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Washington State
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Division Two

March 8, 2016

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	No. 46787-9 UNPUBLISHED OPINION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.

[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.