

FILED
Jan 18, 2017
Court of Appeals
Division III
State of Washington

NO. 34347-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID LEWIS,

Appellant.

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

The Honorable David Estudillo, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to request instructions on the lesser included offense of criminal trespass for two of the three second degree burglary charges.

2. The trial court exceeded its statutory authority in ordering appellant to undergo a mental health evaluation as a condition of community custody.

3. The trial court exceeded its statutory authority in imposing a community custody condition that prohibits appellant from using or possessing controlled substances “except as prescribed by a physician.”

Issues Pertaining to Assignments of Error

1. Where the evidence supported instructions on the lesser included offense of criminal trespass and defense counsel asked the jury to convict appellant of criminal trespass rather than burglary in closing argument, was defense counsel ineffective for failing to request lesser included instructions for two of the three second degree burglary charges?

2. Did the trial court exceed its statutory authority in ordering appellant to undergo a mental health evaluation, where the court did not find either that appellant had a mental illness or that mental illness likely influenced the offense, as required by RCW 9.94B.080?

3. Did the trial court exceed its statutory authority in ordering appellant to not use, possess, or deliver controlled substances, “except as prescribed by a physician,” where Washington law allows many professionals other than just physicians to write prescriptions?

B. STATEMENT OF THE CASE

The State charged David Lewis with three counts of second degree burglary (Counts 1-3) and two counts of third degree theft (Counts 4-5). CP 1-3. The State alleged that on December 18 and 19, 2015, Lewis entered or remained unlawfully in the Ephrata Athletic Club, within intent to commit a crime against a person or property therein. CP 1-2. The State further alleged that on December 18, 2015, Lewis stole property belonging to Roger Holloway and John Ergler. CP 2-3.

1. Substantive Evidence

Mike Scellick owns the Ephrata Athletic Club in Ephrata, Washington. 3RP 145-46.¹ Members must use an access code or sign in at the front desk to enter the club. 3RP 149-50. Lewis was a member of the club for a short period of time until he was no longer welcome there. 3RP 147-48. Pursuant to Scellick’s request, Officer Billy Roberts informed Lewis in March

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – February 18, March 28, April 4, 2016; 2RP – March 16, 2016; 3RP – March 17, 2016; 4RP – March 18, 2016.

2014 that he was no longer allowed at the club and would be arrested for trespass if he returned. 3RP 148-49, 201-02.

Burglary Count 1 and Theft Count 4. On the morning of December 18, 2015, Holloway went to the Ephrata Athletic Club to exercise. 3RP 172. He left his clothes hanging on hooks inside the men's locker room. 3RP 172-73. After exercising, he discovered he "was missing everything out of [his] pockets," including a pocketknife, fingernail clippers, and around \$100 in cash. 3RP 173. He did not see who took the items, but he reported them missing to Scellick. 3RP 173-75.

A surveillance video showed Lewis enter the club around 7:37 a.m., wearing a fairly distinctive "zig-zag" coat. Ex. P2 (track 1); 3RP 153-60, 195. Lewis went inside the men's locker room, where he remained for approximately six minutes. Ex. P2 (track 1). Lewis was never found in possession of Holloway's property.

Burglary Count 2 and Theft Count 5. In the early afternoon on December 19, Ergler went to the Ephrata Athletic Club to exercise. 3RP 177-78. Ergler testified he saw Lewis sitting on a bench inside the men's locker room, without a gym bag and wearing street clothes. 2RP 177-79. Ergler said that when he returned from exercising, Lewis was still sitting there. 2RP 179. Ergler went to retrieve a few dollars from his pants to use the tanning bed, but discovered the money was missing from his pocket. 2RP 179. Ergler did not

see who took the money, but reported it to the woman at the front desk. 2RP 179-82.

Another surveillance video showed Lewis enter the gym at 1:12 p.m., wearing the same zig-zag coat, and go inside the men's locker room. Ex. P2 (track 2); 3RP 160-63. At 1:16 p.m., Lewis exited the gym wearing a different coat, with something that appeared to be stuffed under the coat. Ex. P2 (track 2); 3RP 161. No one reported a coat missing and Lewis was never found in possession of Ergler's money. See 3RP 211-12.

Burglary Count 3. On December 19, Harold Franks, who knows Lewis, went to exercise at the Ephrata Athletic Club. 3RP 183-86. When Franks entered the club at 6:36 p.m., Lewis followed him inside before the door closed. 3RP 186; Ex. P12 (track 1). Franks reminded Lewis he was not a member of the club and told him to wait outside. 3RP 186. Lewis responded that he was meeting a friend there. 3RP 186. Franks said Lewis went straight to the men's locker room and stayed there the entire time. 3RP 187-89; Ex. P12 (track 1). Franks eventually called the police, knowing Lewis was not supposed to be in the club. 3RP 188-90.

Officer Roberts responded at 7:09 p.m. 3RP 199-203; Ex. P12 (track 4). When Roberts opened the door to the men's locker room, he and Lewis "almost bumped into each other." 3RP 203. Lewis told Roberts he had previously been in the locker room to get out of the bad weather. 3RP 205.

In his arms, Lewis had one pair of Nike tennis shoes and another pair of “very worn” tennis shoes that were wet and cold. 3RP 203-10. He was wearing a pair of Brooks tennis shoes. 3RP 206. Lewis’s shoe size did not match the Brooks or Nike shoes. 3RP 210. When Roberts asked where Lewis got the shoes, Lewis said “they were his and he had them with him.” 3RP 205. No owners of the shoes ever came forward. 3RP 213-14.

2. Jury Instructions, Closing Argument, and Verdict

At the end of the first day of trial, the prosecutor noted, “I anticipate that there will be a request for a lesser included” instruction on criminal trespass. 2RP 134. The prosecutor believed there was no basis for the instructions on burglary counts two and three, “[b]ecause in two you can clearly see that there’s something under the coat, and in three, he’s got the -- he’s got the shoes in his hands.” 2RP 134. The prosecutor noted she would be prepared to argue that the following day. 2RP 134. The court asked defense counsel if he was going to request lesser included instructions. 2RP 134. Defense counsel responded, “We have to discuss that with the defendant . . . If so, we would probably request them for all three.” 2RP 135.

The following morning, the prosecutor noted she and defense counsel “have incorporated a lesser included for count one, the burglary occurring on December 18th.” 3RP 141. Defense counsel did not thereafter request lesser included instructions for the remaining two burglary counts, and made no

objection to the lack of lesser included instructions. 3RP 218-26. Consistent with this, the trial court gave a lesser included criminal trespass instruction only for burglary count one. CP 43-46; 3RP 237-39.

Despite the lack of lesser included instructions, defense counsel asked the jury to find Lewis “[g]uilty of criminal trespass only.” 3RP 255. Defense counsel acknowledged Lewis entered the athletic club unlawfully. 3RP 256. He asserted, however, there was no evidence Lewis entered with intent to commit a crime. 3RP 256. Lewis was not found in possession of Holloway’s and Ergler’s missing items, and the State never established the coat and shoes were actually stolen. 3RP 255-58. Counsel asserted all the State established was “[c]oincidence and ownerless property.” 3RP 258. Defense counsel reiterated, “Criminal trespass only.” 3RP 257. In his final remarks, he again asked the jury, “Find him guilty, sure. Of criminal trespass, criminal trespass and criminal trespass.” 3RP 258.

The jury found Lewis not guilty on the first burglary count, but guilty of criminal trespass. CP 54-55. The jury found Lewis guilty of the second and third burglary counts. CP 56-57. Finally, the jury acquitted Lewis of both theft counts. CP 58-59; CP 63-64.

The trial court sentenced Lewis to a prison-based drug offender sentencing alternative (DOSA) of 19 months incarceration and 19 months of community custody for the two burglary convictions. CP 64. The court

sentenced Lewis to 364 days suspended on the criminal trespass conviction.

CP 69. Lewis filed a timely notice of appeal. CP 78.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST INSTRUCTIONS ON THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS FOR TWO OF THE THREE BURGLARY COUNTS.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) defense counsel's performance was deficient and (2) that deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

a. Lewis was entitled to a lesser included instructions on the crime of criminal trespass.

The defense is entitled to have the jury instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. In State v. Workman, the Washington Supreme Court set forth a two-prong test

to determine whether the defense is entitled to an instruction on a lesser included offense: (1) each element of the lesser offense is a necessary element of the greater, charged offense (legal prong) and (2) the evidence supports an inference that only the lesser offense was committed (factual prong). 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The defense is entitled to the lesser included offense instruction when the answer to both questions is yes. State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015).

Second degree burglary is a class B felony, with a maximum confinement term of 10 years in a state correctional institution. RCW 9A.20.021(1)(b); RCW 9A.52.030(2). A person is guilty of second degree burglary 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.” RCW 9A.52.030(1).

First degree criminal trespass is a gross misdemeanor, with a maximum confinement term of 364 days in county jail. RCW 9A.20.021(2). A person is guilty of first degree criminal trespass “if he or she knowingly enters or remains unlawfully in a building.” RCW 9A.52.070(1). First degree criminal trespass is a lesser included offense of second degree burglary under the legal prong of the Workman test. State v. Soto, 45 Wn. App 839, 841, 727 P.2d 999 (1986).

The factual prong of the Workman test is satisfied when the evidence would permit a jury to rationally find the accused guilty of the lesser offense and acquit him of the greater. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In making this determination, the court must consider all evidence presented at trial by either party. Id. at 456. On appeal, the court must view the evidence in the light most favorable to the party requesting the lesser included offense instruction—here, the defense. Condon, 182 Wn.2d at 321.

There is no dispute Lewis entered the athletic club unlawfully, meeting the elements of criminal trespass. Lewis was captured on video entering the club on three separate occasions, even though he did not have a membership and had previously been told he was not welcome there. 3RP 147-50, 255-58; Exs. P2, P12.

However, Lewis told Officer Roberts he had gone inside the club “to get out of the weather.” 3RP 205. It was December in Eastern Washington and a surveillance video showed there was snow on the ground outside. Ex. P12 (track 6). The very worn, cold, wet shoes that Lewis had in his arms suggested he was not well-equipped for the winter weather. Lewis also told Franks during the December 19 incident that he was meeting a friend inside the club. 3RP 186. This evidence established Lewis could have committed

only the lesser offense of criminal trespass, because he had no intent to commit a crime against persons or property inside the athletic club.

Moreover, the State never established ownership of the jacket Lewis wore out of the athletic club for the second burglary count, or the shoes Lewis possessed for the third burglary count. Viewing the evidence in Lewis's favor, the jury could have inferred someone gave the items to Lewis or he retrieved them from the lost and found. The circumstances suggested Lewis might be homeless, or at least down on his luck. The fact that there was sufficient evidence of the burglaries does not mean Lewis was not entitled to instructions of the lesser included offense of criminal trespass. See Condon, 182 Wn.2d at 315, 320-21 (holding there was sufficient evidence to support the jury's finding of premeditation, necessary for first degree murder, but nevertheless concluding Condon was entitled to an instruction on a lesser included offense of second degree murder).

An accused person has an "absolute right" to have the jury consider a lesser included offense if there is "even the slightest evidence" he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 164, 166, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276 77, 60 P. 650 (1900)). The evidence supported an inference that Lewis committed only the lesser offense of criminal trespass, because he gave two reasons for entering the club without intent to commit a crime therein. Lewis was accordingly

entitled to lesser included instructions for burglary counts two and three, not just count one. It would have been error the trial court to refuse to give the instructions had defense counsel requested them.

b. Defense counsel was deficient in failing to request lesser included instructions.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Strickland, 466 U.S. at 689; Thomas, 109 Wn.2d at 226. There is a strong presumption that defense counsel's conduct is not deficient. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). That presumption is rebutted, however, "where there is no conceivable legitimate tactic explaining counsel's performance." Id. Thus, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

In State v. Grier, the Washington Supreme Court concluded the decision to request lesser included offense instructions "is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel." 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Thus, Grier's agreement to forgo lesser included instructions did not bar her subsequent ineffective assistance of counsel claim. Id.

The court ultimately concluded, however, that Grier's ineffective assistance claim failed. Id. In so holding, the court created a nearly categorical rule that pursuing an "all or nothing" approach and forgoing lesser included instructions is a legitimate trial strategy. Id. at 39-40. The court believed it was a reasonable strategy to gamble on acquittal rather than pursue a compromise verdict. Id. at 39. In such circumstances, a lesser included instruction could undermine a claim of innocence. Id. Likewise, "a criminal defendant who genuinely believes she is innocent may prefer to avoid a compromise verdict, even when the odds are stacked against her." Id.

This is essentially what happened at Grier's trial, where her defense theories supported acquittal, rather than a compromise verdict. Id. at 42-43. The court therefore concluded "Grier and her defense counsel reasonably could have believed that an all-or-nothing strategy was the best approach to achieve an outright acquittal." Id. at 43.

The record is not clear why Lewis's counsel did not request lesser included instructions for burglary counts two and three. See 3RP 141 (prosecutor discussing apparent agreement between her and defense counsel on lesser included instruction for count one). The record is clear, however, that it was not a legitimate strategy.

In closing argument, defense counsel acknowledged Lewis entered the athletic club unlawfully. 3RP 256. This could not be disputed, because Lewis was caught on video and seen by witnesses entering the club each time without permission. Defense counsel was clearly not seeking outright acquittal for Lewis on the burglary counts.

Then, despite the lack of lesser included instructions, defense counsel asked the jury to find Lewis “[g]uilty of criminal trespass only.” 3RP 255. Counsel pointed out Lewis was never found in possession of Holloway’s and Ergler’s missing items, and no owners of the jacket or shoes Lewis had in his possession ever came forward. 3RP 255-58. Counsel accordingly argued, “Find him guilty, sure. Of criminal trespass, criminal trespass and criminal trespass.” 3RP 258. Given his repetition of “criminal trespass” three times, defense counsel was clearly asking the jury to find Lewis guilty of only criminal trespass on all three burglary counts. But only one count had a lesser included instruction.

Unlike Grier, Lewis’s counsel did not take an all-or-nothing approach. Acquittal was not a realistic goal, nor was it sought by defense counsel. Rather, defense counsel was plainly pursuing for a compromise verdict: asking the jury to convict Lewis of criminal trespass rather than burglary. Grier is therefore inapplicable in this case. See Grier, 171 Wn.2d

at 44 (recognizing forgoing lesser included instructions is a legitimate strategic decision where “acquittal was a realistic goal”).

There was no reasonable strategy for not requesting lesser included instructions on criminal trespass but then asking the jury to convict Lewis of criminal trespass in closing argument. Such an approach, quite simply, makes no sense. Defense counsel’s failure to request lesser included instructions therefore constitutes deficient performance. See Crace v. Herzog, 798 F.3d 840, 852-53 (9th Cir. 2015) (finding deficient performance in failing to request a lesser included instruction where the jury was already instructed on another lesser included offense, so an all-or-nothing strategy was “clearly inappropriate”).

- c. Defense counsel’s deficient performance severely undermines confidence in the outcome of the trial under the unique facts of this case.

Prejudice occurs when there is a reasonable probability that but for counsel’s deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id. The accused “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 693.

The Grier court found no prejudice resulting from counsel’s failure to request a lesser included instruction, reasoning:

Assuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier's trial. See Strickland, 466 U.S. at 694, 104 S. Ct. 2052 ("a court should presume . . . that the judge or jury acted according to law"); [Autrey v. State, 700 N.E.2d 1140, 1142 (Ind. 1998)] (availability of manslaughter would not have affected outcome where jury found defendant guilty of murder beyond reasonable doubt).

171 Wn.2d at 43-44.

This reasoning is unsound. Sufficient evidence supporting the jury's guilty verdict does not mean the jury is required to reach the same verdict. See Condon, 182 Wn.2d at 321 (sufficient evidence supported a finding of premeditation, but the trial court erroneously denied a lesser included instruction "[b]ecause a rational jury could have had a reasonable doubt as to premeditation"). For instance, the jury might decide a lesser included offense is better suited to the facts of the case. It is conjecture to hold a jury that was never given the option to consider a lesser included offense would necessarily reach the same verdict as a jury that was. Grier's analysis of Strickland prejudice essentially eliminates all ineffective assistance claims for failure to request lesser included instructions.

The Ninth Circuit recently recognized Grier's reasoning is invalid:

The Washington Supreme Court's methodology is a patently unreasonable application of Strickland Strickland did instruct reviewing courts to presume that trial juries act "according to law," but the Washington Supreme

Court . . . has read far more into that instruction than it fairly supports and, as a result, has sanctioned an approach to Strickland that sidesteps the reasonable-probability analysis that Strickland's prejudice prong explicitly requires.

Crace, 798 F.3d at 847. The Crace court explained:

[Strickland] does not require a court to presume—as the Washington Supreme Court did—that, because a jury convicted the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both.

Id. “The Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury necessarily would have reached the same verdict even if instructed on an additional lesser included offense.” Id. at 847-48.

As the Crace court noted, the infirmity in Grier is that it conflates sufficiency of the evidence and Strickland's prejudice inquiry:

[U]nder the Washington Supreme Court's approach, a defendant can only show Strickland prejudice when the evidence is insufficient to support the jury's verdict And conversely, if the evidence is sufficient to support the verdict, there is categorically no Strickland error, according to the Washington Supreme Court's logic. By reducing the question to sufficiency of the evidence, the Washington Supreme Court has focused on the wrong question here—one that has nothing to do with Strickland.

Crace, 798 F.3d at 849; accord Breakiron v. Horn, 642 F.3d 126, 140 (3d Cir. 2011) (holding Strickland requires the reviewing court to “weigh all the evidence of record . . . to determine whether there was a reasonable

probability that the jury would have convicted [the defendant] only of [the lesser offense] if it had been given that option. Merely noting that the evidence was sufficient to convict does not accomplish that task.”).

Crace’s reasoning is sound whereas Grier’s is not. Grier is incorrect and harmful because it forecloses any ineffective assistance claim whenever sufficient evidence supports a guilty verdict. Such a result effectively insulates defense counsel’s unreasonable and unsupportable decisions—and therefore clients’ constitutional right to effective assistance of counsel—from judicial scrutiny. Grier’s prejudice analysis should accordingly be overruled. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis “doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned”).

When an element of the charged offense remains in doubt, but the accused appears guilty of some wrongdoing, the jury is likely to resolve its doubts in favor of conviction.² Crace, 798 F.3d at 848. The Crace court recognized it is “perfectly plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense—doubts that, with ‘the availability of a third option,’ could have led it to convict on a

² See also Kyron Huigens, The Doctrine of Lesser Included Offenses, 16 U. PUGET SOUND L. REV. 185, 193 (1992) (“When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.”).

lesser included offense.” Id. (quoting Keeble v. United States, 412 U.S. 205, 213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

A jury could rationally find a lesser included offense to be best supported by the evidence, consistent with its instructions. Id.; see also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.11, at 90 (3d ed. 2008) (“When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more [degrees] [crimes] that person is guilty, he or she shall be convicted only of the lowest [degree] [crime].”). Providing the jury with a third option of convicting on a lesser included offense “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” Beck v. Alabama, 447 U.S. 625, 634, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

In considering prejudice, Crace provides a useful analogy. Crace was convicted of attempted second degree assault for brandishing a sword at a police officer. Crace, 798 F.3d at 843. The offense was his third strike under Washington’s three-strikes law, so he was sentenced to life without parole. Id. On a petition for habeas corpus, Crace asserted his trial counsel was ineffective for failing to request an instruction on the lesser included offense of unlawful display of a weapon. Id.

The Ninth Circuit concluded Crace was entitled to an instruction on the lesser offense. Id. at 850. The evidence supported an inference that Crace

only displayed the sword and did not intend to create reasonable fear of bodily injury. Id. The trial court therefore would have been obligated to give the instruction had defense counsel requested one. Id. at 851.

If the instruction been given, the Ninth Circuit concluded, “the evidence could well have led Crace’s jury to question whether he acted with the specific intent required for attempted second-degree assault.” Id. As it was, however, “the jury’s only option short of convicting on attempted assault was to acquit Crace outright.” Id. The court believed there was a reasonable probability that, if given an additional option, the jury would have convicted Crace only of the lesser unlawful display of a weapon offense, which has no intent requirement. Id. This satisfied the prejudice prong of Strickland. Id.

The same is true in Lewis’s case. As established, Lewis was entitled to instructions on the lesser included offense of criminal trespass on all three burglary counts, not just count one. See supra section 1.a. The trial court therefore would have been obligated to give lesser included instructions had defense counsel requested them.

Like Crace, the evidence could well have led Lewis’s jury to question whether he entered the athletic club with intent to commit a crime against persons or property therein, as required for second degree burglary. As discussed, there was no dispute Lewis entered the club unlawfully. But the evidence of his intent to commit a crime inside the club was thin.

On the second burglary count, the State never established Lewis took the money from Ergler's pants. 2RP 179-82. Indeed, the jury acquitted Lewis of the related theft. CP 48. The surveillance video showed Lewis wearing a different coat when he exited the club than when he entered. Ex. P2 (track 2); 3RP 161. However, no one ever reported the coat stolen and no other evidence established the owner of the coat. While the State only needed to prove the property belonged to someone other than Lewis, the jury could have easily entertained a reasonable doubt as to whether Lewis stole the coat. State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995). Lewis also offered the reasonable explanation that he went inside the gym to get out of the cold, snowy weather, suggesting a lack of intent to commit a crime therein. 3RP 205; P12 (track 6).

Likewise, on the third burglary count, the State never established the owners of the purportedly stolen Nike and Brooks shoes that Lewis had in his possession. 3RP 213-14. The jury likewise could have doubted Lewis stole the shoes, without any proof of their ownership. And, Lewis offered the explanation that he went inside the gym because he was meeting a friend there, again suggesting a lack of intent to commit a crime therein. 3RP 186.

The verdicts further suggest the jury had doubts about the State's case. The jury acquitted Lewis of both theft counts, likely because the State never established Lewis was in possession of the stolen property. CP 58-59. All the

State proved was Lewis's presence in the men's locker room around the time items were stolen from Holloway's and Ergler's clothes. The jury further acquitted on the first burglary count, convicting Lewis of only criminal trespass. CP 54-55. The Grier court believed "hindsight has no place in an ineffective assistance analysis." 171 Wn.2d at 43. However, these anomalous verdicts suggest the holes in the State's case could well have resulted in convictions on only the lesser offenses, had the jury been able to consider them.

As it was, however, the jury's only option was either to convict Lewis of the second and third burglary counts or to acquit Lewis outright. But such a result would have been inconsistent with the evidence establishing Lewis entered the athletic club unlawfully. It also would have been inconsistent with defense counsel's request of the jury to convict Lewis of criminal trespass, rather than acquit him outright.

The jury was properly instructed that if it had reasonable doubt as to which offense Lewis committed, it was to convict him only of the lesser. CP 43 ("When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime."); State v. Stationak, 73 Wn.2d 647, 651-52, 440 P.2d 457 (1968). The jury therefore would have

acted well within the bounds of the law to find Lewis guilty of only criminal trespass, even if sufficient evidence supported the burglary counts.

Given the weaknesses in the State's case, there is a reasonable probability that, if given an additional option, the jury would have convicted Lewis only of criminal trespass—which, unlike burglary, has no intent requirement. This satisfies the prejudice prong of Strickland. Because defense counsel was ineffective in failing to request instructions on the lesser included offense of criminal trespass, this Court should reverse Lewis's two burglary convictions and remand for a new trial.

2. ILLEGAL COMMUNITY CUSTODY CONDITIONS SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

- a. The trial court failed to make the requisite findings before ordering appellant to undergo a mental health evaluation.

A trial court may generally impose crime-related prohibitions or affirmative conditions as part of a sentence. RCW 9.94A.505(9). However, a court may only impose a sentence authorized by statute. In re Post Sentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). An illegal or erroneous sentence may therefore be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94B.080³ provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

Thus, RCW 9.94B.080 authorizes a trial court to order a mental health evaluation as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). First, the court must find that reasonable grounds exist to believe the offender is mentally ill. Id. Second, the court must find this mental health condition likely influenced the offense. Id.

The trial court ordered Lewis to obtain a mental health evaluation and comply with recommended treatment as a condition of community custody. CP 66. However, the court did not make either of the requisite findings under RCW 9.94B.080. The court made no finding that Lewis is mentally ill or that

³ Although the heading to RCW 9.94B.080 indicates that it applies to crimes committed prior to July 1, 2000, the statute is applicable to crimes committed after that date. See Laws of 2008, ch. 231, § 55.

a qualifying mental illness influenced the offense. See 1RP 37 (ordering mental health evaluation without a finding). There is no evidence in the record regarding Lewis’s mental status or whether he has a mental disorder. No presentence report was filed or completed detailing any mental illnesses. The only evidence presented at sentencing was of Lewis’s drug addiction, with defense counsel explaining “this whole situation was motivated by controlled substances.” 1RP 30.

The court therefore erred in imposing the mental health evaluation condition. State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003). This Court should remand for the trial court to strike the condition. Id.

- b. The trial court erred in limiting appellant to using or possessing controlled substances “except as provided by a physician.”

Under RCW 9.94A.703(2)(c), the trial court may order an offender to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions,” as a condition of community custody. (Emphasis added.) The trial court ordered Lewis to “not use, possess or deliver any controlled substance except as prescribed by a physician,” as a condition on his criminal trespass conviction. CP 70 (emphasis added).

Prescriptions can be lawfully issued by many more individuals than just physicians, such as registered nurses, physician assistants, advanced registered nurse practitioners, optometrists, and dentists. RCW 69.41.030. In

drafting RCW 9.94A.703(2)(c), the legislature was obviously aware it authorized many different medical, dental, and other health practitioners to write valid prescriptions. See Wynn v. Earin, 163 Wn.2d 361, 371, 181 P.3d 806 (2008) (“The legislature is presumed to know the law in the area in which it is legislating.”). The legislature chose to authorize possession of the much broader “lawfully issued prescriptions.”

By limiting Lewis to using or possessing prescriptions only from physicians, the trial court overrode this legislative decision. The trial court therefore exceeded its statutory authority in imposing the condition. This Court should remand for the trial court to strike the condition.

3. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Lewis does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Lewis’s ability to pay must be determined before discretionary legal financial obligations (LFOs) are imposed. State v. Duncan, 185 Wn.2d 430,

436, 374 P.3d 83 (2016). The trial court made no such finding, instead waiving all discretionary LFOs. CP 66-67. At sentencing, both Scellick and the defense requested a DOSA, which the trial court granted, giving Lewis an opportunity to turn his life around. IRP 29-31; CP 64. This Court should honor the trial court's decision and give Lewis the same opportunity.

The trial court also found Lewis indigent for purposes of the appeal. CP 81. If an individual qualifies as indigent, "courts should seriously question that person's ability to pay LFOs." State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). There has been no order finding Lewis's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must therefore presume Lewis remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against Lewis in the event he does not substantially prevail on appeal.

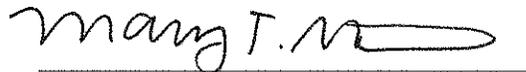
D. CONCLUSION

This Court should reverse Lewis's burglary convictions and remand for a new trial because he was denied effective assistance of counsel. Alternatively, this Court should remand for the trial court to strike the illegal community custody conditions from the judgment and sentence.

DATED this 18th day of January, 2017.

Respectfully submitted,

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No. 34347-2-III

Certificate of Service

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Cause No. 34347-2-III, in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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01-18-2017
Date
Done in Seattle, Washington