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Court of Appeals
Division III
State of Washington

NO. 307395-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JOSHUA JORDAN GRAHAM, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00235-1

BRIEF OF RESPONDENT

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I. ISSUES

- 1. Whether trial counsel's failure to request a lesser-included offense constituted ineffective assistance of counsel.**
- 2. Whether the trial court erred when it ruled the mistake in the verdict form a clerical error and entered a judgment and sentence against the defendant.**

II. STATEMENT OF FACTS

On January 16, 2011, shortly after midnight, an Atomic Bowl employee discovered that the bowling office door had been broken. (RP 12/20/11, 33). The employee was returning the money till to the office safe when he observed that the office door was ajar and the doorjamb was broken. (RP 12/20/11, 33). The employee recalled seeing the defendant in the area of the office earlier in the evening. (RP 12/20/11, 32-33). The office door had signage that read "bowling office/tournament office." (RP 12/20/11, 33). After reviewing video security footage from a camera inside the bowling office, another security employee was able to identify the defendant as the person observed entering the office and opening drawers inside the office. (RP 12/20/11, 49).

During the trial, the video security footage was admitted into evidence and played for the jury. (See EX. 4; RP 12/20/11, 49). In the video, the defendant can be seen entering the office and then using his

shirt to cover his hand while opening desk and cabinet drawers. (EX. 4). The defendant then approaches a safe and uses his shirt to cover his hand while touching the safe. (EX. 4). The defendant is then observed looking in the direction of the surveillance camera before throwing his hand to his head and then immediately walking out of the office. (EX. 4). The defendant testified and admitted that he was the individual seen on the video inside the bowling office. (RP 12/20/11, 73). He testified that on the night in question, he had taken prescription hydrocodone, and then had a couple of beers and a couple of mixed drinks. (RP 12/20/11, 68). The defendant denied breaking a door. (RP 12/20/11, 70). He testified that he remembered looking for a bathroom and turning on a light. (RP 12/20/11, 70, 72). He testified that he remembered seeing a room, and that he was just looking for a urinal. (RP 12/20/11, 70). He denied remembering walking around the room. (RP 12/20/11, 70-71). The defendant admitted that he was the person on the video who used his shirt to open up drawers inside the office. (RP 12/20/11, 73). The defendant testified that he did not like touching things and that he is "a germaphobic." (RP 12/20/11, 73). The defendant admitted to committing two crimes of dishonesty, a theft in 2003 and making a false statement to a public servant in 2005. (RP 12/20/11, 71).

The jury began deliberations on the afternoon of December 20, 2011. (RP 12/20/11, 100). After deliberations began, the jury requested to watch the video again, and they were brought back into court where the video was replayed once. (RP 12/20/11, 104). At approximately 4:35 p.m. the jury was then taken back out of the courtroom to continue deliberations until 4:45 p.m., when the court instructed the bailiff to send the jury home for the day. (RP 12/20/11, 105).

On the following day, at approximately 9:38 a.m., the jury sent a note indicating they were unable to come to a unanimous decision. (CP 36). The court responded with a note at 9:56 a.m. that read, "Please continue your deliberations in an effort to reach a unanimous verdict." (CP 36). A short time after returning the note to the jury, the jury announced that they had reached a verdict. (RP 12/21/11, 107, RP 03/15/12, 130).

Upon announcing that they had reached a verdict, the jury was brought into the courtroom. The judge asked the presiding juror if the jury had reached a verdict, and juror eight responded "yes." (RP 12/21/11, 7). The verdict form was then delivered to the court clerk who announced the verdict by stating, "In the matter of the State of Washington versus Joshua Jordan Graham, Cause Number 11-1-00235-1. Verdict Form A, we the jury find the defendant, Joshua Jordan Graham, guilty of the crime of

Burglary in the Second Degree as charged in Count 1. Dated this 21st day of December, 2011, signed presiding juror.” (RP 12/21/11, 7). The judge then asked the presiding juror to stand, and then asked the juror if the clerk had accurately read the jury’s verdict. (RP 12/21/11, 7). The presiding juror responded, “Yes, your Honor.” (RP 12/21/11, 7).

The judge then asked if either party wished to have the jury polled, and the defense responded “yes.” (RP 12/21/11, 7-8). The judge then polled every juror by asking if this was their verdict and asking if this was the verdict of the jury. (RP 12/21/11, 8-11). Every juror responded “yes” to both questions. (RP 12/21/11, 8-11). At the conclusion of the jury poll, the judge excused the jury and they were taken out of the courtroom. (RP 12/21/11, 11).

The clerk then alerted the judge to a discrepancy in the verdict form that was used by the jury. (RP 12/21/11, 11). The verdict form contained the correct case caption listing the case as “STATE OF WASHINGTON, Plaintiff, vs. JOSHUA JORDAN GRAHAM Defendant.” (CP 37). However, the language used in the body of the verdict form read, “We, the jury, find the defendant ANTHONY JOSEPH SPEELMAN, Guilty of the crime of Burglary in the Second Degree as charged in Count 1.” (CP 37). The judge re-imposed bail, ordered that

the defendant be taken into custody, and scheduled the next court hearing for December 29th at 8:30. (RP 12/21/11, 17).

On March 15, 2012, the case was eventually scheduled for a hearing regarding sentencing and motions filed by both the State and the defense. (RP 03/15/12, 111). After reviewing the briefs filed by the parties, hearing oral argument and reviewing the law, the trial judge ruled that the error in the verdict form was a clerical error that was subject to correction by the court. (RP 03/15/12, 133). After determining that the error in the verdict form was a clerical error, the trial judge entered a judgment and sentence against the defendant, but chose not to physically strike or change the verdict form because of a desire to preserve the record. (RP 03/15/12, 133). The defendant then filed an appeal. (CP 103).

III. ARGUMENT

1. DEFENSE COUNSEL'S DECISION NOT TO REQUEST A LESSER-INCLUDED OFFENSE INSTRUCTION WITH RESPECT TO THE CHARGE OF BURGLARY IN THE SECOND DEGREE WAS A REASONABLE "ALL OR NOTHING" TRIAL STRATEGY.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show (1) deficient performance on the part of counsel, and (2) that the deficient performance prejudiced the defendant. *Strickland*

v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If one of these two elements is absent, an ineffective counsel claim will fail. *Id.* at 687-89. Deficient performance of trial counsel is that which falls below an objective standard of reasonableness. *Id.* at 688. Appellate Courts engage in a strong presumption that representation is effective, and when counsel's conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient. *State v. Breitung*, 173 Wn.2d 393, 267 P.3d 1012 (2011); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

A defendant is entitled to a jury instruction on a lesser-included offense when two conditions are satisfied. "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." [citations omitted] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). As to the second *Workman* requirement (the factual prong), there must be "a factual showing more particularized than that [the sufficient evidence already] required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (citing, inter alia, *State v. Bowerman*,

115 Wn.2d 794, 805, 802 P.2d 116 (1990)). “[T]he evidence must affirmatively establish the defendant’s theory of the case-it is not enough that the jury might disbelieve the evidence pointing to guilty.” *Fernandez-Medina*, 141 Wn.2d at 455.

The defendant now argues that trial counsel’s performance was deficient because counsel failed to request a lesser-included offense of Criminal Trespass in the First Degree. The State concedes that the first (the legal prong) *Workman* requirement is satisfied in the defendant’s case. Criminal Trespass in the First Degree is a lesser-included offense of Burglary in the Second Degree. *State v. Soto*, 45 Wn. App. 839, 727 P.2d 999 (1986). However, the factual analysis required under the second requirement establishes that a lesser-included offense jury instruction would not have been proper after reviewing the totality of the evidence introduced at trial. To allow an instruction on Criminal Trespass in the First Degree, the evidence would have to lead a jury to believe that the defendant was only guilty of Criminal Trespassing, and not guilty of Burglary in the Second Degree. The defense theory and defendant’s own testimony show that the only contested issue at trial was the defendant’s knowledge and intent. The defendant’s trial argument was that he did not knowingly enter unlawfully into the bowling office, and that he did not have a criminal intent once inside the office because of his drug and

alcohol induced confusion. This argument is incongruous with a theory regarding the defendant's culpability of only trespass. The defendant's testimony was that he was simply looking for the bathroom, and unknowingly entered the wrong room. This argument shows that the defense strategy was to prove that the defendant was innocent of any crime requiring elements of knowledge or intent. A request for a lesser-included offense instruction on Criminal Trespass is inapposite to the defendant's trial strategy.

Since a lesser-included instruction of Criminal Trespass in the First Degree was not proper under the evidence produced at trial, defense counsel's failure to request such instruction does not constitute deficient performance. While the defendant's trial strategy was ultimately unsuccessful, it does not amount to ineffective assistance of counsel. It is clear from the record that defense counsel's performance did not fall below the strong presumption that the performance was effective; and therefore, the defendant is unable to satisfy the first prong in regards to ineffective assistance of counsel for failing to request a lesser-included offense.

To satisfy the prejudice prong of the ineffective assistance of counsel claim, the defendant must show that counsel's performance was so inadequate that there is a reasonable probability that, given competent

counsel, the result would have differed, thereby undermining this court's confidence in the outcome of the trial and requiring that it begin anew. *Strickland*, 466 U.S. at 694. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law’ and must ‘exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” *Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 694–95, 104 S.Ct. 2052)); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (the defendant must not only demonstrate that counsel’s performance was deficient, but also that the defendant was prejudiced, such that the outcome of the proceeding would have been different but for the deficient representation). The undisputed evidence presented at trial established that the defendant was the person captured on the video surveillance inside the bowling alley office. The only element at issue was the defendant’s knowledge of his unlawful entry and his intent once inside the room. If the jury had reasonable doubt regarding the defendant’s ability to form criminal intent based on his stated search for a urinal, it would have found him not guilty.

Even if defense counsel had requested and been granted an instruction on the lesser-included offense of Criminal Trespass in the First Degree, it is highly unlikely that the jury would have convicted the

defendant of only Criminal Trespass in the First Degree. The jury would have had to find that the defendant knowingly entered unlawfully into the bowling alley office, but then did not intend to commit a crime inside the office after his illegal entry. There is no evidence to support this finding by the jury; and therefore, there was no prejudice to the defendant as a result of not requesting the instruction.

2. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THE VERDICT FORM CONTAINED A “CLERICAL ERROR” THAT ALLOWED THE COURT TO CORRECT THE FORM AND ENTER THE JUDGMENT AND SENTENCE AGAINST THE DEFENDANT.

A correction to a verdict form is appropriate based on CrR 7.8(a), which states,

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

In the defendant’s case, it is clear that a clerical mistake was made in the wording on the verdict form and it was not discovered until after the jury was dismissed. The record is clear that there were no co-defendants mentioned during the trial, and there was never any mention by either side that another person was involved in the burglary inside the bowling alley

office.

In order to determine whether a clerical error exists under CrR 7.8, Washington Courts use the same test used to determine clerical error under CR 60(a), the civil rule governing amendment of judgments. *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005); *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252, *review denied*, 152 Wn.2d 1028, 101 P.3d 110 (2004). In *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996), the Court set forth the review necessary to determine whether an error is clerical or judicial. The Court looks at “whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial” to determine if the error is clerical. *Id* at 326. If it does, then the amended judgment should either correct the language to reflect the court's intention or add the language the court inadvertently omitted. *Id*. If it does not, then the error is judicial and the court cannot amend the judgment and sentence. *Id*.

In *Rooth*, the State charged the defendant with two counts of first degree unlawful possession of a firearm. *State v. Rooth*, 129 Wn. App. at 761. The information indicated count I charged possession of a 9mm handgun, and count II charged possession of a .22 caliber handgun. *Id*. However, during closing arguments, the State and Defense mixed up the guns and referred to the .22 caliber as being charged in count I and the

9mm as charged in count II. *Id.* The State also conceded in closing argument that it had not presented sufficient evidence for the jury to convict the defendant of possession of the .22 caliber handgun, and asked the jury to acquit on that charge. *Id.* The “to-convict” jury instructions also mixed up the guns and referenced possession of the .22 caliber revolver to convict under count I and possession of the 9mm semi-auto pistol to convict under count II. *Id.* The jury returned the count I verdict form that stated: “We, the jury, find the defendant [n]ot [g]uilty of the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count One. *Id.* at 769-770. The count II verdict form stated: “We, the jury, find the defendant [g]uilty of the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count Two.” *Id.* at 770. The trial court sentenced the defendant based on the jury’s verdicts, and the State alleged the verdicts were incorrect because of a clerical error. The Court of Appeals in finding that the error was a judicial error stated:

Here, the trial court's judgment followed a jury trial, not a bench trial[.] The trial court sentenced according to the jury's verdicts, which the State now alleges were incorrect because of clerical error. Nothing in the record indicates that the trial court intended to sentence in accord with the information but, through some clerical error, it wrongfully sentenced Rooth. *Perhaps if the verdict forms had identified the firearm, i.e., the .22 caliber handgun or the 9 mm handgun, there would be a basis to address clerical error.* But that is not evident from the record. And ‘an intentional act of the court, even if in error, cannot be

corrected under [CrR 7.8].’ *Wilson v. Henkle*, 45 Wn. App. 162, 167, 724 P.2d 1069 (1986). The error in the instructions and the judgment and sentence were judicial errors, not clerical errors.

(Emphasis added) *State v. Rooth*, 129 Wn. App at 771.

As the Court noted, in order to “correct” the claimed error in *Rooth*, the Court would have to impeach the verdict by reversing the jury’s finding of guilty to not guilty on count I. *Id.*

In the defendant’s case, the court’s finding of a clerical error and the subsequent correction clearly embodies the only possible conclusion of the jury. The evidence and allegations at trial established that it was not a case in which anyone other than Mr. Graham was charged, nor was it a case in which identity was put at issue. In reviewing the evidence in the record, it is clear that Mr. Graham testified that he was the person seen in the bowling office security video, and therefore, was the jury’s only possible choice to convict. The jury received no information regarding an “Anthony Joseph Speelman,” and could not have possibly intended to convict someone of the crime other than Mr. Graham.

The error in Mr. Graham’s case is distinguishable from the error in *Rooth*, and the erroneous information included in the jury verdict is obviously a clerical error. As the trial judge noted in ruling the erroneous name was a clerical error, the striking of the erroneous name from the

body of the verdict form does not require the court to impeach the jury's verdict, as the defendant was the only possible defendant and was named in the caption on the verdict form. There was no question that the incorrect name within the verdict form was a clerical error, and it was within the trial court's discretion to correct the jury verdict form and enter a judgment and sentence against the defendant. (RP 03/15/12, 132-33).

IV. CONCLUSION

The defendant was not denied effective assistance of counsel, and the trial court did not err when it found that the verdict form contained a clerical error and entered the judgment and sentence against the defendant. Accordingly, the conviction of the defendant for Burglary in the Second Degree should be affirmed and this case remanded back to the Benton County Superior Court for imposition of the sentence.

RESPECTFULLY SUBMITTED this 19th day of February 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

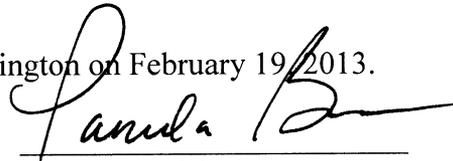
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