

No. 307395

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

JOSHUA GRAHAM, Appellant

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APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

---

OPENING BRIEF OF APPELLANT

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FILED  
DEC 18, 2012  
Court of Appeals  
Division III  
State of Washington

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I. ASSIGNMENTS OF ERROR

- A. Mr. Graham Received Ineffective Assistance Of Counsel,  
Where Counsel Failed To Request The Lesser Included  
Offense Instruction Of Criminal Trespass.
- B. The Trial Court Erred When After It Discharged The Jury  
It Entered A Judgment Against Mr. Graham Where The  
Jury Verdict Form Found “Anthony Joseph Speelman” And  
Not Mr. Graham, Guilty Of The Crime Of Burglary In The  
Second Degree.

Issues Related To Assignments Of Error

- 1. Did Mr. Graham receive ineffective assistance of counsel  
where counsel failed to request a lesser included offense  
instruction?
- 2. Is Mr. Graham entitled to a reversal and dismissal with  
prejudice or at the least, a new trial, where the verdict form  
returned by the jury found another individual, not Mr. Graham,  
guilty of the charged crime?

## II. STATEMENT OF FACTS

Joshua Graham was charged by information with burglary second degree. CP 1. The matter proceeded to a jury trial<sup>1</sup>.

On the evening of January 15<sup>th</sup> and the morning of January 16, 2011, Joshua Graham attended a group event at the Joker's Atomic Bowl: which includes a bowling alley, restaurant, and casino. Vol. 4RP 28. 67. That evening there were between 400 and 600 people at the establishment. Vol. 4RP 53.

Although he is not supposed to drink alcohol because of the potential interaction with his prescribed pain medication, Mr. Graham drank beer and mixed drinks that evening. Vol. 4RP 68. Sometime after 1 a.m., Mr. Graham left the VIP section in the dance club area to find a bathroom. An employee directed him to go past the bowling alley locker area to the bathroom. Vol. 4RP 69. The bowling office was located near the men's room. Vol. 4 RP 30.

Mr. Graham testified he turned a light on in a room, thinking it was the men's room. Vol. 4RP 70,72. Security cameras in the bowling office

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<sup>1</sup> For purposes of this brief, the hearing date of 8/24/2011 will be referenced as Vol. 1RP page no; the hearing dates of 10/12/2011 and 12/21/2011 will be referenced as Vol. 2RP page no; the hearing dates of 12/7/2011, 2/2/2012, and 3/8/2012 will be referenced as Vol. 3RP page no.; hearing dates of 12/20/2011, 2/24/2012 and 3/15/2012 will be referenced as Vol 4RP page no; and the hearing date of 3/2/2012 will be referenced as Vol. 5RP page no.

recorded Mr. Graham moving around the room, at one point standing in front of a four ton, 3x2x2 foot safe, as well as opening a few drawers. Vol. 4RP 50, 58, 73. Mr. Graham recalled turning on a light, but had no recollection of walking around the office. Vol. 4RP 70. He did not remove anything from the office. Vol. 4RP 37, 41-42. He left after about 30 seconds. Vol. 4RP 5.

A bowling alley employee went to the office some time between 1:30 and 1:45 a.m. Vol. 4RP 32. He noticed the office door was ajar and the door jamb was broken. Vol. 4RP 33. He estimated it must have been broken some time between 10 p.m. and 1:30 or 1:45 a.m. Vol. 4RP 43.

The jury deliberations began the afternoon of December 20, 2011. Vol. 4RP 100; CP 47. Deliberations resumed the next morning. At 9:38 a.m., the jury sent a note to the court that it was unable to come to a unanimous decision. CP 36. Both the prosecutor and defense counsel agreed that the court should declare a mistrial because (1) it was a simple case with a thirty second sequence from a video tape; and (2) "with it being Christmas week there would be a tendency to rush to judgment." CP 50. The Court responded to the jury note at 9:56 am, instructing them to "continue your deliberations in an effort to reach a unanimous verdict." CP 36.

Approximately five minutes later the jury announced it had reached a verdict. CP 47. The verdict form, signed by the presiding juror, was as follows:

“We, the jury, find the defendant ANTHONY JOSEPH SPEELMAN, Guilty, of the crime of burglary in the second degree in Count 1.

CP 37.

The court clerk read the verdict aloud as follows:

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 21<sup>st</sup> day of December 2011, signed presiding juror.

Vol. 2RP 7.

The court asked the presiding juror if the clerk accurately read the jury's verdict, and polled the jury. Vol. 2RP 7-8. The jury was dismissed.

Vol. 2RP 11. After the jury left the court room, the following conversation occurred:

The Court: The clerk has pointed out to me that the juror verdict form that was used, the name on the verdict form, as far as the caption, is different than that in the actual body of the verdict.

Mr. Siefken: Oh.

The Court: Is this Mr. Graham or Mr. Speelman?

Mr. Siefken: Graham

Mr. Metro: Mr. Graham

The Court: Graham. The verdict form reads Anthony Joseph Speelman.

Vol. 2 RP 11.

On December 27, 2011, defense counsel filed a motion to strike the sentence and dismiss the case against Mr. Graham, citing the verdict form submitted by the jury, which found Anthony Speelman and not Mr. Graham guilty of the burglary charge. CP 42-43. On December 30, 2011, defense counsel filed a motion for arrest of judgment; or in the alternative a motion for a new trial, along with points and authorities in support of the motion, per CrR 7.4 and 7.5. CP 49-54; Vol. 4RP 112.

The court ruled that the name on the verdict form was a clerical error, and within the court's authority to correct and enter a judgment and sentence against Mr. Graham. Vol. 4RP 132-33. The court imposed a 22 month sentence. Vol. 4RP 137. Mr. Graham makes this appeal. CP 103.

### III. ARGUMENT

- A. Mr. Graham Received Ineffective Assistance Of Counsel,  
Where Counsel Failed To Request The Lesser Included Offense  
Instruction Of Criminal Trespass.

1. First Degree Criminal Trespass Is A Lesser Included Offense of Second Degree Burglary.

Second-degree burglary requires an unlawfully entering or remaining in a building, accompanied with intent to commit a crime against a person or property therein. RCW 9A.52.030. A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building. RCW 9A.52.070. A lesser-included offense exists when all of the elements of the lesser crime are necessary elements of the greater crime. *State v. Holt*, 104 Wn.2d 315, 318, 704 P.2d 1189 (1985). Under Washington law, a first-degree criminal trespass is a lesser-included offense of the crime of second-degree burglary. *State v. Soto*, 45 Wn. App. 839, 727 P.2d 999 (1986); *State v. Allen*, 101 Wn.2d 355, 361, 678 P.2d 798 (1984).

2. Under The *Workman* Test, Mr. Graham Was Entitled To An Instruction Of A Lesser Included Offense.

A criminal defendant is entitled to a jury instruction of a lesser-included offense when two conditions are met: 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. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

In this case, the crime charged was burglary second-degree. The singular issue for the defense was Mr. Graham's lack of intent to commit a crime when he entered the bowling office. Vol. 4RP 6. The elements of criminal trespass, a culpable mental state of "knowing" and an unlawful entry are necessary elements of second-degree burglary. The factual prong of the *Workman* test is satisfied when viewing the evidence most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). Here, the only evidence, the security footage tape, shows Mr. Graham wandering in the office, standing in front of the safe, and opening a few drawers. Inasmuch as evidence does not definitively show Mr. Graham damaging the door to gain entry for some nefarious purpose, or admitting that he intended to commit a crime while in the bowling office, it supports the inference that Mr. Graham committed the lesser crime of criminal trespass. Mr. Graham was entitled to have an instruction on the lesser-included offense of criminal trespass.

3. Counsel Was Ineffective For Failing To Request A Lesser-  
Included Instruction.

Mr. Graham contends that counsel was ineffective for failing to request an instruction on the lesser-included offense of criminal trespass.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Further, the right to present a lesser included offense instruction to the jury is statutory. RCW 10.61.006; RCW 10.61.010; *Fernandez-Medina*, 141 Wn.2d at 454.

The federal and state constitutions guarantee a criminal defendant effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court begins with the strong presumption that counsel rendered effective performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). However, if counsel's choices were not reasonable, the performance may be found to have fallen below an objective standard of reasonableness based on all the circumstances. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

In *Grier*, the Court found that despite Grier having met the *Workman* standard for instructions on the lesser-included offense of manslaughter, counsel's decision to withdraw the instruction did not

amount to ineffective assistance of counsel. *Grier*, 171 Wn.2d at 45. The Court noted that the defense theory there was that the State had not proved beyond a reasonable doubt that Grier was armed when the victim was shot, or that she intentionally shot him, or in the alternative, that she shot the victim in self-defense. Because the strategy was to obtain an acquittal, the Court concluded the strategy of “all or nothing” was reasonable. *Id.* at 42-43.

This case is different from *Grier*. Here, the argument was that while Mr. Graham did enter the room without permission, he did not enter with the intent to commit a crime therein. This is the essence of first-degree criminal trespass. After its second session of deliberations, the jury here informed the court it could not come to a unanimous verdict. Because of the weakness of the evidence suggesting intent and the difficulty the jury experienced in coming to a unanimous conclusion, it is more probable than not that the jury could have easily settled on first degree criminal trespass. Under this set of facts, counsel’s failure to request the lesser-included instruction prejudiced the defendant. This amounted to ineffective assistance of counsel, entitling Mr. Graham to a new trial.

B. The Trial Court Erred When After It Discharged The Jury It Entered A Judgment Against Mr. Graham Where The Jury Verdict Form Found “Anthony Joseph Speelman”, Not Mr.

Graham, Guilty Of The Crime Of Burglary In The Second Degree.

“Only under limited circumstances may a trial court, upon determining that the verdict form is inaccurate, correct the verdict to conform to the actual finding of the jury. The jury must not have passed from the trial court’s control, jurors must not have had an opportunity to mingle with nonjurors, and the jurors must not have renewed their deliberations or discussed the merits of the case.” *State v. Edwards*, 15 Wn. App. 848, 851-52, 552 P.2d 1095 (1976) (*rev. denied*, 88 Wn.2d 1003 (1977)).

In this case, the jury foreman signed a verdict stating, “Anthony Joseph Speelman” was guilty of the crime of burglary in the second degree. CP 37. The court clerk, whose duty it was to accurately read the verdict form, substituted the name of Mr. Graham for that of Mr. Speelman. The mistake in the verdict form was not discovered until after the verdict had been received and the jury had been dismissed. Further, the verdict was entered against Mr. Graham, despite the verdict form never demonstrating that he had indeed been found guilty of the crime.

Under Washington law, if a verdict form, as presented to the jury, is inaccurate, or states an incorrect crime, and the error is discovered *before the jury is discharged*, the court may take steps to amend or correct the verdict. *State v. Badda*, 68 Wn. 2d 50, 61, 411 P.2d 411 (1966). (emphasis added). In *Badda*, the verdict form which was sent to the jury contained the words, “burglary in the second degree” instead of the word

“robbery.” The clerk read the verdict as it was written, and everyone immediately realized an error had occurred. The trial court promptly sent the jury back, with the words, “Void wrong form” written on it. A proper form of the verdict was prepared and the jury deliberated for few minutes and a signed verdict finding Badda guilty. *Badda*, 68 Wn.2d at 59-60. The reviewing court held that the trial court had properly resolved the issue as the verdict had not been filed and the jury had not been dismissed. In other words, although it was obvious the defendant had been charged with robbery and not burglary in the second degree, the incorrect verdict form mattered. On review, the court applied the rules, that is, the jury had not been dismissed and the verdict had not been filed, so correction by the jury was appropriate. What the reviewing court did *not* say was that the wrong verdict form was of no consequence.

In contrast, here, the trial court considered the fact that the verdict form was incorrect, concluded it was a clerical error, and then filed the *incorrect form* in its original language as a judgment against Mr. Graham. This action does not comport with case law.

In a somewhat similar case, the jury in *Zwiefelhofer* returned verdicts that stated the defendant was “not guilty.” The clerk read aloud the verdict as written. *State v. Zwiefelhofer*, 75 Wn.App. 440, 442, 880 P.2d 58 (1994). After the jury was dismissed, *Zwiefelhofer* was released

from custody, and the court ordered the filing of the jury verdicts. *Id.* Two days later, the prosecuting attorney prepared an affidavit stating several jurors came forward to say there had been a mistake, and Zwiefelhofer had actually been found guilty. The jury foreman told him she had mistakenly written “not guilty” on the verdict. *Id.*

The trial court reconvened the jury and they all agreed the foreman had made an error in completing the verdict. They also acknowledged that after dismissal they discussed the problem amongst themselves, with friends, police officers and the prosecuting attorney. The trial court concluded the mistake was in the nature of a clerical error and thus, amenable to correction. It vacated the “not guilty” verdict and entered a judgment of conviction. *Id.* at 60. On review, the court held that under the facts, the correction of the jury verdict violated Zwiefelhofer’s constitutional rights prohibiting double jeopardy. *Id.*

Similarly, here, the jury verdict, as given by the jury, did not find Mr. Graham guilty of burglary in the second degree. The verdict form as entered by the trial court was never corrected, so the actual verdict in the record holds Speelman guilty, not Mr. Graham. The court here substituted its judgment for the judgment of the jury. Mr. Graham’s conviction should be reversed and dismissed with prejudice.

Moreover, in *Berlinger*, a verdict form awarded the plaintiff's \$5,000 against each of the defendants. The court read the verdict aloud, and then polled the jury. *Berlinger v. Shield*, 164 Wash. 147, 149, 2 P.2d 681 (1931). The jury unanimously agreed to the verdict both separately and as a jury. One juror then arose to clarify that the jury had awarded a total of \$10,000 to the plaintiff. Despite the fact that the jury had not been dismissed nor the verdict received or filed, the trial court believed it was powerless to send the jury back to the jury room for the purpose of correcting its verdict. *Berlinger v. Shield*, 164 Wash. 147, 152-54, 2P.2d 681 (1931). On review, the Court held, "It is undisputed that the verdict returned and filed, because of a mistake or misapprehension, did not express the real finding of the jury. Inasmuch as the trial judge, before the discharge of the jury, had failed to have the jury correct or amend their verdict, the granting of a new trial was necessary and proper." *Id.* at 154-55.

In this case, the verdict was misread by the clerk. The jury was polled and discharged; then the error was discovered. The verdict form was received and filed without correction by either the court or the jury. The verdict form as filed did not find that Mr. Graham was guilty of the charged crime. Similar to *Berlinger*, in as much as the trial judge failed to

have the jury correct or amend their verdict, at the very least, the granting of a new trial is required.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Graham respectfully asks this court to vacate the conviction and dismiss with prejudice because the jury found Anthony Speelman guilty, not Mr. Graham. In the alternative, he requests a new trial.

Dated this 18<sup>th</sup> day of December 2012.

Respectfully submitted,

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# **APPENDIX A**

JOSIE DELVIN  
BENTON COUNTY CLERK

DEC 21 2011

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA JORDAN GRAHAM

Defendant.

NO. 11-1-00235-1

VERDICT FORM A

JUDGMENT DOCKET  
NO 11-9-03696-3

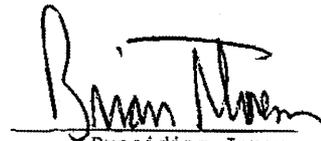
We, the jury, find the defendant ANTHONY JOSEPH SPEELMAN,

Guilty of the crime of Burglary in the Second  
(Guilty or Not Guilty)

Degree as charged in Count 1.

DATE:

12/21/11

  
Presiding Juror

CERTIFIED COPY

COPY

0-000000057

## CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Joshua Graham, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on December 18, 2012 to Joshua Graham, 8 S. Auburn, Kennewick, WA 99336; and by email per agreement between the parties to Andrew K. Miller, Benton County Prosecutor at [prosecuting@co.benton.wa.us](mailto:prosecuting@co.benton.wa.us).

s/ Marie Trombley

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