IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYRONE D. RUDOLPH, Appellant.	No. 38330-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Tyrone Rudolph appeals his conviction for first degree trafficking in stolen property,[1] arguing that the trial court erred in refusing to give a lesser included offense instruction for second degree trafficking. We affirm.

FACTS

On May 25, 2007, LaDonna Gehlhaar stayed at home to work in her garden. Late that morning, she noticed two young men in the neighborhood. One was "a young white male," and the other was "a young African American gentleman, or boy." Report of Proceedings (RP) at 67. She also saw them carrying a large item, possibly a wall mount television, covered with a blanket.

[1] RCW 9A.82.050(1) provides, "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."

Gehlhaar spotted them again around 1:30 pm. She watched as they walked into a greenbelt behind her neighbor's house. Later, the two young men walked out of the greenbelt and left, one walking and one on a bicycle. Gehlhaar called the police around 1:30 pm because she thought it "odd" that they were not in school that day. RP at 75.

Around 4:00 pm, Gehlhaar saw the two return in a car driven by a woman with "bleach blond" hair. RP at 73. The car stopped and the driver and the young men exited the car. The driver opened the trunk and returned to the driver's seat. The men walked into the greenbelt and returned shortly, carrying some speakers and other large items from the greenbelt. They put the items into the trunk of the car. Gehlhaar noted the car's license plate and reported it to the police. At trial, Gehlhaar could not identify the defendant as one of the two young men she had seen.

Around 5:15 pm, Gehlhaar's neighbor, Anita Bingham, returned from work and found her patio door pried open. Immediately after Bingham arrived home, Gehlhaar contacted her and expressed concern that "some suspicious activity" had occurred at Bingham's home. Bingham discovered that a television, stereo equipment, speakers, two digital video disc (DVD) players, and alcohol were missing from the house. Bingham reported the missing items to the police.

When Olympia Police Officer Bryan Henry arrived to investigate, he found pry marks on the back sliding glass door but could not find any fingerprints. Henry also investigated the car that was used to tranport the items from the greenbelt. Using the license number provided by Gehlhaar, he located the registered owner who said that his 17 year old daughter, Erika Greene, drove the car. Henry then interviewed Greene.

Greene testified that around 3:00 pm on May 25, she drove to the house of her friend, Kristen Eixenberger. Eixenberger's boyfriend, Raul Espinosa, had called Eixenberger to ask if she

and Greene could pick him up, along with his friend, Tyrone Rudolph, "because [their] friends had given them some things . . . so they needed a ride." RP at 91. Following Eixenberger's directions, Greene drove Eixenberger to a location near a housing development. There, they found Espinosa and Rudolph sitting on the side of the road. After they arrived, Espinosa and Rudolph went into the woods and came out with a television, stereo equipment, and DVD players. The men loaded the items into the trunk of Greene's car and Greene drove them all to an apartment. Greene left her three passengers at the apartment and went to visit another friend.

Eixenberger testified that she and Greene met Espinosa and Rudolph at an apartment after school. According to Eixenberger, Rudolph asked whether they "wanted to go take him somewhere to pick up some of his stuff." RP at 136. As Greene was driving, Rudolph told her to pull over. Rudolph and Espinosa exited the car, Espinosa stood in the street, and Rudolph went into the woods and returned with two televisions and some speakers. Then, Eixenberger, Greene, Espinosa, and Rudolph all returned to the apartment.

One month later, on June 25, 2007, Olympia Police Sergeant Paul Lower learned that Rudolph had pawned the stolen television at the Pawn X-Change in Olympia. Rudolph had presented his driver's license to Kevin Briley, a pawn broker at Pawn X-Change, for the transaction. Lower showed Briley a photographic lineup but Briley could not identify the individual who pawned the television.

The State charged Rudolph with first degree trafficking in stolen property. Rudolph neither testified nor presented any witnesses. After both sides rested, Rudolph unsuccessfully proposed the following instruction in trafficking in stolen property in the second degree, "A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the

second degree." Clerk's Papers at 21. Although the record does not contain any discussion about jury instructions, Rudolph later objected on the record to the trial court's refusal to give this proposed instruction.

A jury convicted Rudolph as charged. Rudolph appeals.

ANALYSIS

Lesser Included Instruction

Rudolph contends that the trial court erred in refusing to instruct the jury on trafficking in stolen property in the second degree because it is a lesser included offense to trafficking in stolen property in the first degree. The State argues that substantial evidence does not support the lesser included instruction. We agree with the State.

A. Standard of Review

A trial court's failure to instruct on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). If a trial court's refusal to give a defendant's requested jury instruction is based on a factual dispute, we review for abuse of discretion but, if it is based on a legal dispute, we review de novo.[2] *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

B. Lesser Included Offense Instruction Not Supported by the Evidence

We apply the *Workman*[3] test to determine whether a lesser offense is included within a charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The

[2] It is not clear whether the trial court refused the lesser included instruction as a matter of law or as a matter of fact. The discussion on the second degree instruction is off-the-record. When defense counsel later stated for the record that the defense takes "exception" to the trial court's refusal to give the second degree instruction, the court did not respond.

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

Workman test has two prongs, "[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged [and,] [s]econd, the evidence in the case must support an inference that the lesser crime was committed." *State v. Fernandez-Medina*, 141 Wn.2d at 454 (alterations in original) (quoting *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). The parties concede that the legal component of the test is satisfied.

In order to satisfy the factual prong, substantial evidence[4] must support "a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense." *Fernandez-Medina*, 141 Wn.2d at 461. 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. *Fernandez-Medina*, 141 Wn.2d at 456. 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. We examine the evidence in the light most favorable to the party seeking the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56.

Here, substantial evidence presented by the State supports the State's argument that Rudolph knew that the property he pawned was stolen. Gehlhaar noted the "odd" presence of two young men in her neighborhood, specifically near the Bingham's house. RP at 75. She also

[4] Washington cases have not defined the phrase "substantial evidence" in the framework of the factual prong of the *Workman* test. 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).

observed a woman drive the same two men back to the neighborhood and observed the men load the car with speakers and other large items. The car she observed was identified as Erika Greene's. Greene testified that she and Eixenberger drove to a location near a housing development, where they met Rudolph and Espinosa. Rudolph and Espinosa went into some woods and retrieved a stereo, television and DVD player. Eixenberger also testified that Rudolph retrieved items from the woods.

Lower testified that he learned at the Pawn X-Change that someone had pawned the stolen television on May 25, 2007. Briley testified that he handled the transaction and that the record of the transaction bore Rudolph's identification, including his address, birth date and social security number. Lower's and Briley's testimony support a rational inference that Rudolph was the person who trafficked the stolen property.

None of the evidence at trial suggested that Rudolph unknowingly or recklessly trafficked in the stolen property at Pawn X-Change. Greene's and Eixenberger's testimony both show that he removed the television set from the woods near Bingham's house and Lower's testimony established that Rudolph pawned the television from Bingham. Moreover Gehlhaar saw Rudolph and a friend carrying a large item, saw them enter the greenbelt and leave, then return and load large items from the greenbelt into a car. Rudolph offered no other evidence at trial.

Because the factual prong of the *Workman* test requires that substantial evidence support "a rational inference that the defendant committed only the lesser included . . . offense to the exclusion of the greater offense," we hold that the factual prong is not satisfied and, therefore, the trial court did not err in refusing the lesser included instruction. *Fernandez-Medina*, 141 Wn.2d at 461. We hold that the trial court did not err in refusing to give the lesser included

offense instruction on second degree trafficking in stolen property.

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 pursuant to RCW 2.06.040, it is so ordered.

We concur:

Van Deren, C.J.

Houghton, J.

Quinn-Brintnall, J.