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Court of Appeals  
Division III  
State of Washington

NO. 34347-2-III

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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DAVID STEWART LEWIS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

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BRIEF OF RESPONDENT

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**I. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR**

- A. SUBSTANTIAL EVIDENCE ESTABLISHED MR. LEWIS’S INTENT TO STEAL OTHER PEOPLE’S PROPERTY WHEN HE ENTERED THE CLUB ON DECEMBER 19, 2015, MAKING IT HIGHLY IMPROBABLE LESSER INCLUDED CRIMINAL TRESPASS INSTRUCTIONS WOULD HAVE CHANGED THE TWO BURGLARY VERDICTS. WAS MR. LEWIS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, REGARDLESS OF DEFICIENT PERFORMANCE, WHEN HE CANNOT DEMONSTRATE PREJUDICE? (ASSIGNMENT OF ERROR No. 1)
  
- B. SHOULD THE JUDGMENT AND SENTENCE BE AMENDED TO CORRECT COMMUNITY CUSTODY PROVISIONS? (ASSIGNMENT OF ERROR No. 2)

**II. STATEMENT OF THE CASE<sup>1</sup>**

The State adopts the facts recited by appellant David Stewart Lewis and supplements those facts as follows. RAP 10.3(b).

Ephrata Athletic Club (“Club”) owner Mike Scellick terminated Mr. Lewis’s brief Club membership sometime before the December 2015 incidents at issue here and before Mr. Scellick asked the Ephrata Police Department to “trespass” Mr. Lewis from the Club in March 2014. RP 147–48; 201–02. Mr. Lewis never renewed his membership, was never invited to renew his membership and was unwelcome at the Club in December 2015. RP 148.

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<sup>1</sup> The State cites only to the sequentially paginated verbatim report of trial March 16 – 18, 2016, designated RP \_\_\_\_ and to portions of video recordings in P2 and P12.

A. SUBSTANTIVE FACTS – COUNTS ONE THROUGH FIVE

1. *Count one (second degree burglary) and count four (third degree theft-Holloway)*

On December 18, 2015, member Roger Holloway arrived at the Club to work out around 7:00 a.m., as he usually did. RP 172. Mr. Holloway did not rent a locker and left his street clothes hanging on a hook in the locker room. *Id.* He worked out for about an hour, enjoyed the hot tub, and then showered. RP 173. As he was getting back into his street clothes, he noticed his pants pockets had been emptied of most of their contents. *Id.* The missing items included a pocketknife, fingernail clippers, and a little over one hundred dollars cash. *Id.* The thief did not take Mr. Holloway's money clip and keys. *Id.* Mr. Holloway was certain the items had been in his pocket when he entered the Club. *Id.* He reported the stolen property to Mr. Scellick around 8:30 a.m. RP 174. The property was never recovered. *Id.*

Mr. Scellick reviewed security camera footage covering the time Mr. Holloway had been working out. RP 153, 157. Twelve security cameras cover both Club entrances and all interior rooms except the locker rooms. RP 160. The security cameras accurately reflect the recording date and time. RP 158. The time records on the cameras correspond to the

computer-recorded time records on keypads the members use for entry.

RP 158.

The door to the men's locker room is visible in the video Mr. Scellick reviewed after Mr. Holloway's report. RP 157; Ex. P2 (Track 1 at 07:37:06<sup>2</sup>). The video shows a man exit the locker room, wave to the security camera, and open the outside door. *Id.* As the member is leaving, someone can be seen grabbing the door from the outside and entering the building, turning his back to the security camera as he enters the locker room. Ex. P2 (Track 1 at 07:37:09–16). The person appears to be male and is wearing a black "hoodie" and jacket with a distinctive white zigzag pattern across the back. *Id.* He is not carrying anything. *Id.* He is wearing white shoes. Ex. P2 (Track 1 at 07:37:10–11). Snow is on the ground outside. *Id.* Five minutes, thirty seconds after entering the locker room, the person leaves the locker room, hiding his face from the security camera with his right hand and opening the door with his left. Ex. P2 (Track 1 at 07:37:47). The man does not appear to have anything in his hands and his jacket is open in the front. *Id.* Nothing appears to be hidden under the jacket. *Id.*

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<sup>2</sup> The state cites to the time stamp visible on the recording, not to the number of minutes and seconds into the video track.

2. *Count two (second degree burglary) and count five (third degree theft-Ergler)*

The next afternoon, December 19, member John Ergler found his money gone from jeans he had hung on a locker room hook. RP 179–81. Mr. Ergler’s pants pockets “were ruffled up” and pulled out. *Id.* He reported the theft to one of the staff members. RP 180.

Mr. Scellick reviewed security footage covering the time Mr. Ergler had been working out and saw a man he later identified as Mr. Lewis. RP 161. The video shows Mr. Lewis entering the Club a little after one o’clock that afternoon and heading straight to the locker room, wearing the same zigzag-patterned coat he wore December 18. Ex. P2 (Track 2 at 13:12:46–52). Less than four minutes later, he left the locker room wearing a different coat. RP 161; Ex. P2 (Track 2 at 13:16:34–38). The coat was open, and there was a sizeable bulge under the coat on the front left side. Ex. P2 (Track 2 at 13:16:34–35). As Mr. Lewis steps outside, the viewer can see the outline of a hard, right-angle edge under the coat on the left side of Mr. Lewis’s back. RP 162; Ex. P2 (Track 2 at 13:16:37–39).

3. *Count three (second degree burglary)*

Later that evening, at 6:36 p.m., Mr. Lewis again entered the Club when another member opened the door. Ex. P12 (Track 3 at 18:36:34–42).

He was again wearing the zigzag coat. *Id.* Security video footage shows the member saying something to Mr. Lewis, then looking intently at Mr. Lewis as Mr. Lewis enters the locker room. *Id.*

The member was Harold Franks, who had known Mr. Lewis since around 1998. RP 185. Mr. Franks told Mr. Lewis he could not come inside because he was not a Club member *Id.* Mr. Lewis replied he was there to meet a friend with the last name of “Ohl.” *Id.* Mr. Franks, unfamiliar with the name “Ohl,” repeated Mr. Lewis had to wait for his friend outside. *Id.* Instead of leaving, Mr. Lewis “went straight back through the locker room into the restroom area and stayed there the whole duration. And never came out.” RP 187. The restroom area is entirely closed and Mr. Franks could not see Mr. Lewis through the door. *Id.* Mr. Franks repeatedly told Mr. Lewis through the closed door his friend had not arrived and he would have to leave. *Id.* Each time, Mr. Lewis replied his friend would be there in a few minutes. *Id.*

Mr. Franks went to the hot tub for about 20 minutes and watched the restroom door. RP 189. Mr. Lewis did not come out. *Id.* Mr. Franks did not see Mr. Lewis again and eventually called Ephrata police. RP 188. He waited for the police in the Club parking lot. RP 190.

One of the responding officers was the officer who had trespassed Mr. Lewis from the Club in March 2014. RP 202–03. Mr. Lewis was still

in the locker room when the officers arrived. RP 203. The officers almost bumped into him as they entered the locker room. *Id.* Mr. Lewis had shoes and other items of clothing laid across his arms, which he held straight out in front of him. RP 203–04. Nobody else was in the locker room when the officers encountered Mr. Lewis. *Id.* Mr. Lewis did not tell the officers why he was in the locker room at that moment, but said he had been in before “trying to get out of the weather.” RP 205.

Mr. Lewis had a black, green, and purple coat. RP 211. This was the coat with the distinctive zigzag pattern he had worn on his previous Club intrusions. Ex. P7. Officer Ryan Harvey testified he had seen Mr. Lewis wear the zigzag coat in and around Ephrata before the events at issue here. RP 195. Mr. Lewis also carried a coat with a Lawman 1000 motorcycle tour emblem on the back. RP 212; Ex. P11. He was wearing a pair of Brooks Beast athletic shoes. RP 206; Ex. P9. They were black and gray with a red sole and red accents. Ex. P9. The officer asked Mr. Lewis about the Nike Air Max athletic shoes he was holding. RP 205, 208. Mr. Lewis said they were his. RP 205. They were black and gray with a white Nike “swoosh.” Ex. P10. Both pairs of shoes were clean and appeared new. Ex. P9; P10. Mr. Lewis was able to tell the officers his shoe size but was not able to identify the size of the Brooks Beast shoes on his feet or the Nike Air pair in his hands. RP 210. The two pair of new shoes were

not the size Mr. Lewis had identified as his own. *Id.* Law enforcement never identified the owners of the two pair of new shoes.<sup>3</sup> RP 213–14.

Mr. Lewis also carried a third pair of shoes, very worn, “appear[ing] to have a lot of miles put on them, dirty[.]” RP 208. The old shoes were white. Ex. P8. They were wet and cool to the touch. RP 209. On the video clip of Mr. Lewis’s entry, two brief flashes of white can be seen at his feet as he walks past Mr. Franks, a flash for each footfall. Ex. P12 (Track 3 at 18:36:39–40). Mr. Lewis also appeared to be wearing white shoes in the security video from December 18. Ex. P2 (Track 1 at 07:37:10–11).

Mr. Scellick eventually reviewed all security footage covering the time Mr. Lewis was known to have been inside the Club and did not see footage of Mr. Lewis anywhere other than the men’s locker room or wearing anything other than street clothes. RP 159. None of the video footage showed Mr. Lewis after he entered the locker room. RP 170. No footage showed him taking any items of property. *Id.*

#### B. PROCEDURE

The state charged Mr. Lewis with three counts of second degree burglary. CP 1–2. The state also charged two counts of third degree theft,

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<sup>3</sup> Law enforcement apparently was also unable to identify the owner of the Lawman 1000 jacket or the jacket that had been worn out of the Club during Mr. Lewis’s first December 19 foray, but that is not in the record.

one for the property stolen from Mr. Holloway and one for the property stolen from Mr. Ergler. CP 2–3. The state did not charge Mr. Lewis with theft of the athletic shoes or jackets. CP 1–3.

After opening statements, outside the presence of the jury, the state informed the court:

I anticipate that there will be a request for a lesser included. I don't think there is a legally sufficient basis for a lesser included, at least for counts two and three. Because 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. One, I would dispute whether there is a sufficiency for lesser included, but I'll have that - - I will try to be prepared for that.

RP 134. Defense counsel said he and his client would discuss whether to request a lesser included instruction and, “[i]f so, we would probably request them for all three. But I understand the state’s position.” RP 135. The following morning, the state told the court: “I was able to speak to [defense counsel] and we have incorporated a lesser included for count one, the burglary occurring on December 18<sup>th</sup>.” RP 141.

### **III. ARGUMENT**

- A. SUBSTANTIAL EVIDENCE ESTABLISHED MR. LEWIS’S INTENT TO STEAL OTHER PEOPLE’S PROPERTY WHEN HE ENTERED THE CLUB ON DECEMBER 19, 2015, MAKING IT HIGHLY IMPROBABLE LESSER INCLUDED CRIMINAL TRESPASS INSTRUCTIONS WOULD HAVE CHANGED THE TWO GUILTY BURGLARY VERDICTS. BECAUSE HE CANNOT DEMONSTRATE PREJUDICE, MR. LEWIS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL REGARDLESS OF DEFICIENT PERFORMANCE.

Appellate courts review de novo claims of ineffective assistance of counsel. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prevail, Mr. Lewis must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Both prongs must be satisfied—failure on either defeats the claim. *Strickland*, 466 U.S. at 697; *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Scrutiny of counsel's performance is highly deferential, employing a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335–36. Mr. Lewis bears the burden of rebutting this presumption by establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The fundamental inquiry into prejudice is “whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. The burden is on Mr. Lewis to demonstrate prejudice, a reasonable probability the outcome of trial would have been

different if counsel's performance had not been deficient. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "A reviewing court need not address whether counsel's performance was deficient if it can first say that the defendant was not prejudiced." *In re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) (citing *Strickland*, 466 U.S. at 697).

Mr. Lewis fails to demonstrate prejudice.

1. *Mr. Lewis was not absolutely entitled to lesser included criminal trespass instructions on counts two and three because counsel's failure to request those instructions was not per se prejudicial.*

Citing *State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357 (2015),

Mr. Lewis asserts "[t]he fact that there was sufficient evidence of the burglaries does not mean [he] was not entitled to instructions of the lesser included offense of criminal trespass." Br. of Appellant at 10. Citing *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984), he argues he had an absolute right to have the jury consider the lesser included crime of first degree criminal trespass if there was "even the slightest evidence" he may have committed only that offense. *Id.*

Substantial evidence supported both burglary convictions. Mr. Lewis misplaces his reliance on *Condon* and *Parker* for the proposition he suffered per se prejudice from counsel's decision not to request lesser included trespass instructions. In both *Condon* and *Parker*, the issue was

whether the trial court properly refused to give a lesser included instruction the defendant requested. *Condon*, 182 Wn.2d at 316 (trial court concluded as matter of law Condon not entitled to instruction); *Parker*, 102 Wn.2d at 166 (“trial court committed prejudicial error in failing to instruct on the lesser included offense of reckless driving”).

That analysis does not apply here. When the issue is counsel’s failure to request a lesser included instruction, reviewing courts adhere to the framework in *Strickland*, within which the defendant bears the burden of showing prejudice. *See, e.g., State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (defendant not prejudiced despite counsel’s failure to request diminished capacity instruction); *State v. Adams*, 138 Wn. App. 36, 49, 155 P.3d 989, *review denied*, 161 Wn.2d 1006, 169 P.3d 33 (2007) (defendant required to demonstrate prejudice to support allegation of counsel’s ineffective assistance in failing to request a lesser included offense instruction).

In *Cienfuegos*, the Supreme Court rejected argument that “failure to propose a diminished capacity instruction—unquestionably deficient performance in his case—was, per se, prejudicial.” *Cienfuegos*, 144 Wn.2d at 228–29. “[T]he general rule remains that we look to the facts of the individual case to see if the *Strickland* test has been met.” *Id.* at 229. “The question of whether counsel’s performance was ineffective is

generally not amenable to per se rules, but requires a case by case basis analysis.” *Id.* “Failure to request a diminished capacity instruction is not ineffective assistance of counsel per se.” *Id.*

2. *Mr. Lewis cannot demonstrate prejudice from counsel’s failure to request lesser included trespass instructions because substantial evidence shows both times he entered the Club on December 19, 2015, he intended to steal and did steal.*

The jury acquitted Mr. Lewis of one count of second degree burglary in favor of criminal trespass. The first question, then, is whether the jury would have been more likely to acquit Mr. Lewis of the remaining two burglary charges had it been given the same criminal trespass options. The answer is no. The jury would have convicted Mr. Lewis of burglary with or without instructions on criminal trespass.

The jury’s verdicts here are internally consistent and entirely reasonable. First, the jury acquitted Mr. Lewis of both theft charges, undoubtedly considering the ease with which any male Club member could have quickly rifled pockets in an empty locker room. RP 272; CP 58, 59. Although circumstantial evidence pointed to Mr. Lewis as the likely thief, the jury reasonably concluded the state failed to prove culpability on either count beyond a reasonable doubt.

Second, there was no direct evidence Mr. Lewis took anything from the locker room on December 18, 2015. The video shows he entered

by grabbing the door as another member walked out, tried to hide his face going to and coming from the locker room, and exited five and a half minutes later with his hands empty and nothing visible under his open jacket. Ex. P2 (Track 1 at 07:37:09–07:37:47). First degree criminal trespass was an appropriate verdict. Like the acquittals on counts three and four, the verdict demonstrates the jury required more than mere coincidence of time and place to conclude Mr. Lewis stole Mr. Holloway’s property, or the property of anybody else, on December 18.

The jury did have the necessary evidence for both December 19 incidents. Mr. Lewis, conceding he wore a different jacket out in the early afternoon than he wore coming in, argues the jury reasonably could have doubted he stole the coat. *Id.* at 20. Mr. Lewis points to his “reasonable explanation that he went inside the gym to get out of the cold, snowy weather[.]” *Id.* While he may have been in the gym more than one time in the early afternoon of December 19, the video to which he refers shows he exited the club wearing a different jacket *less than four minutes* after entering. Ex. P2 (Track 2 at 13:12:46–13:16:38). “Getting out of the weather” was not a reasonable explanation for so short a stay in the locker room. His rapid in-and-out also renders it improbable some unknown person befriended him in the locker room and gave him a new jacket in a flash of sympathetic generosity. No evidence supports this speculation.

Further, the video clearly shows something bulky underneath the new jacket, bulging in the front and with a sharp, hard, right-angle outline in the back. Ex. P2 (Track 2 at 13:16:34–39). The state did not need to prove what was under the jacket or to whom it belonged. Neither did the state need to prove ownership of the Lawman 1000 jacket and the two pair of new athletic shoes Mr. Lewis was carrying as he came face to face with police officers later that evening. “[I]n cases of theft and larceny proof of ownership of the stolen property in the specific person alleged is not essential. The State is required to prove only that it belonged to someone other than the accused.” *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143, 1147 (1995).

There is no evidence any of the property belonged to Mr. Lewis, nor is there anything that would lead the jury to infer, as Mr. Lewis argues, “someone gave the items to [him] or he retrieved them from the lost and found.” Br. of Appellant at 10. There is no evidence the Club had a “lost and found” or that any Club member, or any other person, gave him anything on December 19. “The existence of a fact cannot rest in guess, speculation or conjecture.” *State v. Carter*, 5 Wn. App. 802, 807, 490 P.2d 1346 (1971). The jury could not have found reasonable doubt on such speculation.

Mr. Lewis also fails to consider, even if there had been evidence of

a lost and found bin, he had not been a member of the Club for around two years. RP 147–48; 201–02. It is unlikely anything in a lost and found bin would have belonged to him. Property taken from a lost and found bin would have belonged to someone other than Mr. Lewis. If Mr. Lewis honestly believed he had a right to take property—from a lost and found bin or any other place—he probably would not have told the officers the athletic shoes he was carrying were his. “I thought it was okay” would have been more persuasive than: “These are my shoes but I don’t know what size they are.”

Setting aside such speculation, the jury received evidence raising a number of reasonable inferences supporting Mr. Lewis’s intent to steal. The old, dirty, white athletic shoes Mr. Lewis carried when confronted by the police were cool and wet. RP 208. He appeared to be wearing white shoes when he entered the Club December 18 and earlier in the day December 19. Snow was on the ground outside. The reasonable inference is when Mr. Lewis encountered the police, he was carrying the shoes he wore into the Club and wearing shoes he found in the locker room after Mr. Franks finally left him alone.

When Mr. Lewis entered the Club the evening of December 19, he was wearing the same zigzag coat he wore into the Club earlier when he left wearing a different coat. Ex. P2 (Track 3 at 18:36:34–42). The only

reasonable inference is that Mr. Lewis was wearing both jackets when he left the first time, eliminating any chance he grabbed the wrong coat by mistake.

Mr. Lewis did not give an explanation for his presence in the locker room the evening of December 19. RP 205. He did tell the officers he had been in another time “trying to get out of the weather.” RP 205. He very well may have been, at some point. But videos of two earlier visits show he stayed only minutes before leaving again, leading to the reasonable inference Mr. Lewis had been in the Club for some reason other than trying to escape cold weather.

Mr. Lewis insisted to Mr. Franks he was waiting for a friend named “Ohl” who was expected at any moment. RP 185. When challenged, Mr. Lewis retreated to the restroom, locked the door, and stayed inside while Mr. Franks remained in the locker room. *Id.* There is no evidence anybody named Ohl showed up, either before the police arrived, during Mr. Lewis’s arrest, or while the case was pending. The reasonable inference is Mr. Lewis did not want to disclose his true reason for being in the Club locker room.

Mr. Franks eventually left the locker room and waited for law enforcement in the Club parking lot. RP 190. The officers nearly bumped into Mr. Lewis as they entered the locker room, his arms full of other

people's clothing, somebody else's shoes on his feet. RP 203. The reasonable inference is that Mr. Lewis's true purpose for being in the Club locker room was to steal other people's property and he was forced to wait to accomplish his purpose until Mr. Franks left.

There is no probability the jury would have concluded Mr. Lewis entered the Club either time on December 19 for any purpose other than to see what he could steal. Mr. Lewis fails to satisfy the second prong of the *Strickland* test: the existence of a reasonable probability that, but for counsel's failure to request lesser included criminal trespass instructions, the trial results would have been different on counts two and three.

3. *The Ninth Circuit's assessment of Grier is irrelevant to this Court's analysis.*

Mr. Lewis argues "sufficient evidence supporting the jury's guilty verdict does not mean the jury is required to reach the same verdict." Br. of Appellant at 15, citing *Condon*, 182 Wn. 2d at 321. As argued earlier, *Condon's* analysis of absolute prejudice from a trial court's refusal to give a requested instruction is inapplicable to the question of prejudice from counsel's failure to request the instruction in the first place.

Further, Mr. Lewis apparently urges this Court, (Br. of Appellant at 17), to overrule the Supreme Court's prejudice analysis in *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). He cites the Ninth Circuit

Court of Appeals' recent scathing critique of *Grier* in *Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015). He asserts *Crace* requires this Court to ignore overwhelming evidence of Mr. Lewis's larcenous intent because the jury might have ignored it as well.

Ninth Circuit Court of Appeals decisions do not control here. "The Washington State Supreme Court has the same duty and authority as a federal circuit court to apply the United States Constitution and United States Supreme Court opinions in criminal matters." *State v. Lord*, 161 Wn.2d 276, 287, 165 P.3d 1251 (2007) (citing U.S. Const. art. VI, § 2; 28 U.S.C. § 2254(d)(1)).

More to the point, the ire of the Ninth Circuit focused on *Grier*'s interpretation of *Strickland*'s presumption, "absent challenge to the judgment on the grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Crace*, 798 F.3d at 846 (internal citations omitted). Specifically, *Crace* disapproved of *Grier*'s conclusion that a guilty verdict on the greater crime automatically proved the jury would not have chosen to convict on the lesser crime had it had the option. *Id.* at 847.

The Ninth Circuit concluded the Washington Supreme Court "read far more into [*Strickland*'s] instruction than it fairly supports . . ." *Id.* The objectionable result was "an approach to *Strickland* that *sidesteps the reasonable-probability analysis* that *Strickland*'s prejudice prong

explicitly requires.” *Id.* (emphasis added). *Strickland*

forbids a reviewing court from finding prejudice by speculating that, if the defendant is permitted to roll the dice again, the jury might convict on a lesser included offense merely as a means of jury nullification, without regard for whether that verdict is consistent with the evidence.

*Id.* A proper assessment of prejudice, according to *Crace*, ““ should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision.”” *Id.* (quoting *Strickland*, 466 U.S. at 695).

The concerns expressed in *Crace* do not apply here. This is not a close case. There is no probability a jury would find the facts here a better fit for criminal trespass convictions if it reasonably, conscientiously, and impartially applied the law as it was instructed to do.

4. *Counsel’s performance was not deficient in light of overwhelming evidence of criminal intent concerning counts two and three.*

Because there is no showing of prejudice, this Court need not address whether counsel’s performance was deficient. Although this Court need not reach the issue, it should conclude counsel’s performance here was not deficient. Counsel made a tactical decision at the start of trial not to ask for lesser included instructions on counts two and three. Before making the decision, counsel told the court he would discuss the issue

with Mr. Lewis. RP 135. Following that representation, the court learned the parties agreed Mr. Lewis would not request lesser included instructions for the December 19 charges. RP 141. Applying the “strong presumption of reasonableness” of counsel’s performance, *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335-36, it is arguable counsel chose at that time to gamble on an all-or-nothing verdict. His closing argument—that his client was guilty only of trespass—would have resulted in acquittal had the jury agreed because the jury did not have instructions authorizing the lesser conviction.

Uncontroverted evidence shows Mr. Lewis and his attorney made a conscious decision not to ask for the lesser included trespass instructions. Mr. Lewis fails to establish the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Counsel’s performance was not deficient.

B. THE STATE CONCEDES THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO CORRECT COMMUNITY CUSTODY PROVISIONS. THE CONTROLLED SUBSTANCE PROHIBITION SHOULD BE CORRECTED AND NOT STRICKEN.

The state concedes no evidence supports the statutory requirements for imposing a mental health evaluation as a condition of community custody. This condition should not have been imposed.

The state further concedes the language of the community custody

prohibition against use of controlled substances without a prescription misstates the statutory language and impermissibly narrows the category of legal prescribers. The remedy, however, is not to strike this provision, especially in light of Mr. Lewis's prison DOSA sentence. The remedy is to correct the language in the judgment and sentence to mirror the language of RCW 9.94B.080.

This Court should remand the matter for entry of an amended judgment and sentence eliminating the mental health evaluation condition and correcting the language of the controlled substances prohibition.

#### IV. CONCLUSION

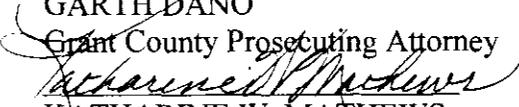
This Court should affirm Mr. Lewis's second degree burglary convictions and remand the matter to Grant County Superior Court for amendment of the judgment and sentence to eliminate the mental health evaluation and correct the language of controlled substances condition.

DATED this 1st day of May, 2017.

Respectfully submitted,

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Grant County Prosecuting Attorney

  
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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

STATE OF WASHINGTON,            )  
  )  
                          Respondent,    ) No. 34347-2-III  
  )  
                          vs.                )  
  )  
DAVID SEWART LEWIS,            ) DECLARATION OF SERVICE  
  )  
                          Appellant.     )  
\_\_\_\_\_ )

Under penalty of perjury of the laws of the State of Washington,  
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this  
matter by e-mail on the following party, receipt confirmed, pursuant to the  
parties' agreement:

Mary T. Swift  
Nielsen, Broman & Koch, PLLC  
[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)

Dated: May 1, 2017.

  
\_\_\_\_\_  
Kaye Burns

**GRANT COUNTY PROSECUTOR**  
**May 01, 2017 - 11:06 AM**  
**Transmittal Letter**

Document Uploaded: 343472-Brief of Respondent.pdf  
Case Name: State of Washington v. David Stewart Lewis  
Court of Appeals Case Number: 34347-2  
Party Represented: Respondent  
Is This a Personal Restraint Petition?  Yes  No  
Trial Court County: Grant - Superior Court #: 15-1-00824-5

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- Personal Restraint Petition (PRP)
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**Comments:**

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to sloanej@nwattorney.net.

Sender Name: Kaye J Burns - Email: [kburns@co.grant.wa.us](mailto:kburns@co.grant.wa.us)