut them down in the middle of the night and clearly the power line belonged to the power company cannot be said to be reckless. RP 34-35, 37, 55-57, 145, 150; Ex. 1, 2, 5. Arguendo, if Bass did believe he had permission to take the recyclables out of the house, there was no mention by Bass that Mr. Boss had given him permission to take the City's power line, which was located outside the house. See RP 134-153. There is no evidence of

recklessness when it comes to the acts committed by Bass in regards to the City's power line nor to the exclusion of knowingly in regards to the wiring inside the house.

The trial court explained its decision:

I'm not instructing on the lesser included of Trafficking in the Second Degree. I don't see any evidence in this record at all of reckless on the part of the defendant. Everything he did he did intentionally with the claim that he was entitled to do it by virtue of this permission that was given to him some months earlier by the guy who was being dispossessed of the property by virtue of a Deed of Trust foreclosure. There's nothing reckless about that.

RP 167-68. The trial court did not base its decision on untenable reasons or grounds. See *C.J.*, 148 Wn.2d at 686. Another reasonable judge could have reached the same conclusion, that there was not sufficient evidence of recklessness on Bass' part. *Rodriguez*, 146 Wn.2d at 269. The decision was not manifestly unreasonable given the testimony outlined above. Bass cannot show the trial court abused its discretion when it declined his invitation to instruct the jury on the lesser included offense of Trafficking in Stolen Property in the Second Degree. Therefore, this Court should affirm Bass' conviction for Trafficking in Stolen Property in the First Degree.

C. BASS WAS NOT DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE AS HE WAS NOT ENTITLED TO A LESSER INCLUDED JURY INSTRUCTION ON TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE NOR WAS HE ENTITLED TO A JURY INSTRUCTION ON ABANDONMENT.

Bass asserts that he was denied his due process right under the Fourteenth Amendment to present a defense because the trial court denied his request to submit a jury instruction on the lesser included offense of Trafficking in Stolen Property in the Second Degree and a jury instruction on abandonment. The trial court did not abuse its discretion when it denied Bass' requests because Bass was not entitled to either instruction, therefore there is no due process violation.

1. Standard Of Review.

In general, an appellate court reviews a trial court's choice of jury instructions for an abuse of discretion. *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011); *State v. Douglas*, 128 Wn, App. 555, 561, 1116 P.3d 1012 (2005). However, when the alleged error is legal question, the reviewing court reviews the error under a de novo standard. *State v. Jensen*, 149 Wn. App. 393, 398, 203 P.3d 393 (2009).

2. Bass Was Not Entitled To Have The Trial Court Instruct On Abandonment Or Trafficking In Stolen Property In The Second Degree.

Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); *Hathaway*, 161 Wn. App. at 647. Furthermore, it is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory. *Hathaway*, 161 Wn. App. at 647; *State v. Portrey*, 102 Wn. App. 898, 902, 10 P.3d 481 (2000); *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656, *reviewed denied*, 133 Wn.2d 1014 (1997).

As argued above Bass was not entitled to a jury instruction for Trafficking in Stolen Property in the Second Degree, therefore there was no err and no due process violation for failing to give the instruction. In regards to abandonment, Bass was not entitled to have the trial court give the instruction as there was not substantial evidence to support a claim of abandonment.

Abandonment is a statutory defense to Criminal Trespass in the First Degree. RCW 9A.52.090. Bass proposed a jury instruction

for two statutory defenses for the lesser included charge of Criminal Trespass in the First Degree. CP 28. Bass proposed:

It is a defense to a charge of criminal trespass in the first degree that:

(a) a building involved in the trespass was abandoned, or

(b) the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable count, it will be your duty to return a verdict of not guilty on Criminal Trespass in the First Degree.

CP 28, *citing* WPIC 19.06. The trial court declined to give the abandonment statutory defense, reasoning, that there was not any testimony that the property was abandoned. RP 172.

Bass argues he presented substantial evidence to support abandonment. Brief of Appellant 15. This is inaccurate. Bass testified that there was black mold on the walls, the house and property was a dump, for lack of a better way to put it, and no one had lived there for six months. RP 43, 136-37. There was no evidence, other than Bass stating he was told to get out the recyclables before the house was demolished, that Bass had

information that the house was scheduled to be demolished in January or February. See RP. The fact that the house was subsequently demolished does not mean at the time Bass' actions the house was scheduled for demolition. RP 158. The house was in such disrepair after Bass ripped the wiring out of the walls, removing sheetrock, insulation and taking some of the walls down to the studs that it is improbable at that point the bank found it in its best interest to attempt to rehabilitate the house. RP 82, 143-44; Ex. 8, 9, 1414, 15, 17. The evidence presented by the State showed the house belonged to the bank. Ex. 3. Further, the power bill was continued to be paid by someone. RP 49. Mr. Stoeckler testified that the home's power bill was consistent with low power usage, stating,

It could be consistent if the account was an active account, the bill was being paid, it was a vacant house, but it was being paid for. We did have a customer record and that was a real estate company, so it got pretty much either normal usage and this low usage is a real generalization. It could be a lot of things.

RP 49. There was not substantial evidence that the house was abandoned, to the contrary, there was substantial evidence that the house was not abandoned. Bass was not entitled to the jury

instruction and the trial court did not abuse its discretion by failing to give it.

Arguendo, if the trial court abused its discretion by not giving a jury instruction on abandonment, it was harmless. The State recognizes that it is generally held that, “A refusal to give a requested jury instruction constitutes reversible error where the absence of the instructions prevents the defendant from presenting his theory of the case.” *State v. Cuthbert*, 154 Wn. App. 318, 341-42, 225 P.3d 407 (2010), *citing State v. Buzzell*, 148 Wn. App. 592, 598, 200 P.3d 287, *review denied*, 166 Wn.2d 1036 (2009). In *Cuthbert* the defendant was charged with Theft and requested an instruction that the property was appropriated openly and avowedly under a claim of title made in good faith. *Cuthbert*, 154 Wn. App. at 342. The trial court denied the request stating that the defendant did not openly and avowedly seek additional fees for services as the guardian of the person. *Id.* at 343. The trial court also found that the defendant did not testify or was any evidence presented to support that the defendant believed he was legally entitled to do what he was doing. *Id.*

The distinction in Bass’ case is he was not charged with Criminal Trespass in the First Degree. CP 10-12. Criminal Trespass

in the First Degree was submitted as a lesser included jury instruction. CP 60. The jury was instructed,

The defendant is charged with Burglary in the second degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Criminal Trespass in the first degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

CP 60, *citing* WPIC 4.11. The reviewing court presumes the jury followed the court's instruction. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). The jury was never to consider Criminal Trespass in the First Degree or the statutory defense of abandonment if it found Bass committed Burglary in the Second Degree. CP 60. The jury convicted Bass of Burglary in the Second Degree. CP 71. Therefore, it was harmless to fail to give the abandonment instruction in this case because the jury never considered the lesser included of Criminal Trespass in the First Degree, the crime that the abandonment defense attached to.

3. There Was No Violation Of Bass' Due Process Right.

Because Bass was not entitled to either instruction, there was no due process violation. Bass alleges his due process rights

were violated. U.S. Constitution, Amendment XIV. In the alternative, if Bass was entitled to the abandonment instruction, any error was harmless beyond a reasonable doubt. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). An error of constitutional magnitude is harmless beyond a reasonable doubt if the reviewing court can find that any reasonable jury would have reached the same result if the error had not occurred. *Jones*, 168 Wn.2d at 724. As argued above, the jury would have reached the same result because it was not to even consider Criminal Trespass in the First Degree until it could not reach a verdict for the Burglary in the Second Degree. CP 60. The jury would not have considered the abandonment defense because it was not applicable to any of the charged counts. Because the jury convicted Bass of the greater offense, Burglary in the Second Degree, the failure to give the abandonment jury instruction did not affect the outcome of the trial. This Court should affirm Bass' convictions.

IV. CONCLUSION

The State presented sufficient evidence to sustain Bass' convictions for Trafficking in Stolen Property in the First Degree, Theft in the Third Degree and Burglary in the Second Degree. The trial court did not err when it refused to give Bass' proposed jury instruction for the lesser included offense of Trafficking in Stolen Property in the Second Degree. Finally, the trial court did not violate Bass' due process right to present a defense because Bass was not entitled to have the jury instructed on abandonment or the lesser included offense of Trafficking in Stolen Property in the Second Degree. This Court should affirm Bass' convictions.

RESPECTFULLY submitted this 7th day of May, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



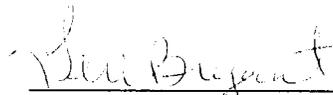
by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. CHAD C. BASS, Appellant.	No. 46540-0-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 7, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email address: LiseEllnerlaw@comcast.net.

DATED this 7th day of May, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

May 07, 2015 - 4:50 PM

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