No. 31792-7-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

KEITH SCRIBNER,

Appellant.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT,
THE HONORABLE LINDA G. TOMPKINS

BRIEF OF APPELLANT

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I. INTRODUCTION

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This is an appeal from convictions entered in a criminal case involving attempted insurance fraud. The weight of snow caused the collapse of an awning on the back deck of a home owned by the defendant's mother. With her son's help, the mother made an insurance claim seeking roughly $200,000 to repair the damage and build a new deck cover. Ultimately the claim was denied and nothing was ever paid on the claim.

The State brought *two* criminal charges against the defendant: Causing a False Claim to be Presented (Count I), and *Attempted* Theft 1° (Count II). CP 24-26. The information alleged that both crimes were committed during the same thirteen-and-a-half month period. (Appendix A). The defendant committed several different acts during this time period. "When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington Constitution." *State v. Furseth,* 156 Wn. App. 516, 519, 233 P.3d 902 (2010). *Accord State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995). There are two ways

to insure that the constitutional right to a unanimous jury verdict is protected.

> The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all twelve jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement.

Petrich, 101 Wn.2d at 572.

Until the last day of trial, Scribner's attorney failed to recognize that the way the charges were framed created a jury unanimity problem because they allowed for the return of guilty verdicts without jury unanimity as to which one of the defendant's acts constituted the crime. When defense counsel recognized the existence of this problem, he realized that it could be solved if a *Petrich* jury unanimity instruction were given, and then he did finally propose such an instruction.

After defense counsel belatedly raised the jury unanimity issue, the trial judge sought to solve the problem in a different way. Rather than give a *Petrich* instruction, the trial judge changed the time period alleged in the "to-convict" jury instructions for Counts I and II. The trial court modified Instruction Nos. 8 and 12 by changing the time period from thirteen-and-a-half months (July 31, 2009 to October 13, 2009) to a single day (January 11, 2010). The trial judge made this modification in order to insure that any guilty verdict that the jury returned would be based on unanimous agreement that the defendant committed the crimes on January

11, 2010 when he made a statement to insurance adjustors Evans and Steele that was later shown to be inaccurate.

Unfortunately, defense counsel had previously proposed a *third* "to convict" jury instruction, which the trial court judge gave to the jury as Instruction No. 15. If Instruction No. 15 had never been given, the rewriting of Instructions 8 and 12 would have solved the jury unanimity problem by guaranteeing that any guilty verdict returned would necessarily be based on unanimous agreement as to the act that the defendant committed, because only one act alleged to be deceitful was committed on that day. But Instruction No. 15 erroneously referred *to a crime that was never charged.* Instruction No. 15 informed the jury as to the elements of the *completed* crime of Theft 1°. Moreover, No. 15 conflicted with the other two "to-convict" jury instructions (Nos. 8 and 12) because No. 15 referred to the entire thirteen-and-a-half month period that was alleged in the information. Thus the jury got two instructions that told them the State needed to prove that criminal acts were committed on January 11, 2010, and a third instruction telling them that the State only needed to prove that these criminal acts were committed sometime between July 31, 2009 and October 13, 2010. These three jury instructions read as follows.

No. 8, the "to-convict" instruction for Count I, stated in part:

> ***To convict the defendant of the crime of False Claims or Proof as charged in Count I, each of the following four elements must be proved beyond a reasonable doubt:***
>
> (1) ***That on January 11, 2010,*** the defendant presented or

> caused to be presented a false or fraudulent claim or any proof in support of such a claim under a contract of insurance; . . .

CP 133 (emphasis added) (copy attached as Appendix B).

No. 12, the "to convict" instruction for Count II, stated in part:

> ***To convict the defendant of the crime of Attempted Theft in the First Degree as charged in Count II each of the following three elements of the crime must be proved beyond a reasonable doubt:***
>
> (1) ***That on January 11, 2010,*** the defendant did an act that was a substantial step towards the commission of Theft in the First Degree; . . .

CP 137 (emphasis added) (copy attached as Appendix C).

No. 15, the "to convict" instruction for the *completed* crime of Theft in the First Degree, which never was charged at all, stated in part:

> ***To convict the defendant of the crime of theft in the first degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:***
>
> (1) ***That from July 31, 2009 to and including October 13, 2010,*** the defendant by color or aid of deception, obtained control over the property or services of another or the value thereof; . . .

CP 140 (emphasis added) (copy attached as Appendix D).

Defense counsel submitted Instruction No. 15 and *initially* proposed that it be given. However, at the very end of the trial – after the trial judge made changes to Instruction Nos. 8 and 12 and immediately prior to closing argument – defense counsel *objected* to No. 15 because it conflicted with Instruction Nos. 8 and 12. He noted that due to that conflict, the *Petrich* jury unanimity problem had *not* been solved. But defense counsel *never* realized that Instruction No. 15 was completely

unnecessary, and had always been unnecessary, because it referred to the completed offense of Theft 1° which had never been charged, and which had never been committed because the insurance claim was denied and no money was ever paid on it.

Defense counsel's act of submitting and requesting Instruction No. 15 constituted ineffective assistance of counsel. Since the *completed* offense of Theft 1° was never charged, there was no conceivable strategic reason for informing the jury of what had to be proved in order "to convict" Scribner of that crime. Thus it was deficient conduct for defense counsel to have initially proposed it.

The giving of Instruction No. 15 was also highly prejudicial to Scribner because the thirteen and a half month time period that it referenced *conflicted* with the time period of a single day that was referenced in the two other jury instructions (Nos. 8 and 12), which set forth the elements of the two crimes that *had* been charged. Instruction No. 15 allowed the jury to consider any act that the defendant had committed between July 31, 2009 and October 13, 2010. But Instruction Nos. 8 & 12, after the trial judge modified them, both referred to a single day: January 11, 2010. Since no *Petrich* jury unanimity instruction was ever given, the jurors were never told that they had to be unanimous as to which act they were relying on before they could find Scribner guilty of either Count I or Count II.

There is no way of knowing how the jurors reconciled the conflict between the 13-1/2 month time period referenced in Instruction No. 15

and the one specific day referenced in Nos. 8 and 12. Nor is there any way of knowing whether the jurors unanimously agreed upon the same underlying act as the basis for their guilty verdicts. Thus, there is a reasonable probability that the jurors actually used the broad time period specified in Instruction No. 15, and that different jurors considered different acts as the basis for their individual determinations that the State had proved commission of the two crimes charged. This means that there is a reasonable probability that the verdicts returned did *not* comply with the constitutional requirement of *Petrich* that jury verdicts be based on such unanimous agreement. In sum, the performance of Scribner's trial attorney meets the two-pronged *Strickland* test for ineffective assistance of counsel because both deficient conduct and prejudice are clearly evident. In addition to establishing a denial of the Sixth Amendment right to effective assistance of counsel, the giving of Instruction No. 15 also caused violations of Scribner's state and federal constitutional rights to a jury trial because without a *Petrich* instruction there was nothing that protected his right to a unanimous jury verdict.

B. Trial Counsel Failed to Object to Testimony From Prosecution Witnesses Who Testified That In Their Opinion (1) The Defendant's Mother, a Key Defense Witness, was "Evasive" When Questioned, and (2) That the Insurance Claim Was Denied Because of Scribner's "Concealment, Misrepresentation and Fraud."

Insurance adjustor Ben Steele testified that he asked another prosecution witness, Traci Johnson, about Johnson's questioning of the defendant's mother, Marilyn Warsinke. Steele asked Johnson, "Did she

[Warsinke] really not know anything and was she evading?" Scribner's attorney made no objection to this question and Steele testified that Johnson responded that in her opinion Warsinke was "evading, definitely." RP 811-12. Scribner's counsel made no motion to strike this testimony, and no motion for a mistrial. Shortly thereafter, Warsinke took the witness stand and testified as a witness for the defense. RP 933-1011.

Steele also testified regarding the denial of the insurance claim. He said the claim was denied for several reasons, including "concealment," "misrepresentation," and "fraud." RP 731, 735-36. When asked to identify the "fraud" that he was talking about, Steele said he was referring to Scribner's description of the awning. RP 739-40. Again, trial counsel failed to object.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

Appellant assigns error to:

1. His trial counsel's submission of a proposed "to convict" jury instruction (which was eventually given to the jury as Instruction No. 15), that informed the jury what had to be proved in order to convict the defendant of completed offense of Theft 1°, when the defendant was never charged with that offense.

2. The trial court's decision to give Instruction No. 15.

3. The trial court's failure to give a *Petrich* jury unanimity instruction.

4. The failure of his trial counsel to object to, or to move to strike, the testimony that in the opinion of prosecution witness Traci Johnson, when she interviewed defense witness Marilyn Warsinke, Warsinke was "definitely evasive."

5. The failure of his trial counsel to object to, or to move to strike, the opinion testimony of prosecution witness Ben Steele that the insurance claim submitted by the defendant and his mother was denied for "concealment, misrepresentation and fraud."

B. Statement of Issues.

1. Did trial counsel deny the defendant his Sixth Amendment right to effective assistance of counsel when he proposed a "to-convict" jury instruction which told the jury what had to be proved in order to convict the defendant of a crime that the defendant was not charged with and had never been charged with?

2. Did Instruction No. 15 violate due process because there is a reasonable probability that one or more jurors interpreted it as permitting them to convict the defendant on one or both charges if they found that the act constituting the crime was committed sometime during a 13-1/2 month period, even though Instruction Nos. 8 and 12 informed the jury that they could convict if it was proved that the act constituting the crime was committed on one specific day?

3. Did Instruction No. 15 violate the defendant's Sixth Amendment and Wash. Const., art. 1, §§ 21& 22 constitutional rights to a

unanimous jury verdict where all twelve jurors agree that the same underlying act of the defendant provides the basis for their verdict?

4. Did trial counsel deny the defendant his Sixth Amendment right to effective representation of counsel when he failed to object to, and failed to move to strike, testimony that in the opinion of one of the prosecution's witness, a defense witness was "definitely evasive" when she was questioned under oath?

5. Did trial counsel deny the defendant his Sixth Amendment right to effective assistance of counsel when he failed to object to, and failed to move to strike, opinion testimony from a prosecution witness that the insurance claim submitted by the defendant's mother was denied because the defendant engaged in concealment, misrepresentation, and fraud?

6. Did the admission of the opinions of insurance company employees that the defendant's mother was not being truthful, and that the defendant engaged in concealment, misrepresentation and fraud, violate the defendant's article I, § 21 & § 22, and/or his Sixth Amendment right to a trial by jury?

III. STATEMENT OF THE CASE

A. Overview of Procedural History

Scribner was charged with submitting a False Claim or Proof to an insurance company (Count I) and with Attempted Theft 1° (Count II). CP 24-26. Following a six day trial, a jury found him guilty as charged. CP 148, 149. A judgment of conviction was entered on June 14, 2013. CO

257-267. Scribner received concurrent sentences of 45 days with 30 days converted to community service hours. CP 260-61. He has completed his entire sentence.

B. Overview of Evidence Presented at Trial

In 2008, Keith Scribner helped his 78 year old mother Marilyn Warsinke buy a Spokane home to live in. RP 95, 937. When the home was purchased it had an awning covering a portion of the back deck. RP 86. On January 15, 2009 there was a big snowstorm and the awning collapsed from the weight of the snow. RP 325. Shortly thereafter Scribner hired someone to clean up the debris from the collapsed awning and to repair some siding damaged by the collapse. RP 285, 288.

On July 31, 2009, Warsinke made a claim for approximately $200,000 with Liberty Mutual on her homeowner's insurance policy for the cost of putting in a new replacement awning that would comply with local building code upgrades. RP 376. Warsinke told the company that the entire awning had collapsed from the weight of snow and that she was so worried that the entire deck might also collapse that she had the snow cleared off the deck. RP 382.

Scribner helped his mother present her claim. RP 277, 326, 716. Adjustor Trevor Evans told Scribner to obtain three bids from different construction companies for the job of building a new deck cover, and Scribner did as he asked. RP 350. Scribner gave Liberty Mutual estimates from Ball Construction, Kevco Construction and Coughmill, Inc., for $195,586, $213,815 and $198,513, respectively. RP 312.

Initially, the company was going to pay this claim. RP 313. Evans recommended that the company pay Warsinke $187,000. RP 319. But a company manager decided that the company should conduct further investigation to see if they could locate any pre-loss photo that showed the condition and size of the collapsed awning. RP 320. Eventually the company denied the claim. RP 731.

The State contended that Scribner deliberately lied to insurance claims adjustors Ben Steele and Trevor Evans by falsely telling them that the collapsed awning had covered the whole back deck of the house. RP 282, 286, 1177. The company sought evidence to confirm that Scribner was accurately representing the size of the collapsed awning. RP 544. In particular, the insurance adjustors tried to locate a photo of the back of the house that would show the awning that later collapsed. RP 544. The company asked Scribner if there had been an appraisal of the house at the time Warsinke bought it. RP 305. Scribner told them there had not been any appraisal. RP 307. When he was asked whether his mother had any pre-loss photos of the back of the house that would show what the awning had looked like before it collapsed, Scriber replied that he checked with his mother and she was not aware of any. RP 304.

Eventually the insurance company discovered that there *had* been an appraisal done on August 21, 2008; that pre-loss photos of the awning *did* exist; and the company was able to obtain a photo from the previous homeowner who had sold the house to Warsinke. RP 133, 105, 320-21, 546, 548. The photo showed that the collapsed awning had *not* covered

the entire deck, and that it was considerably smaller than the size Scribner had represented it to be when he spoke to adjustors Steele and Evans on January 11, 2010. RP 828.

When the company interviewed Warsinke under oath the interviewer, Traci Johnson, asked Warsinke about the size of the collapsed awning. RP 965. Warsinke testified that she told Johnson she didn't know how big it was. RP 965. Johnson subsequently told adjuster Steele that she thought that Warsinke was "evading, definitely," during her interview. RP 811-812. The company decided to deny the claim and thus never paid Warsinke anything. RP 731.

The State accused Scribner of deliberately lying about the size of the collapsed awning in an attempt to obtain far more money than was needed to simply replace the old awning. Scribner told the adjustors that there had not been any appraisal and that there were no photos of the collapsed awning. The State argued that "both of these responses were untruthful" and that "he knew" they were untruthful because he was present when an appraisal was done and when photos were taken. RP 1181. Scribner testified that he never intentionally misrepresented the size of the awning, and that he simply forgot about the appraisal and the appraisal photos that were taken. RP 1103.

The State charged Scribner as both a principal and as an accomplice. RP 800; CP 24-26. Although the State never charged his mother with any crime, the State's theory was that Scribner knowingly aided his mother and helped her to commit the two charged crimes. RP

800-01. But at the conclusion of the trial and just prior to instructing the jury, the State conceded that the evidence was not sufficient to show accomplice liability. RP 1014-15. Thus, the State abandoned its accomplice theory and proceeded solely on the theory that Scribner alone committed these offenses. *Id.* Although Scribner testified that he simply did not remember that there had been an appraisal and appraisal photos, and that he did not intentionally misrepresent the size of the collapsed awning, the jury did not believe him and it convicted him as charged. CP 148, 149.

C. The Information Failed to Specify The Particular Act, or the Particular Statement, Upon Which the Charges Were Based.

In Count I the Information alleged that over a period of roughly 13-1/2 months, Scribner committed "the crime of FALSE CLAIMS OR PROOF," as follows:

> That the defendant, KEITH R. SCRIBNER, in Spokane County, State of Washington, ***from July 31, 2009 to and including October 13, 2010,*** knowing it to be such, ***did present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim***, in excess of one thousand five hundred dollars, for the payment of a loss under a contract of insurance; to wit: a claim to Liberty Northwest under claim number Y08882975; and/or was an accomplice to said crime pursuant to RCW 9A.020.

CP 24-25 (Appendix A) (emphasis added). The information did *not* specify *how* Scribner committed this crime. It did not identify any particular act as the act which "caused" the "presenting" of the false claim.

Count II accused Scribner of committing "the crime of ATTEMPTED THEFT IN THE FIRST DEGREE" over the same 13-1/2 month period:

> That the defendant, KEITH R. SCRIBNER, in Spokane County, State of Washington, ***from July 31, 2009 to and including October 13, 2010, did an act which was a substantial step towards the commission of the crime of Theft in the First Degree***, to wit: by color or aid of deception to obtain control over the property or services of another or the value thereof, other than a firearm as defined in RCW 9.41.010, which exceeds five thousand dollars in value, with intent to deprive another of such property or services, to wit: a monetary payment for a claim made to Liberty Northwest under claim number Y08882975; contrary to Revised Code of Washington 9.56.030(1)(a), RCW 9A.56.020(1)(b), RCW 9A.28.020; and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

CP 25-26 (Appendix A) (emphasis added). Again, the information did *not* specify *how* Scribner committed this crime. Nor did it identify the particular act which constituted the substantial step towards commission of Attempted Theft 1°.

Despite the fact that the information gave no clue as to which particular act of the defendant the State viewed as the act constituting the crimes charged, Scribner's trial counsel never made any motion for a bill of particulars. It was not until the very end of the trial that Scribner's counsel realized that because there were multiple acts which might be viewed as constituting the criminal act charged that there was a jury unanimity problem.

D. In Opening Statement, The Prosecutor Identified Multiple Acts of Alleged Deception By Scribner, Any One of Which Might Arguably Constitute a "Substantial Step" Towards Commission of Theft 1, and Which Might Also be The Act Which Caused His Mother to Present a False Insurance Claim

In her opening statement, the prosecutor told the jury that the evidence would show that Scribner had done several things. Prior to meeting with insurance adjustors Scribner saw to it that "all the debris ha[d] been

cleaned up" after the cover collapsed, and so she suggested that this showed that he was hiding the evidence of what the collapsed roof consisted of. RP 26. She maintained that the fact that "repairs have been done, the house has been painted," showed that he had covered up evidence of what size cover had been there before. *Id.* Then, on January 11, 2010, when he met with adjustors Evans and Steele, Scribner "describ[ed] [to them] how this prior structure that collapsed covered the whole length of the deck." *Id.* Later, in February when an adjustor asked Scribner if his mother had had an appraisal done when the house was purchased Scribner incorrectly told him, "no, there was no appraisal," but "that wasn't true," and Scribner knew it wasn't true because he had been there when the appraisal had been done. RP 30.

Thus the evidence showed at least three acts: (1) disposing of the old awning; (2) misrepresenting the size of the old awning; and (3) concealing the existence of an appraisal that might have been based in part upon photographs that showed the size of the old awning. Despite the prosecutor's enumeration of these multiple acts, any one of which might arguably show deception and be the "cause" of the presentation of a false claim, defense counsel did not request any election of the specific act upon which the charges were based.

E. Trial Counsel Made No Objection and No Motion to Strike When Witness Steele Testified That Investigator Johnson Thought Defense Witness Warsinke Had Been "Evasive" When She Interviewed Her.

Traci Johnson is an investigator with Liberty Mutual's special

investigations unit. RP 538. She investigates potential insurance fraud. *Id.* Johnson was assigned to investigate the claim submitted by Scribner's mother, Marilyn Warsinke and to look into the size of the awning that had collapsed. RP 543. Johnson contacted Warsinke and told her that she needed to arrange a time to take a recorded statement from her. RP 559. On April 6, 2010, Johnson interviewed Warsinke under oath at her home. RP 562. Warsinke answered some of Johnson's questions, but she refused to answer some questions about her finances. RP 565, 613. When Johnson asked if there were other questions that she refused to answer, Scribner's counsel objected on hearsay grounds. *Id.* The Court overruled that objection because it was not hearsay. RP 615. The prosecutor then posed this question: "Was it a pattern during this interview for questions not to be answered?" *Id.* Defense counsel then objected on both hearsay and relevance grounds and the Court again overruled defense counsel's objection. *Id.* The prosecutor then asked: "Ms. Johnson, were there other questions that Ms. Warsinke refused to answer?" and Johnson replied, "Yes." RP 617.

On the next day of trial (March 11th), the prosecutor presented the testimony of adjustor Benjamin Steele. She asked Steele about an e-mail exchange (Trial Exhibit No. 205) that he had with Johnson on April 7th, the day after Warsinke's recorded interview:

> Q. And what is she communicating to you in the e-mail?
>
> A. Well, at this point she had taken a recorded statement with Marilyn Warsinke, so she's actually sending me her notes, if you will, of that brief recorded statement

that was taken.

Q. Okay. ***And what did she say in this e-mail***?

A. Do you want me to read it?

Q. Yeah . . .

A. Sure. Sure. Here is a brief recorded – RS, which means recorded statement. ***I did not make much headway with her yesterday and her attorney.*** Sorry.

Do you want me to keep going?

Q. Well, that's all that there is on that initial e-mail. . . .

RP 809-10 (emphasis added).

As the transcript demonstrates, Scribner's defense counsel made no objections. Although he *had* objected to somewhat similar testimony on hearsay grounds on March 7th, he made no objection on March 11th when the prosecutor asked the witness to relate the content of Johnson's initial e-mail message.

The prosecutor then asked Steele about pages 2 and 3 of the e-mail exchange. Steele said that he responded to Johnson's initial e-mail with a question to her about the pre-loss photo that the company had obtained:

A. Thanks, Traci. Hopefully, they can provide us with the requested documentation. Did you show them the photo? What were their thoughts to the photo?

Q. And who is saying ---

A. That's me, yeah. I'm responding to Traci on the same day and just that's what I have commented back to her.

Q. And then what was her reply to you?

A. Given how the statement went, no, I did not show it to them; have no intentions to at this point.

Q. Then what was your response?

A. My response was the same day, I said, that works for me, keep them guessing.

Q. What was her response?

A. Yesterday did not go well. She hardly answered any questions. It was really a waste of time.

And then you go to page 1 [of Exhibit No. 205), which is the same day, and it just says, sorry about that, ***did she really not know anything and was she evading***?

Q. And who was that talking?

A. That was me. ***And Traci responds with evading, definitely.***

RP 811-12 (emphasis added).

Again, Scribner's trial counsel made no objection to the question, "[D]id she really not know anything and was she evading?" Nor did he move to strike the answer given, that Traci thought Warsinke was "evading, definitely."

F. Trial Counsel Neither Objected Nor Moved to Strike When Steele Testified That Warsinke's Claim was Denied for Four Reasons, Including "Concealment," "Misrepresentation," and "Fraud."

On direct examination the prosecutor asked Steele why Warsinke's insurance claim was denied and Steele responded as follows:

Q. Why was the claim denied?

A. It was denied on four counts, really, late reporting, lack of cooperation, ***concealment or misrepresentation***, and lack of coverage.

RP 731 (emphasis added). Scribner's attorney did not object to this testimony nor did he move to strike it.

When the prosecutor next referred to the denial of the claim, she added

the word "fraud" to the question, defense counsel again made no objection, and Steele *agreed* with the prosecutor that the claim had been denied *on grounds of fraud*:

> Q. First, you had just testified before that the coverage was denied for lack of coverage, late reporting, lack of cooperation and ***concealment or fraud, correct?***
>
> A. Correct.
>
> Q. ***I want to focus more on the concealment or fraud***, okay?
>
> A. ***Okay***.

RP 735-36 (emphasis added).

A few moments later the prosecutor questioned Steele further on this subject:

> Q. . . . Now, [the claim] was also denied ***on concealment or fraud. Correct***?
>
> A. ***Correct***.
>
> Q. ***What was the concealment or fraud*** that caused the claim to be denied?
>
> A. ***Well, it had everything to do with what was described to us by Keith Scribner*** with the size of this thing.

RP 739-740 (emphasis added). Again, there was no objection, and no motion to strike from defense counsel.

G. On The Last Day of Trial, Right Before The Jury Was to Be Instructed, Scribner's Trial Counsel Recognized That There was a "*Petrich*" Jury Unanimity Problem Caused by The Prosecutor's Identification of Multiple Acts.

It was not until March 12th, the very last day of trial, that Scribner's trial attorney realized there was a *Petrich* jury unanimity problem created

by the fact that the prosecution had identified several of Scribner's acts and statements, any one of which might constitute the basis for a conviction on either or both counts. That morning, apologizing for not having realized it sooner, defense counsel notified the Court that because the information charged a lengthy period of time, and because the prosecutor had identified multiple acts committed within that time period, he thought there might be a need for an additional jury instruction in order to insure that Scribner's right to a unanimous jury verdict was protected:

> MR. ORESKOVICH: Judge, I went through the jury instructions last night, and I began to wonder if we might not need an additional instruction based upon *State v. Petrich.*
>
> What I'm thinking about is this: The prosecution in her opening statement talked about a number or series, I think the word was series but I could be mistaken, of acts that were performed by Mr. Scribner that were the false statements in support of the proof.
>
> And as I started to kind of script out the argument last night, I began to wonder, are we going to need some unanimity as to the nature of the act that is the basis if the jury were to convict?
>
> And so we worked on that quickly last night and some this morning, and we are going to propose an instruction, but I just wanted to bring it to everybody's attention to think about whether we need it or not.
>
> . . .
>
> . . . under *Petrich* . . . if the state presents evidence of multiple, distinct acts that could form the basis of one charge, the state must tell the jury which act to rely on, or the Court must instruct a jury to agree on a specific act. . . .[1]

[1] This is a correct statement of *Petrich's* holding. *See Petrich*, 101 Wn.2d at 572, quoted *infra,* on page 2.

. . .

> So I did the research last night, I began to think, we have got maybe two acts here, and at least from my perspective, we're defending two acts. The act of the January statement to Mr. Evans and Mr. Steele concerning the length of the deck and then perhaps the February statement to Mr. Evans about the existence of an appraisal.
>
> And if that's true and if both those acts form the basis, Judge, for either the false statement count, false proof count, or if one of those acts or both of those acts are the substantial step for the attempted theft, then I think what we've got to have is a unanimity instruction for the jury deciding or agreeing which of those acts satisfy the element.

RP 1026-28.

The prosecutor argued that a *Petrich* instruction was unnecessary because "the misrepresentation here is the January 11th, 2010, statement regarding the size of the deck to Mr. Steele and Mr. Evans." RP 1029. Thus, she argued that there was only one deceptive statement so there was no need for a *Petrich* instruction *on Count I* (the violation of RCW 48.30.230(2)(b).

The Court asked the prosecutor whether a *Petrich* instruction was needed *for Count II* in order to insure unanimity about the element of the "substantial step" towards committing Attempted Theft 1 and again the prosecutor said the instruction wasn't needed because there was only one act that could constitute the substantial step: "The deception here is the January statement to Mr. Evans and Mr. Steele, and that's the single act here." RP 1030.

The parties and the court returned to this issue after the defense rested and after the lunch recess. The prosecutor again argued that a *Petrich*

instruction was not necessary. RP 1116-1118. Scribner's attorney argued that a *Petrich* instruction was necessary because the prosecution had not only elicited testimony about Scribner's statement about the size of the collapsed awning (made on January 11, 2010 to the adjusters), but had *also* elicited testimony about his statement denying that any appraisal of the house had ever been done, *and* about his statement that there were no photographs of the prior collapsed awning:

> Now they may say, look, all this is really is a concealment of a false statement that was made previously, so any discussion about photos or appraisal isn't really a false statement whatsoever, it's just concealment of the false statement about the size of the deck.
>
> The jury needs to be told that. I mean if that's what the argument is going to be, then we're really talking about one false statement, Judge.
>
> But if we're going to get into situations about a false statement made, a second false statement made about concealment of some type of proof and another false statement made about concealment of some type of proof, then, in fact, what needs to happen is ***the jury needs to be instructed that if these are the allegations that are made, then you have to unanimously agree as to which one you can convict on.***
>
> So I think the government is trying to make a distinction without any difference whatsoever, and it violates Mr. Scribner's constitutional rights for a unanimous verdict or unanimous decision based upon the nature of the charges that he has."
>
> So I don't think they get it both ways. ***If they are going to argue three different events, then the jury needs to be instructed as to what they are and what the requirement is in terms of their agreement.***

RP 1118-1119 (emphasis added).

The trial judge then expressed some skepticism as to whether the State

was correct when it claimed that it was only basing the charges on Scribner's January 11th statement:

> If the sole false or fraudulent claim is the statement about the contours and size of the deck in the Evans/Steele meeting, we've spent an awful lot of time on the appraisal and we spent a lot of time on the photographs, photographs, photographs.

RP 1120.

The court then ruled that at least as to Count II, the Attempted Theft 1 charge, a *Petrich* instruction seemed to be required. RP 1121. The prosecutor said that the defense was only seeking a *Petrich* instruction as to Count I, the false claim charge, but Scribner's attorney clarified that he was seeking a *Petrich* instruction applicable to *both* counts. RP 1120. The prosecutor then argued that a *Petrich* instruction was not necessary for Count II (the Attempted Theft 1 charge) either. RP 1122-23. Defense counsel disagreed and argued as follows:

> MR. ORESKOVICH: . . . We're arguing about the element in the attempted theft charge ***in Count II*** that begins with, ***between certain dates that he did an act which was a substantial step toward the commission of a crime.***
>
> ***Now again, the act is going to be what?*** Is it going to be a representation that the deck cover went the full length? Is the act, well, we didn't get an appraisal? Is the act – that's really all it can be. I mean, the notion that there were no pre-loss photos that Mrs. Warsinke had, there's been no evidence offered at trial that Mrs. Warsinke was in possession of that.
>
> So we're really talking about, frankly Judge, two separate acts. ***And if we're going to talk about an act that was a substantial step and it's more than one, then the jury has to agree unanimously as to what that act is.***
>
> I mean, it seems to me that ***either the State says, okay, the***

> ***act, and it's a singular act, is solely the representation that was made to Ben Steele and Trevor Evans on January 11th.*** Okay. They say that's the only false statement or the only substantial step, ***that's fine, and we wouldn't need to deal with any unanimity.***
>
> ***But*** attempting to parse it out saying there was an act or a second act that deals with a misstatement or a false statement about an appraisal, ***once we start identifying more than one act, then we get to issues that deal with jury unanimity.***

RP 1123-24 (emphasis added).

At this point the prosecutor announced that she "didn't feel that strongly about it," and "to remove any issues on appeal" she had decided she would "argue that the misrepresentation is the statement to Mr. Steele and Mr. Evans," and that she was "going to identify that act anyway." RP 1125. This Court then said "it does appear that the Evans/Steele meeting [of January 11, 2010] is the factual focus point for both Count I and Count II," and that "my worry" is that if the jury were allowed to consider other acts on other dates it "may raise more questions in the jury's mind" regarding what else they could consider with respect to Count II. RP 1125.

The prosecutor then pointed out that in light of her concession that she was only going to identify the one act committed on January 22, 2010, the defendant's proposed *Petrich* instruction would not be accurate because it referred to a series of acts committed over time and the State was now agreeing not to argue multiple acts, and to simply say instead that "he committed this act on January 11th, 2010." RP 1126. The Court responded by noting that the prosecutor was effectively changing the time

period charged in the information:

> THE COURT: Now, we're sort of – we're morphing here. ***We're evolving because we started out with a range of dates, which is quite different than now honing in on one single date. We would have to change the elements if we did that.*** And I don't want to discourage you, Ms. Tratnik, because it's valuable –
>
> MS. TRATNIK: I'm not being discouraged. I'm trying to make it less complicated than it needs to be. And if having this instruction and inserting both counts moves us into closing argument and doesn't create the need for more instruction or modifications of instructions or whatever the Court is mulling over, I would prefer that we just do that and move on. That's all that I'm saying. I'm not discouraged. I was going to argue my case this way.
>
> Anyway, ***I don't think it's a necessary instruction, but it's not going to change how I argue my case, so it's not really worth fighting over, quite frankly.***

RP 1127 (emphasis added).

The Court took a short recess to allow counsel to negotiate the exact language of a *Petrich* unanimity instruction that both parties found acceptable, but after the recess the attorneys reported they were not able to agree on language for such an instruction. RP 1128. Defense counsel argued that if the prosecutor was now taking the position that would argue that the *only* act that constituted these crimes was committed on January 11, 2010, then "the elements instruction" should be altered so as to refer to that date only, instead of the thirteen-and-a-half month period that had been charged:

> Now, ***if the argument is, there's a false claim that occurred on January the 11th, then that's what the elements instruction ought to say.***
>
> ***But if she's going to argue that***, okay, there was a false

> claim made on January 11th, and then ***there were some additional steps taken as to furthering that claim, then the jury has to be instructed about that.*** And we know from the evidence that it's January 11th that the meeting occurs of 2010 with Mr. Trevor Evans and Ben Steele. It was later, I believe, in February 2nd I believe that Mr. Scribner sends an e-mail back to Mr. Evans saying, first, no pre-loss photos and then no appraisal.
>
> ***So we know*** by virtue of the actual evidence itself that ***the dates on which these acts occurred are separate dates, so if the argument is going to be made*** that these things are furthering the false claim, ***then the jury has to be instructed as to unanimity.***
>
> ***A jury could conclude, for instance, well, maybe it was a mistake about a statement that was made to Mr. Evans and Mr. Steele on January 11th. Maybe that was a mistake. But the defendant knew that there was an appraisal there that would tell them the truth. Instead of correcting the mistake, he further carried it out by lying about an appraisal.*** Right. That's what I'm concerned about. That's why they have to have unanimity on that issue.

RP 1130 (emphasis added).

H. The Trial Judge Sought to Solve The Jury Unanimity Problem By Changing the Dates Set Forth in the Two "To-Convict" Instructions, Nos. 8 and 12.

The trial judge then ruled by modifying the time period language in the two "to-convict" instructions that outlined the elements of the crimes charged in Counts I and II:

> THE COURT: All right. Counsel, ***on Instruction 8, the Court will modify the first element.*** This is [the] false claims or proof. ***It currently says that during the period from July 31st through October 13th.***
>
> ***I'm striking,*** ["]during the period from July 31st, comma, 2009, through October 13th, 2010,["] ***and I'm inserting ["]on January 11th, 2010.***["] Is that the correct date for the January?
>
> MS. TRATNIK: Yes.

RP 1131 (emphasis added).

After hearing further argument, the Court ruled that it was also changing the time period for commission of the offense set forth in Instruction No. 12, the "to-convict" instruction for Count II (Attempted Theft 1°): "[Instruction No.] Twelve is pinpointed to January 11th, 2010 and [Instruction No.] 15 remains as it is." RP 1136.

Even though he had initially proposed it, Scribner's counsel then took exception to Instruction No. 15. He argued at some length that since the State had now agreed to confine its argument about commission of a "substantial step" to the representation made to Evans and Steele on January 11, 2010, that argument conflicted with language in No. 15 that was "way broader than that" because it still referred to the time period from "July 31st, 2009, to and including October 13th, 2010." RP 1138. He argued that "the crime [of attempt] cannot occur . . . until such time as a substantial step is taken in that regard. So my argument is the time period cannot precede the substantial step." *Id.*. Moreover, since the insurance company had located a pre-collapse photo of the awning by March 16, 2010, he argued that the crime of Attempted Theft 1° could not possibly have occurred after that date, because after that date the company was no longer deceived as to the size of the collapsed awning. RP 1139.

The trial judge stated that she agreed with defense counsel that if the substantial step was not taken until January 11, 2010, as the State was now asserting, then "[i]t makes good sense" that any deception began there as well. RP 1140. She reiterated that she was changing the dates in

Instruction No. 12 to make it refer *solely* to January 11, 2010. But the trial judge ruled that it was "retain[ing] the larger charging range of dates" in Instruction No. 15. RP 1141. Believing that a *Petrich* instruction was no longer necessary, the trial judge then announced that she was not going to give any *Petrich* instruction, and no one took exception to that failure to instruct. RP 1142.

The jury was then instructed and closing arguments were made. The jury returned two general guilty verdicts finding the defendant guilty "as charged." CP 148, 149 (Appendices E & F).

IV. ARGUMENT

A. Ineffective Assistance: It Was Deficient Conduct to Submit A "To-Convict" Instruction (No. 15) For An Offense That Was Never Charged.

Scribner was never charged with the crime of *completed* offense of Theft 1°. He was charged with *Attempted* Theft 1°. It *was* necessary to give the jury a "to-convict" instruction which apprised the jury of the elements of *Attempted* Theft 1° and the jury *was* given such an instruction (No. 12). But it was totally ***un***necessary to give the jury another "to-convict" instruction about the completed offense of Theft 1°.

Scribner's defense counsel initially proposed the instruction. But at the end of the trial he took exception to it. He excepted to it on the ground that it created a *Petrich* unanimity problem because it contained a broad date range which conflicted with the date specified in Instruction Nos. 8 and 12, the to-convict instructions for the charged crimes. But even when he excepted to it, he still did not realize that No. 15 was completely

unnecessary. He never realized that a "to-convict" instruction for Theft 1° was completely unnecessary and inappropriate because Theft 1° had never been charged. If he had objected *on this ground* then it is virtually certain that the instruction would never have been given. But he did not object on this ground, and Instruction No. 15 was given to the jury.

Thus the jury ended up getting *three* "to-convict" instructions: Nos. 8, 12 and 15. The jurors were told what had to be proved in order for them to find the defendant guilty of *three* criminal offenses, *even though he was only charged with two*. There is no conceivable strategic reason for giving the jury an instruction informing it how to convict the defendant for an offense that was never charged.

A defense attorney's conduct is deficient when it falls below an objective standard of reasonableness. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Trial counsel's conduct in proposing a jury instruction that was addressed a criminal offense that was never charged was objectively unreasonable, and therefore his conduct was deficient.

As noted below, counsel's deficient conduct was also highly prejudicial because the giving of instruction No. 15 ended up causing a due process violation, and a violation of Scribner's Sixth Amendment and article I,§ 22 constitutional rights to a unanimous jury verdict.

B. There is a Very Real Probability That the Jurors Applied Instruction No. 15 in an Unconstitutional Manner. Because Counsel's Deficient Conduct Caused Prejudice There Was a Denial of the Sixth Amendment Right to Effective Assistance of Counsel.

Instruction No. 15 was very prejudicial to Scribner because it eviscerated his right to a unanimous jury verdict. The huge date range mentioned in Instruction No. 15 conflicted with the pinpoint date of January 11, 2010 identified in Instruction Nos. 8 and 12. On the one hand the jury was told "to convict" it had to find that the State had proved that the crime was committed *on one specific day*. On the other hand, the jury was told that "to convict" it merely had to find that the crime was committed at some point in time within a thirteen and a half month time period. There is no way of knowing how the jury reconciled this conflict.

The jury was given *two* verdict forms to fill out, one for each of the two charged counts. Because Theft 1° was never charged the jury was never given any verdict form for Theft 1°. And yet the jury was instructed as to what the State had to prove in order for them "to convict the defendant of the crime of theft in the first degree . . ." CP 140.

How did the jury resolve this date conflict? How did it resolve the puzzling fact that it was instructed on how to convict the defendant of a crime that was never charged? One possibility is that the jurors, like the attorneys and the trial judge, never even noticed that Instructions 12 and 15 referred to different crimes. Instruction No. 15 referred to the *completed* offense of Theft 1, whereas No. 12 dealt with the crime of *attempted* Theft 1°. If the jurors failed to notice this difference, then since

both instructions dealt generally with the crime of theft by deception, it is very likely that the jurors viewed Instruction No. 15 as applying to Count II, the Attempted Theft 1° charge. Therefore the jurors probably interpreted No. 15 as telling them that they should convict Scribner of Attempted Theft 1° if he attempted to obtain money (by getting the insurance company to pay his mother's claim) at any time during the 13-1/2 month period from July 2009 to October 2010. If this is how the jurors interpreted Instruction No. 15, then Scribner's constitutional right to a unanimous jury verdict was ***not*** assured as *Petrich* requires.

Scribner does not have to prove that it is more likely than not that this is how the jury applied Instruction No. 15. To establish ineffective assistance of counsel, a defendant need *not* prove prejudice by a preponderance of the evidence. "A defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (italics added). *Accord State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) the Court again made this point clear:

> *Strickland* held that to prove prejudice the defendant must establish a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' *id.*, at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (emphasis added); ***it specifically rejected*** the proposition that the defendant had to prove it more likely than not that the outcome would have been altered, *id.*, at 693, 80 L.Ed.2d 674, 104 S.Ct. 2052." (Bold italics added).

Instead, the proper prejudice standard is considerably less onerous:

> The defendant must show that there is ***a reasonable probability*** that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***A reasonable probability is a probability sufficient to undermine confidence in the outcome.***

Strickland, 466 U.S. at 694 (emphasis added).

In this case, if defense counsel had not engaged in deficient conduct – by submitting Instruction No. 15 as a proposed instruction in the first place – it is practically a *certainty* that it would never have been given. After all, there was no need to give any instruction as to how "to convict" the defendant of the completed offense of Theft 1° because it was undisputed that no completed theft offense never occurred. Since no one contended that occurred, this crime was never charged. The prosecution never proposed a "to-convict" instruction for the offense of Theft 1°, and this is not surprising since such an instruction would have made no sense and served no purpose. So it is clear that if defense counsel had not proposed it, no "to-convict" instruction for Theft 1° would ever have been given.

If the instruction had never been given, there never would have been a *Petrich* problem created by the conflict in the charged time period between Instruction Nos. 8 and 12, on the one hand, and No. 15 on the other. Thus, in this case, it is a virtual certainty that defense counsel's deficient conduct was prejudicial to Scribner, because it created the *Petrich* problem. While it is to defense counsel's credit that he eventually recognized the *Petrich* problem, raised it, and objected to Instruction No.

15, that does not change the fact that counsel's own deficient act of submitting and proposing a completely unnecessary jury instruction was what created the whole problem in the first place.

C. Even If Trial Counsel's Conduct Was Not Deficient, Scribner is Still Entitled to a New Trial Because There Was A Due Process Violation and a Violation of the Right to a Unanimous Jury Verdict. There Is a Reasonable Probability That The Jury Applied Instruction No. 15 In An Unconstitutional Manner, and Instruction No. 15 Prevents Any Court From Being Assured That The Jurors Unanimously Agreed That The Act of the Defendant Committed on January 11, 2010 Constituted Commission of the Crimes Charged.

While proof of deficient conduct is an essential component of a Sixth Amendment claim of ineffective assistance, it is not a component of either a due process claim encompassed by *Boyde v. California*, 494 U.S. 370 (1990), or of a *Petrich* claim of denial of the right to a unanimous jury verdict. Even if this Court were to conclude that trial counsel's performance in this case was flawless, Scribner would still be entitled to a reversal and a new trial because of these violations of due process and of the right to jury trial.

Jury instructions are adequate if they "do not mislead the jury or misstate the law." *State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). If "they are not misleading, and when read as a whole they properly inform the trier of fact of the applicable law," then they are constitutionally adequate. *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). But when jury instructions are confusing, ambiguous, or misleading, they violate due process because if the jury doesn't understand and apply the correct legal principles the defendant does not receive a fair

trial. "They must be 'readily understood and not misleading to the ordinary mind.'" *State v. Campbell*, 163 Wn. App. 394, 400, 260 P.3d 235 (2011), quoting *State v. Dana,* 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

The test for whether the instructions are constitutionally adequate is whether there is a reasonable possibility that they misled the jury. When "the claim is that [an] instruction is ambiguous and therefore subject to an erroneous interpretation . . . the proper inquiry in such a case is whether there is *a reasonable likelihood* that the jury has applied the challenged instruction in a way" that is unconstitutional. *Boyde*, 494 U.S. at 380 (italics added).[2] Clearly, in this case there *is* a reasonable possibility that one or more of the jurors interpreted Instruction No. 15 as permitting them to convict Scribner of Attempted Theft 1° if that crime was committed at some point in time over the 13-1/2 month time period; therefore Instruction No. 15 permitted some jurors to vote for conviction based on the commission of one act while other jurors voted to convict based on commission of a different act.

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[2] In *Boyde* the inquiry was whether there was a reasonable likelihood that the jury applied the instruction in such a way as to preclude them from considering some of the defendant's mitigation evidence in violation of the Eighth Amendment. In the present case the inquiry is whether there is a reasonable likelihood that one or more of the jurors applied Instruction No. 15 in such a way as to deny the defendant his state and federal constitutional rights to a unanimous jury verdict. If one or more of the jurors failed to realize that all twelve of them had to agree that the defendant was guilty because he committed an act that was a substantial step towards committing Theft 1 ***on January 11, 2010***, then the defendant's right to a unanimous jury verdict was not honored and assured. If there is a reasonable probability that even one juror failed to base his vote for a guilty verdict on the act committed on January 11, 2010, and based it instead on some other act committed on some other day during the larger 13-1/2 month time period, then there was a violation of the defendant's right to a jury trial.

Boyde claims and *Petrich* claims are closely related. The scope of *Boyde* is broader because *Boyde* states a general rule: A defendant is constitutionally entitled to jury instructions which do not create any reasonable probability of jury misapplication. *Boyde* holds that *any* unclear jury instruction which creates a reasonable probability of misapplication violates due process simply because the defendant is constitutionally entitled to clear jury instructions which do not create any such probability. Washington law has always been fully consistent with *Boyde*. *See, e.g.*, *State v. Hardy*, 44 Wn. App. 477, 480 & 484, 722 P.2d 872 (1986) (citing *Dana,* 73 Wn.2d at 537, and holding that "[T]he jury was given no guidance as to what actions could be considered "unlawful" under the aggressor instruction. As a result, the instruction was too vague and thus violative of due process.").

Petrich and its progeny simply apply the broad constitutional principle of *Boyde* to the specific constitutional right to have the jury instructed in a manner which assures the defendant that his constitutional right to a unanimous jury verdict will be honored. As *Petrich* states, the defendant is entitled to jury instructions which "protect" his right to a unanimous verdict:

> When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, ***jury unanimity must be protected.*** . . . The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, ***if the jury is instructed that all twelve jurors must agree that the same underlying criminal act has been proved*** beyond a reasonable doubt, ***a unanimous jury verdict on one criminal act will be assured.*** When the State chooses not

> to elect, ***this jury instruction must be given to ensure the jury's understanding of the unanimity requirement.***

Petrich, 101 Wn.2d 572 (emphasis added).

In this case, the deficient conduct of Scribner's trial counsel – in failing to realize that Instruction No. 15 referred to a crime that was never charged and was therefore completely unnecessary – led directly to two other constitutional violations. Had trial counsel realized that Instruction No. 15 referred to an uncharged crime, and had he objected *on that basis*, then the trial judge would not have given Instruction No. 15 and thus the *Boyde* and *Petrich* errors would never have been committed.

But even if there had been no deficient conduct, the *Boyde* and *Petrich* errors *independently* require reversal in this case. Eventually, on the last day of trial defense counsel *did* object[3] to Instruction No. 15 because he recognized that it conflicted with Instruction Nos. 8 and 12, and because he recognized that it created a *Petrich* problem by failing to assure jury unanimity as to the same underlying act. Therefore, *regardless* of whether there was a denial of the right to effective assistance of counsel, there was a denial of the right to a unanimous jury verdict. Instruction No. 15 destroyed the effect of the trial judge's modification of the dates of commission specified in Instructions 8 and 12. It permitted the return of a

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[3] Even if Scribner's trial counsel had *not* objected to Instruction No. 15 and had not raised the jury unanimity issue, Scribner would have been entitled to raise this issue for the first time on appeal. *See, e.g., State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); *State v. Bobenhouse*, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009); *State v. Holland*, 77 Wn. App. 420. 424, 891 P.2d 49 (1995) ("Although he did not except to the court's instructions, the right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal."); *State v. Furseth*, 156 Wn. App. at 519 n.3.

guilty verdict without unanimous agreement as to the particular act that constituted the substantial step towards committing theft.

Moreover, violation of the right to a unanimous jury verdict cannot be held harmless unless the appellate court can say that no rational juror could have had a reasonable doubt that each of the defendant's separate acts was proven and established the charged offense:

> When the constitutional right to proper instructions which assure jury unanimity is violated "the error will be deemed harmless ***only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime*** beyond a reasonable doubt. [*State v.*] *Kitchen,* 110 Wash.2d [403] at 405-06, 756 P.2d 105 [(1988)] (modifying the harmless error standard enunciated in *Petrich*). Since the error is of constitutional magnitude, it may be raised for the first time on appeal. *Kitchen,* 110 Wash.2d at 411, 756 P.2d 105.

State v. Crane, 116 Wn.2d at 325 (emphasis added).

In sum, even if this Court decides that Scribner has established ineffective assistance of counsel, Scribner is still entitled to a new trial because he has established a violation of his state and federal constitutional right to the use of jury instructions that protect his right to a unanimous jury verdict, and he has established a *Boyde* due process violation due to the insoluble ambiguity of the three jury instructions Nos. 8, 12, and 15, which use different dates, and one of which speaks to a crime that was never charged.

D. Ineffective Assistance of Counsel: Failure to Object To Testimony That In the Opinion of Traci Johnson, Defense Witness Marilyn Warsinke Was Definitely Being Evasive When She Gave Her Recorded Statement Under Oath

1. *It Is Impermissible For Any Witness to Give His Opinion About the Veracity of Another Witness or About the Guilt of the Defendant.*

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). No witness may give an opinion as to the guilt of a defendant, whether by direct statement or inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).[4]

Similarly, a witness may not give his or her opinion that another witness lied, or told the truth. "[N]o witness may give an opinion on another witness' credibility." *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). *See, e.g., State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (conviction reversed because prosecution witness testified that the child did not exhibit any signs of lying).

> ***An expert may not offer an opinion on the ultimate issue of fact when it is based solely on the expert's perception of the witness' truthfulness. [Citation]. That is precisely what Bennett did in this case. By stating that he believed that M was not lying, Bennett effectively stated that Alexander was guilty as charged.*** An expert's opinion as

[4] In *Black* the Supreme Court held that it was error to allow expert to testify that alleged victim suffered from "rape trauma syndrome" since that testimony necessarily "carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped. [Citation]. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape." *Id.* at 349.

> to the defendant's guilt invades the jury's exclusive function to weigh the evidence and determine credibility.

Alexander, 64 Wn. App. at 154 (bold italics added). *Accord State v. Dunn*, 125 Wn. App. 582, 592-93, 105 P.3d 1022 (2005) (testimony of physician's assistant that based on his interview of the child he believed sexual abuse was probable was constitutional error and was presumed to be prejudicial); *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994) ("Asking a witness to judge whether or not another witness is lying invades the province of the jury."); *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985) (convictions reversed because pediatrician testified that based on her interviews with two children she believed they had been molested; improper for witness to give opinion on the ultimate issue of guilt based upon the witness' determination of a witness' veracity).

2. *Deficient Conduct: Failure to Object to The Testimony That Marilyn Warsinke was Being Evasive and Untruthful When She Claimed Not to Know Anything.*

The law in this area has been settled for more than a quarter of a century. There is no conceivable tactical reason why Scribner's trial counsel would *want* the jury to hear that Johnson, an insurance fraud investigator, believed that Warsinke was being dishonest when she gave her insurance claim statement under oath. Warsinke was a key defense witness. Allowing prosecution witness testimony that she seemed to be falsely claiming not to know anything, and that she appeared evasive, was harmful to the defense. A defense attorney acting in accord with prevailing professional norms would have objected, and if the objection had not been

fast enough to prevent the testimony he would have moved to strike it and to have the jury instructed not to consider it. Here trial counsel did nothing. Doing nothing was objectively unreasonable and constituted deficient conduct.

3. *Because There Is A Reasonable Probability That The Outcome of the Trial Would Have Been Different Had Such Opinion Testimony About Warsinke Been Precluded, Scribner Has Established Prejudice.*

This is not a case where it is likely that the jury forgot about the improper opinion testimony. In fact, the prosecutor made sure that the jurors would not forget it by *explicitly reminding them of it.* In closing argument the prosecutor reminded them of Traci Johnson's opinion that Marilyn Warsinke was "evasive" when Johnson interviewed her:

> So they began an investigation. They are about to pay this claim for almost $200,000 until they find this photo, and then they go and interview the homeowner in this case, Ms. Warsinke, ***and she's evasive. That's what the person who interviewed her felt.***

TT 1231 (emphasis added).

Since there is a reasonable probability that this opinion testimony destroyed the effectiveness of Warsinke as a defense witness, there is a reasonable probability that without the trial outcome would have been different.[5] Scribner has established that the conduct of his trial attorney

[5] As noted above, to establish ineffective assistance the defendant need *not* establish that it is more likely than not that a different trial outcome would have been produced had there been no deficient conduct. *Thomas,* 109 Wn.2d at 225-26.

was both deficient and prejudicial, so both prongs of the *Strickland* test for ineffective assistance of counsel have been met.

E. Ineffective Assistance of Counsel: Failure to Object to Steele's Testimony That in His Opinion Scribner Perpetrated a Fraud When He Described The Size of the Collapsed Awning.

In this case, witness Steele gave his opinion that the defendant committed fraud. Since the defendant was charged with attempting to commit theft by deception, the crime charged was a crime of fraud.[6] Thus Steele gave an opinion on the ultimate issue of the defendant's guilt.

This case is similar to *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). There a law enforcement officer testified that in his opinion the defendant *intended* to try to manufacture methamphetamine out of the chemicals he possessed. That amounted to testimony that he believed the defendant was guilty of the crime of attempting to manufacture a controlled substance. In the present case, witness Steele testified that in his opinion Scribner was tried to perpetrate a fraud, misrepresented the truth, and tried to conceal the truth. Thus Steele gave his opinion that Scribner did not simply make an innocent mistake about the length of the awning. This constituted both an opinion that Scribner was lying when he said he made an innocent mistake, and an opinion that

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[6] The dictionary defines :fraud" in words nearly identical to the legal definition of the charged crime of theft by deception. "Fraud" is the "intentional perversion of truth in order to induce another to part with something of value." *Webster's Ninth New Collegiate Dictionary* 490 (1983). *Webster's* lists "deceit" as the first synonym for fraud. Similarly, the information in this case accused Scribner of doing an act that was a substantial step towards the commission of theft "by color or aid of deception to obtain control over the property or services of another. . ." CP 25.

Scribner was guilty as charged. In both this case and in *Montgomery*, the witnesses gave their opinion as to the *mens rea* element of the crime and their opinions were clearly improper.

As the prosecutor stated in her closing, the central issue for the jury to decide was whether Scribner *knew* that his representation of the size of the collapsed awning was not accurate.[7] Steele testified that the claim was denied for concealment, misrepresentation and fraud. RP 731, 735-36. When asked to identify the fraud, he said the fraud was Scribner's statement to the adjustors that the collapsed awning ran the entire length of the deck. RP 739-40. The essence of the charge of Attempted Theft 1° was that Scribner tried to obtain property by means of deception. CP 25. Steele testified that in his opinion, Scribner's description of the size of the awning, for which he was seeking money to pay for a replacement awning, was a misrepresentation and a fraud. Thus, Steele testified that Scribner was guilty as charged. This has been improper for decades.

There is no conceivable objectively reasonable strategic reason why a defense attorney would fail to object to testimony by a prosecution witness that in his opinion, and in the opinion of his company, Scribner was guilty of fraud. This was deficient conduct.

Obviously, it was also highly prejudicial. Steele's testimony informed the jury that the insurance company, Liberty Mutual, had already found

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[7] "The real dispute is element two, that the defendant knew the submitted claim was false or fraudulent. . . . When he said it extended the length of the deck, did he know that to be true or not?: *TT* 1165.

Scribner "guilty" of concealment, misrepresentation and fraud. There is far *more* than a reasonable probability that if defense counsel had objected to the questions that elicited Steele's opinion testimony, his objections would have been sustained. Had they been sustained, the jury would never have heard Steele testify that the insurance company had already concluded that Scribner was trying to perpetrate a fraud, and had denied his claim for that reason. Had that evidence been kept out, there is a reasonable probability that one or more of the jurors would have had a reasonable doubt, and thus Scribner would not have been convicted.

F. The Admission of the Opinions of Traci Johnson and Benjamin Steele Violated Scribner's Constitutional Right to a Jury Trial and Constituted Manifest Constitutional Error Which Cannot Be Deemed Harmless.

In the preceding sections, Scribner has argued that his trial counsel rendered ineffective assistance because he failed to object to the opinion testimony that employees of Liberty Mutual thought Scribner's mother was lying and that Scribner was guilty of trying to perpetrate a fraud. To prevail on these claims of ineffective assistance of counsel, Scribner must show that his attorney's failure to object was deficient conduct. But as with his claims regarding Instruction No. 15, even if this Court is not persuaded that the conduct of Scribner's counsel was deficient and thus not persuaded that there has been a Sixth Amendment violation, the admission of the improper opinions can be raised as manifest error affecting a constitutional right under RAP 2.5. If the test for manifest error is met, then a new trial must be ordered in order to remedy the

violation of the constitutional right to have the jury be the sole arbiter of the veracity of the witnesses, and the guilt of the defendant.

In this context, "manifest error requires a nearly explicit statement by the witness" on either the ultimate issue of fact (guilt or innocence) or on the issue of a witness' veracity. *State v. Kirkman*, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007). In this case the opinion testimony clearly satisfies this requirement for manifest error. The testimony that Traci Johnson believed that defense witness Warsinke was "evading, definitely," when she said under oath that she really didn't know anything, is an explicit statement that Warsinke was not being truthful. RP 811-12. Similarly, Steele's testimony that the insurance claim was denied because of Scribner's concealment, misrepresentation and fraud, was an explicit statement of opinion that Scribner was guilty as charged of attempted theft in the first degree.

The second requirement for obtaining relief on a "manifest constitutional error" raised for the first time on appeal is that the error caused the defendant to suffer actual prejudice. To meet this requirement the appellant "must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case." *Kirkman*, 159 Wn.2d at 935. Clearly, the errors in admitting opinion testimony in this case also meet this requirement. As a consequence of these errors, the jurors learned that the professional people with experience in investigating insurance claims thought that this was a bogus claim, that Scribner and his mother were lying, and that Scriber was guilty. Here, as in *State v. Barr*,

123 Wn. App. 373, 381, 98 P.2d 518 (2004),[8] the admission of improper opinion testimony improperly invaded the province of the jury and had practical identifiable consequences.

In closing argument the prosecutor told the jury that the central issue in this case was whether Scribner *knew* that his representation of the size of the collapsed awning was not accurate.[9] If he didn't know this, then there was no use of deception. If he did know this, then he was trying to defraud the insurance company and obtain for his mother a pay out on her claim that he knew she was not entitled to. Thus, the prosecutor acknowledged that Steele's opinion testimony went to the heart of the case.

Because the Johnson and Steele opinions invaded the province of the jury, they violated Scribner's state and federal constitutional rights to a jury trial. "The role of the jury is to be held 'inviolate' under Washington's Constitution." *Montgomery,* 163 Wn.2d at 590, citing article I, § 21 & § 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." *Id.* Here, as in *Barr* (138 Wn. App. at 383), these errors cannot be deemed harmless beyond a reasonable doubt.

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[8] "The officer's assessments concerning Mr. Barr's and A.J.'s credibility were a crucial part of the State's case—Officer Koss not only gave his opinion, but bolstered that opinion with statements related to his Reid training. In the context of this case, the **error** here had "practical and identifiable consequences" at trial."

[9] "The real dispute is element two, that the defendant knew the submitted claim was false or fraudulent. . . . When he said it extended the length of the deck, did he know that to be true or not? RP 1165.

V. CONCLUSION

For these reasons, Appellant Scribner asks this Court to reverse his convictions and to remand with directions to hold a new trial.

Respectfully submitted this 1st day of May, 2014.

CARNEY BADLEY SPELLMAN, P.S.

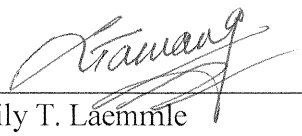
By _____
James E. Lobsenz, WSBA No. 8787
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, and competent to be a witness herein. On May 1, 2014, I served a true and correct copy of the following document: BRIEF OF APPELLANT on the following attorney of record via **US MAIL**:

Melanie Tratnik
Attorney General's Office/CJ Division
800 5th Avenue Suite 2000
Seattle WA 98104-3188

SIGNED at Seattle, Washington this 1st day of May, 2014.



Lily T. Laemmle
Legal Assistant to James E. Lobsenz

APPENDIX A

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. KEITH R. SCRIBNER, Defendant.	NO. 2011-01-03474-8 CORRECTED INFORMATION PA# Report #100902814 RCW 48.30.230; RCW 9A.56.030/9A.28.020

I, Robert W. Ferguson, Attorney General of Washington, in the name and by the authority of the State of Washington, pursuant to RCW 43.10.232 and at the request of the Spokane County Prosecuting Attorney, do accuse KEITH R. SCRIBNER, of the crimes of, False Claims or Proof and Attempted Theft in the First Degree, committed as follows:

COUNT I

I, Robert W. Ferguson, Attorney General, in the name and by the authority of the State of Washington and pursuant to RCW 43.10.232, do accuse KEITH R. SCRIBNER of the crime of FALSE CLAIMS OR PROOF, committed as follows:

That the defendant, KEITH R. SCRIBNER, in Spokane County, State of Washington, from July 31, 2009 to and including October 13, 2010, knowing it to be such, did present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, in

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Criminal Justice Division
800 5th Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430

excess of one thousand five hundred dollars, for the payment of a loss under a contract of insurance; to-wit: a claim to Liberty Northwest under claim number Y0882975; and/or was an accomplice to said crime pursuant to RCW 9A.08.020. (Maximum penalty: 5 years imprisonment and/or a $10,000 fine pursuant to RCW 48.30.230(2)(b) and RCW 9A.20.021(1)(c), plus restitution and assessments).

COUNT II

And I, Robert W. Ferguson, Attorney General, in the name and by the authority of the State of Washington and pursuant to RCW 43.10.232, do accuse KEITH R. SCRIBNER, of the crime of ATTEMPTED THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That the defendant, KEITH R. SCRIBNER, in Spokane County, State of Washington, from July 31, 2009 to and including October 13, 2010, did an act which was a substantial step towards the commission of the crime of Theft in the First Degree, to wit: by color or aid of deception to obtain control over the property or services of another or the value thereof, other than a firearm as defined in RCW 9.41.010, which exceeds five thousand dollars in value, with intent to deprive another of such property or services, to wit: a monetary payment for a claim made to Liberty Northwest under claim number Y0882975; contrary to Revised Code of Washington 9A.56.030(1)(a), RCW 9A.56.020(1)(b), RCW 9A.28.020; and/or was an

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accomplice to said crime pursuant to RCW 9A.08.020. (Maximum penalty: 5 years imprisonment and/or a $10,000 fine pursuant to RCW 9A.56.030(2), RCW 9A.20.021(1)(b), RCW 9A.28.020(3)(c), plus restitution and assessments).

DATED this 8th day of February, 2013.

ROBERT W. FERGUSON
Attorney General

MELANIE TRATNIK
WSBA # 25576
Assistant Attorney General
Attorneys for the State of Washington

* * * * * * * * * * * * * *

Suspect/Defendant Information:

NAME: Keith R. Scribner

HT: 6'2"	DOB: 7/23/64	SID:
WT: 260	SEX: Male	FBI:
EYES: Blue	RACE: Caucasian	DOC:
HAIR: Blonde	DOL: SCRIBKR360M3	

LAST KNOWN ADDRESS:
508 E. Rockwood Blvd.
Spokane, WA 99202

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APPENDIX B

INSTRUCTION NO. 8

To convict the defendant of the crime of False Claims or Proof as charged in Count I, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That on January 11, 2010, the defendant presented or caused to be presented a false or fraudulent claim or any proof in support of such a claim under a contract of insurance;

(2) That the defendant knew the submitted claim or proof in support of such a claim was false or fraudulent;

(3) That the claim for recovery was in excess of one thousand five hundred dollars; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX C

INSTRUCTION NO. 12

To convict the defendant of the crime of Attempted Theft in the First Degree as charged in Count II, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on January 11, 2010, the defendant did an act that was a substantial step toward the commission of Theft in the First Degree;

(2) That the act was done with the intent to commit Theft in the First Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX D

INSTRUCTION NO. 15

To convict the defendant of the crime of theft in the first degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That from July 31, 2009 to and including October 13, 2010 the defendant by color or aid of deception, obtained control over property or services of another or the value thereof; and

(2) That the property or services exceeded $5,000 in value; and

(3) That the defendant intended to deprive the other person of the property or services; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), and (4) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3) or (4), then it will be your duty to return a verdict of not guilty.

APPENDIX E

FILED

MAR 13 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEITH R. SCRIBNER, Defendant.	CAUSE NO. 2011-1-03474-8 **VERDICT FORM FOR COUNT I**

We, the jury, find the defendant Guilty (Not Guilty or Guilty)

of the crime of FALSE CLAIMS OR PROOF as charged in Count I.

Carl M. Miller
PRESIDING JUROR

APPENDIX F

FILED

MAR 13 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEITH R. SCRIBNER, Defendant.	CAUSE NO. 2011-1-03474-8 **VERDICT FORM FOR COUNT II**

We, the jury, find the defendant Guilty (Not Guilty or Guilty) of the crime of ATTEMPTED THEFT IN THE FIRST DEGREE as charged in Count II.

Carl M. Miller
PRESIDING JUROR