No. 31792-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH SCRIBNER,

Appellant

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
The Honorable Linda G. Tompkins

REPLY BRIEF OF APPELLANT

James E. Lobsenz, WSBA 8787
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ARGUMENT IN REPLY 2

A. The Jury Instructions Failed to Protect Scribner's Right to a Unanimous Jury Verdict. The Trial Judge Should Have Modified The Time Period in Instruction No. 15 to Match the Date Specified in Instructions 8 and 12. 2

1. Instead of a third "to convict" instruction, the jury should have been given "a person commits" definitional instruction 2

2. Instruction No. 15 conflicted with Nos. 8 and 12. The latter used a fourteen month time period while the former used a pinpoint date. This created a *Petrich* jury unanimity problem 4

3. The prosecution argues that the jury simply ignored instruction No. 15 because the jury recognized that had been included in the instructions by mistake. But neither the judge nor the attorneys recognized this 5

4. Instruction No. 15 wasn't entirely superfluous. It defined the crime that Scribner was alleged to have taken a substantial step towards committing and identified the value, deception, and specific intent elements of the completed offense 8

Page

5. It is disingenuous to claim that Nos. 12 and 15 do not conflict with each other because they each refer to "a different crime." No. 12 defines the charged attempt as taking a substantial step towards *commission of theft in the first degree* with the *intent to commit theft in the first degree.* No. 15 lists the elements of *theft in the first degree*. 9

6. As this court recognized in *State v. Lewis*, conflicting instructions in a criminal case require reversal. 10

7. Even in civil cases it is settled law that the giving of inconsistent instructions on a material issue is prejudicial and requires reversal 11

8. The State's reliance upon *Corbett* is misplaced 13

9. The State misstates the proper harmless error test. The correct test is whether a juror could have entertained a reasonable doubt that each incident established the crime. 18

B. Testimony That Johnson Felt That the Defendant's Mother Was "Evasive" Violated Scribner's Right to Trial By Jury. Defense Counsel Should have Objected to it... 20

C. Steele's Testimony That Scribner's Claim was Denied on Grounds of Fraud and Concealment Violated Scribner's Right to Trial By Jury. Defense Counsel Should Have Objected to it. 23

III. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Chiapetta v. Bahr,
111 Wn. App. 536, 46 P.3d 797 (2002) 12

Coyle v. Seattle,
32 Wn. App. 741, 649 P.2d 652 (1982) 13

Crowley v. Barto,
59 Wn.2d 280, 367 P.2d 828 (1962) 13

Paysse v. Paysse,
84 Wash. 351, 146 P. 840 (1915) 13

Renner v. Nestor,
33 Wn. App. 546, 656 P.2d 533 (1983) 13

State v. Barry,
179 Wn. App. 175, 317 P.3d 528 (2014) 17

State v. Corbett,
158 Wn. App. 576, 242 P.3d 52 (2010) 13, 14, 16

State v. Crawford,
159 Wn.2d 86, 147 P.3d 1288 (2006) 16

State v. DeRyke,
149 Wn.2d 906, 73 P.2d 1000 (2003) 3, 4, 7

State v. Dunn,
125 Wn. App. 582, 105 P.3d 1022 (2005) 25

State v. Easter,
130 Wn.2d 228, 922 P.2d 1285 (1996) 24

State v. Johnson,
173 Wn.2d 895, 270 P.3d 591 (2012) 9

State v. Kitchen,
110 Wn.2d 403, 756 P.2d 105 (1988) 18, 19

Page(s)

State v. Larry,
108 Wn. App. 894, 34 P.3d 241 (2001).....22

State v. Lewis,
6 Wn. App. 38, 491 P.2d 1062 (1971).....10, 11

State v. Loehner,
42 Wn. App. 408, 711 P.2d 377 (1985).....19

State v. Ng,
110 Wn.2d 32, 43, 750 P.2d 632 (1988).....12

State v. O'Neill,
91 Wn. App. 978, 967 P.2d 985 (1995).....12

State v. Petrich,
101 Wn.2d 566, 683 P.2d 173 (1984).....1, 4, 5, 9, 11, 113, 18

State v. Simms,
151 Wn. App. 677, 214 P.3d 919 (2009).....22

State v. Stevens,
158 Wn.2d 304, 143 P.3d 817 (2006).....12

State v. Vander Houwen,
163 Wn.2d 25, 177 P.3d 93 (2008).....11

Federal Cases

Boyde v. California,
494 U.S. 370, 380 (1990).....12

Constitutional Provisions, Statutes and Court Rules

WPIC 70.01.....4

WPIC 70.02.....4

WPIC 100.02.....3

I. INTRODUCTION

The trial judge recognized that there was a *Petrich* jury unanimity problem in this case. The judge sought to fix the problem by modifying the dates in the two "to-convict" jury instructions for the two charged crimes by instructing the jury that the State had to prove that these crimes were committed on one particular day. One of the two charged crimes was an *attempt* to commit Theft 1. But as defense counsel noted, the modification of those two instructions did not solve the jury unanimity problem because a third "to-convict" jury instruction, for the uncharged *completed* crime of Theft 1, used a 14 month time period and thus conflicted with the first two "to-convict" jury instructions.

The third "to-convict" instruction was originally proposed by defense counsel, but by the end of the trial he objected to it because its date range created a *Petrich* jury unanimity instruction. If defense counsel had initially submitted a definitional jury instruction ("To commit the crime of theft in the first degree") instead of a "to convict" jury instruction, the jury unanimity problem would have been solved by the modification of the dates in the first two instructions. Because the WPIC instruction defining Theft 1 does not contain any reference to any date of commission, it could have been given without creating any conflict between it and the two "to-convict" instructions for the charged crimes. Instead, defense counsel proposed a "to-convict" instruction for Theft 1. When the trial judge modified the dates in the other instructions, but declined to modify the dates in the Theft 1 "to-convict" instruction so as to

match them, the jury unanimity problem persisted.

Errors committed by both the trial judge and by defense counsel caused a violation of the defendant's state constitutional right to a jury trial. The trial judge should have modified the date in the third "to-convict" jury instruction, and because she didn't Scribner's constitutional right to a unanimous jury verdict was not protected. Moreover, his attorney's initial act of proposing the third "to-convict" instruction for the completed offense was deficient conduct. Although defense counsel later did take exception to the third "to-convict" jury instruction, it was given over his objection. Thus, his objection came too late to cure the prejudice that he caused when he originally proposed it.

Scribner's right to a jury trial was violated by the admission of opinion testimony that (1) a defense witness was "evasive," and (2) that Scribner's insurance claim was denied on grounds of fraud and concealment. In addition, defense counsel's failure to object to these inadmissible opinions constituted ineffective assistance of counsel.

II. ARGUMENT IN REPLY

A. The Jury Instructions Failed to Protect Scribner's Right to a Unanimous Jury Verdict. The Trial Judge Should Have Modified The Time Period in Instruction No. 15 to Match the Date Specified in Instructions 8 and 12.

1. Instead of a third "to convict" instruction, the jury should have been given "a person commits" definitional instruction.

When a person is charged and tried with an *attempt* to commit a crime (but *not* with the completed offense), the jury should receive a "to-convict" instruction that sets forth all the elements of the crime of attempt.

State v. DeRyke, 149 Wn.2d 906, 910, 73 P.2d 1000 (2003). The crime of attempt contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime. *Id.* In this case, the jury properly received Instruction No. 12, which informed the jury that "to-convict" Scribner of the charged offense of *attempted* first degree theft, the State had to prove those two elements. CP 137.

But without another instruction that defines the completed crime, the jury has no standard for determining whether or not the State proved that the defendant took a substantial step towards commission of the completed crime. Therefore, as the "Note on Use" for WPIC 100.02 explains, another instruction must be given that defines the completed crime. *DeRyke*, 149 Wn.2d at 911.

In this case, instead of giving such a definitional instruction, the Court gave another "to-convict" instruction that told the jury what had to be proved in order "[t]o convict the defendant of the crime of theft in the first degree." CP 140. But Scribner could not be convicted of that crime because he was never charged with it.

In *DeRyke* the charge was *attempted* rape in the first degree. The jury was given two instructions (1) a "to-convict" instruction that set forth the two elements of attempt (specific intent and substantial step towards commission of rape); and (2) a separate instruction which defined Rape 1. That second instruction began with the words, "A person commits the crime of rape in the first degree when that person . . ." and then set out the elements of that offense.

In the present case, the jury was *not* given a definitional instruction of the completed offense of Theft 1. Instead, the jury was given another "to-convict" instruction, even though Scribner could not be convicted of Theft 1 because he wasn't charged with it. The jury should have been given a separate instruction "defining the substantive crime so that the elements of that crime are delineated as separate elements." *DeRyke*, 149 Wn.2d at 911. Instead of being given WPIC 70.02 ("To convict the defendant of the crime of theft in the first degree . . ."), the jury should have been given WPIC 70.01, which reads:

> A person commits the crime of theft in the first degree when he or she commits theft of property or services exceeding $1500 in value.

Unlike WPIC 70.02, which includes a specific date as one of the elements of Theft 1 ("That on or about (date), the defendant . . ."), WPIC 70.01 does not make any reference to any specific date, because it defines the generic offense of Theft 1. Thus, if WPIC 70.01 had been given, there never would have been any conflict between it and the two jury instructions (Nos. 8 and 12) which specified January 11, 2010 as the date on which the two charged crimes were alleged to have been committed.[1]

2. Instruction No. 15 conflicted with Nos. 8 and 12. The latter used a fourteen month time period while the former used a pinpoint date. This created a *Petrich* jury unanimity problem.

The jury was given conflicting jury instructions. There were two

[1] Thus, if Scribner's trial counsel had submitted the definitional instruction for Theft 1 (WPIC 70.02) instead of the "to-convict" instruction, no jury unanimity problem would ever have arisen.

"to-convict" instructions for the charged offenses: No. 8 for the False Claim charge, and No. 12 for Attempted Theft 1. Both of these instructions referred to a specific date: January 11, 2010. CP 133, 137. The third "to-convict" instruction, No. 15, was for Theft 1, but that offense was ever charged. CP 140. This instruction referred to the fourteen month time period from July 31, 2009 through October 13, 2010. CP 140.

The conflict between the dates used in these instructions created a *Petrich* jury unanimity problem. If the jury used No. 15, then Scribner's right to a unanimous jury verdict was not protected because No. 15 did not tell the jurors that in order to convict they had to be unanimous as to which act committed by the defendant during the fourteen month time period was the substantial step taken towards commission of Theft 1.

Because no *Petrich* instruction was given, there is a distinct possibility that some jurors based their verdicts on the fact that on January 11, 2010 the defendant said that the collapsed awning covered the whole deck, while other jurors based their verdicts on the fact that on February 2, 2010 the defendant said that no appraisal done when his mother bought the house and that there were no photos of the collapsed awning. Because Instruction No. 15 permitted that to occur, Scribner's state constitutional right to a unanimous jury verdict was not protected.

3. The prosecution argues that the jury simply ignored instruction No. 15 because the jury recognized that had been included in the instructions by mistake. But neither the judge nor the attorneys recognized this.

The State tells this Court that there is nothing to worry about.

According to the State, it is obvious that the jury never relied on No. 15 at all. The prosecution repeatedly states that "Instruction No. 15 was superfluous." *Brief of Respondent ("BOR")* at 26. It was "simply an unnecessary and superfluous instruction." *BOR*, at 19. Because "[t]he instruction was for an uncharged crime" the State asserts that it could not possibly have prejudiced Scribner. *BOR* at 2. *See also BOR* at 3 (Issue A Pertaining to Assignments of Error).

According to the State, the jurors realized that No. 15 was given to them by mistake; they understood it was irrelevant to the case; and they ignored it entirely. But in order to reach this conclusion one has to conclude that the jurors were far more perceptive than the trial judge and both trial attorneys. Neither defense counsel nor the prosecutor recognized that No. 15 instructed the jury on how "to convict" Scribner of the uncharged completed offense of Theft 1. Nor did the judge realize that. When the court went over the instructions with counsel and came to No. 15, no one said: "Whoa, what's this doing in the instruction packet?" No one said, "Hey, we shouldn't be giving an instruction on how 'to-convict' the defendant of an uncharged crime."[2]

Instead, all the trial participants intuitively understood that the jury needed *a definition* of Theft 1 so that it could figure out whether Scribner

[2] If No. 15 had been a "to-convict" instruction that set forth the elements of the crime of kidnapping or rape, surely everyone would have said, "Hey, this shouldn't be in here." The inclusion of such an instruction would have been instantly recognized by all as a mistake – as an instruction that had nothing to do with Scribner's case. But it wasn't an instruction about an obviously irrelevant offense.

took a substantial step *towards* commission of Theft 1. They all understood that because "the basic charge [was] an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that [completed] crime." WPIC 100.02 "Note on Use," quoted in *DeRyke*, 149 Wn.2d at 911. They understood that an instruction defining Theft 1 clearly was relevant to their task because Theft 1 was the crime that the prosecution had to prove the defendant had taken a substantial step *towards committing*. And because it was the yardstick against which the State's proof of a substantial step would be measured, it was important that it not conflict with the other jury instructions.

That is precisely why defense counsel took strenuous exception to No. 15. He recognized that it did conflict with Nos. 8 and 12. He recognized that it created the very *Petrich* problem that the trial judge had tried to solve when she changed the fourteen month time period set forth in those two instructions to the single date of January 11, 2010. RP 1138-1139. Defense counsel argued that No. 15 should be changed so that it also referred solely to one pinpoint date: January 11, 2010. Such a change in No. 15 would have made it consistent with Nos. 8 and 12.

But the prosecutor argued *against* such a modification of No. 15. She argued in favor of retaining its reference to a 14 month period:

> The totality of the jury instructions have to be written in such a way where both sides can argue their theory of the case, and I think that has been done. Even though I've objected to some of these[3] I think the jury instructions as a whole let both people argue their

[3] She objected to the modification of the dates in Instruction Nos. 8 and 12. RP 1137.

theory of the case.

RP 1140. Thus, the prosecutor argued that the conflict between Nos. 8 and 12 on the one hand, and No. 15 on the other, *was a good thing*. And ultimately the prosecutor got her wish: conflicting jury instructions were given, and no jury unanimity instruction was given.

4. Instruction No. 15 wasn't entirely superfluous. It defined the crime that Scribner was alleged to have taken a substantial step towards committing and identified the value, deception, and specific intent elements of the completed offense.

Instruction No. 15 *wasn't* entirely superfluous. On the one hand, because the completed crime was never committed and had not been charged, it was unnecessary to instruct the jury about what had to be proved "to convict" him of the completed offense. However, *some* additional jury instruction was needed so that the jury could have a standard for ascertaining whether or not Scribner took a substantial step *towards* commission of Theft 1.

No. 15 was needed because although No. 12 informed the jury that the prosecution had to prove that "the defendant did an act that was a substantial step toward the commission of Theft in the First Degree," (CP 137), it did not define the crime of Theft in the First Degree. Without an additional instruction, the jury would have no way of knowing what the defendant "substantially stepped" towards. No. 15 told the jurors that the defendant had to have taken a substantial step towards obtaining property "by color or aid of deception." CP 140. It also informed them that Theft 1 required proof that the property in question "exceeded $5,000 in value." CP 140. And finally, it told them that the State had to prove that the

defendant "intended to deprive the other person of the property."[4] CP 140. No. 15 informed the jury about three elements of Theft 1 – the deception element, the value element and the specific intent to deprive element. If No. 15 had been omitted, the jury would not have known that these were elements of Theft 1, and without that knowledge the jury could not have determined whether the State had proved that Scribner had taken a substantial step towards committing Theft 1.

In sum, instruction No. 15 provided a definition of elements of Theft 1, but it conflicted with Instructions Nos. 8 and 12 because it used a different time period. That conflict created the very jury unanimity *Petrich* problem that the trial judge had attempted to solve by altering the dates specified in Instructions 8 and 12.

5. It is disingenuous to claim that Nos. 12 and 15 do not conflict with each other because they each refer to "a different crime." No. 12 defines the charged attempt as taking a substantial step towards *commission of theft in the first degree* with the *intent to commit theft in the first degree.* No. 15 lists the elements of *theft in the first degree.*

According to the State, "The instructions did not conflict with each other because they each defined a different crime." *BOR*, at 19. But it cannot be said that Instruction 15 and Instruction 12 related to "different" crimes. Although Instruction No. 12 was the "to-convict" instruction for *Attempted* Theft in the First Degree, it contained two express references to

[4] As the Supreme Court recently noted, "[W]e look to the base crime to define the specific intent element of criminal attempt . . ." *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012).

Theft in the First Degree. Instruction No. 12 told the jury that the State was required to prove 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 intent to commit Theft in the First Degree;*** and
>
> (3) That the act occurred in the State of Washington.

CP 137 (emphasis added).

Instruction No. 15 told the jury that "[t]o convict the defendant of ***the crime of theft in the first degree***, each of the following four elements must be proved beyond a reasonable doubt: . . ." CP 140 (emphasis added). Since the crime of attempt requires a substantial step towards the commission of the completed crime, it is disingenuous to assert that these two instructions "did not conflict with each other because they each defined a different crime." *BOR*, at 19.

6. As this court recognized in *State v. Lewis*, conflicting instructions in a criminal case require reversal.

In *State v. Lewis*, 6 Wn. App. 38, 491 P.2d 1062 (1971) the trial court gave two conflicting jury instructions on self-defense. The first instruction told the jury that it is lawful for a person under attack to "stand her ground and defend herself." The second instruction told the jury that in assessing the claim of self-defense it should consider "the availability to defendant of a means of escape from danger." Recognizing that these two instructions were contradictory, this Court reversed the defendant's

conviction. There was no analysis of whether the defendant could *prove* that the jury considered the availability of a means of escape. Instead, the Court held that the defendant was entitled to a new trial simply because two jury instructions contradicted each other:

> [I]nstruction No. 14 was confusing. It told the jury it could consider the availability of a means of escape . . . when it had just been told by instruction No. 13 she could stand her ground and defend if her apprehension was reasonable.

Lewis, 6 Wn. App. at 42. The same is true in this case. Instruction No. 15 "allowed the jury" to convict the defendant if he committed any act within a 14 month period that the jurors thought was a substantial step towards commission of theft one. Furthermore, it allowed them to convict the defendant in this manner even if they were not in unanimous agreement as to which specific act within that time frame constituted the substantial step. Thus, the constitutional rule that "jury unanimity must be protected" was violated. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

The burden is not on the defendant to prove that the jury was not unanimous as to which act it relied upon. The burden is on the State to show that the jury was in unanimous agreement on this point. *See State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008) ("the error lies in the inability of the State to assure us" that all 12 jurors agreed on the same underlying criminal act).

7. <u>Even in civil cases it is settled law that the giving of inconsistent instructions on a material issue is prejudicial and requires reversal</u>.

Instruction No. 15 conflicted with Instruction Nos. 8 and 12

because it said that the State had to prove commission of a criminal act during a fourteen month time period and the other two instructions said that the State had to prove commission of the criminal act on one specific day. Numerous cases hold that instructions in criminal cases are constitutionally adequate if they are not misleading or confusing. *See, e.g., State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). The State does not dispute this. Instead, the State stubbornly asserts that despite the fact Instruction No. 15 used a time period that conflicted with the single date mentioned in the other two instructions, Scribner was not prejudiced by this conflict because there is nothing to show that the jury actually used the broader time period set forth in No. 15. Thus, the State argues that Scribner carries the burden of showing that the jury actually relied on No. 15.

But there is no support for this contention. In criminal cases, the law is settled that Scribner need only show that there is a reasonable probability that the jurors were misled or confused. *Boyde v. California*, 494 U.S. 370, 380 (1990). He need not show that they were in fact misled. *See, e.g., State v. O'Neill*, 91 Wn. App. 978, 967 P.2d 985 (1995) ("we cannot conclude that the instructional error had no possible consequence on the jury's verdict"). On the contrary, the State must show that the jury was not misled.[5]

---

[5] Indeed, since "the individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict," *Chiapetta v. Bahr*, 111 Wn. App. 536, 540, 46 P.3d 797 (2002), quoting *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988), it is impossible for anyone to prove that the jurors were in fact

(Footnote continued next page)

Even in civil cases, the rule has been established for roughly a century that a civil litigant is entitled to a reversal and a new trial *without* having to show anything more than the fact that two jury instructions were in conflict with each other:

> The defendant was clearly entitled to correct instructions upon the questions presented, and to instructions which were not contradictory in themselves. ***Contradictory instructions necessarily lead to confusion.*** Clear instructions clear up and make plain to the jury the issues which they are to determine.
>
> For the reason that the instructions above noticed were contradictory, erroneous and misleading, the judgment is reversed.

Paysse v. Paysse, 84 Wash. 351, 355-56, 146 P. 840 (1915) (emphasis added).[6]

8. <u>The State's reliance upon *Corbett* is misplaced</u>.

The State purports to rely on *State v. Corbett*, 158 Wn. App. 576, 593, 242 P.3d 52 (2010). But *Corbett* is obviously distinguishable since in that case the jury *was* given a *Petrich* jury unanimity instruction. In *Corbett* the defendant was charged with four counts of child rape, and the jury was given four identical "to-convict" jury instructions, each of which stated that the defendant had sexual intercourse with the child "between the 1st day of January, 2005 and the 31st day of August 2005." *Id.* at 585

---

confused. If the State were correct that actual jury confusion must be proved, then no criminal defendant one could ever prevail on a claim that the instructions were constitutionally inadequate.

[6] *Accord Renner v. Nestor*, 33 Wn. App. 546, 549, 656 P.2d 533 (1983) ("Instructions which provide inconsistent decisional standards are erroneous and require reversal."); *Crowley v. Barto*, 59 Wn.2d 280, 367 P.2d 828 (1962) (same); *Coyle v. Seattle*, 32 Wn. App. 741, 747, 649 P.2d 652 (1982) ("The giving of conflicting and inconsistent instructions on a material issue is prejudicial error requiring reversal.").

n.6. On appeal the defendant claimed violations of both the double jeopardy right not to be punished twice for the same offense, and his right to a unanimous jury verdict. The Court of Appeals held that neither of these constitutional rights were violated because jury instructions were given that clearly told the jury that each count was based upon a different act (thereby eliminating any possibility of a double jeopardy violation), that they had to be unanimous as to which specific act constituted the offense in each count. *Corbett*, 158 Wn.2d at 585 n.7.[7] Thus, Corbett's right to a unanimous jury verdict *was protected* by a specific jury instruction informing the jury on the need for such unanimous agreement.

No such jury instruction was given in this case. Scribner's jury was *never* instructed that they had to reach unanimous agreement as to which act constituted the crime charged. Nor was the jury instructed that "the State relies upon evidence regarding a single act constituting each count" as the jury was in *Corbett*.[8]

Finally, the prosecution argues that "like *Corbett*, the State's closing argument made it clear to the jury that in order to find the defendant guilty [of both of the charged offenses] it had to find that Scribner misrepresented the size of the awning to Trevor Evans and Ben

---

[7] Jury Instruction No. 6 stated: "In alleging that [Corbett] committed Rape of a Child in the First Degree, the State relies upon evidence regarding a single act constituting each count of the alleged offense. ***To convict [Corbett] on any count, you must unanimously agree that this specific act was proved***. (Emphasis added).

[8] The *Corbett* opinion states, "The jury instructions in the context of this case clearly conveyed to the jury that there were four counts related to four specific incidents of abuse that they were to consider." *Id.* at 593. The jury instructions in the present case said *nothing* about which specific incidents of deception the jurors were to consider.

Steele on January 11, 2010." *BOR,* at 23. The State then cites to two places in the record of its closing argument where the prosecutor discussed the defendant's January 11, 2010 statement misrepresenting the size of the collapsed awning. *BOR* at 24, citing to RP 1164-65 and RP 1167-68.

But the State ignores the fact that it did *not* confine its closing argument to remarks about the statement that the defendant made on January 11, 2010. On the contrary, the State told the jury that additional acts of deception were committed later "in early February when" one of the insurance adjustors "starts sending the defendant emails saying, can you give me something to show me what was there before?" RP 1179. The prosecutor urged the jury to conclude that the defendant lied when he told the adjustors there was no appraisal done when his mother bought the house and thus there were no appraisal photographs of the collapsed awning. The prosecutor told the jury that the defendant's responses – no there was no appraisal and there were no such photos -- were additional acts of deception. RP 1180-81.[9]

---

[9] "And the defendant responds by protecting and maintaining this misrepresentation. And this brings us to the legal and commonsensical definition of deception which I showed you before. Deception occurs when an actor knowingly creates or confirms another's false impression that the actor knows to be false. – that's the original misrepresentation about the size – or fails to correct another's impression that the actor previously has created. And that's what occurred here.

"Exhibit 72, ***he asks for any photos, and the response to the request is, I spoke to Marilyn. She is not aware of any photos.***

"So we asked for an appraisal. And in response to that request, he says to the request for an appraisal, he says, Trevor, she didn't get one.

"Both of these responses are untruthful. You know and he knew that he was aware of the photos that Martin Hill took because he was there when he took them." (Emphasis added).

The prosecutor discussed the defendant's presence at the appraisal at great length. RP 1183-84. And then the prosecutor reiterated how the defendant's statements made in early February of 2010-- that there was no appraisal and there were no photos of the collapsed awning -- were additional acts which were "all part of the deception." RP 1184-85.[10]

These allegedly false statements made by Scribner were *not* made on January 11, 2010. These statements were made in early February. Thus, *unlike* the closing argument in *Corbett*, the prosecutor did *not* make clear in closing argument that she was relying on a single act as the basis for a conviction on each count.[11]

The State cites to *State v. Crawford,* 159 Wn.2d 86, 99, 147 P.3d

---

[10] "Now, what's noteworthy about these responses to the photos and the appraisal is not only that the responses are false but that the way he's answering them is he's answering them (sic) in a way to distance himself as the person with knowledge or at least to attempt to do that.

The answer to the photo question, even though he's the one clearly handling this claim, he's doing all the communication . . . This was being completely handled by the defendant, and yet when he's talking about the photos, his response is Marilyn is not aware of any photos. Well, that's a very different statement than I'm not aware of any photos. It may be a true statement that Marilyn is not aware of any.

But ***clearly what Mr. Evans is asking for is photos, and he's saying, Marilyn's not aware of any, but he is***. He was there when Mr. Hill took the photos. These are the photos you see with the bars hanging down that demonstrate unequivocally that this only covered one portion of the deck on that side of the chimney.

The appraisal. What's the response? She didn't get an appraisal. Well, the bank got one. He knew that. The question that's being asked is, is there an appraisal? And instead of saying "yes" or "no", he's saying, oh, Marilyn didn't get one. He's distancing himself from that information. ***That's all part of the deception.*** . . . " (Emphasis added).

[11] In her rebuttal closing argument the prosecutor returned to this theme and argued that there were actually *four* acts of deception. In addition to his January 11, 2010 statement to Mr. Evans and Mr. Steele about the size of the collapsed awning, the prosecutor said, "He continued his deception when he said he didn't know who painted the house. . . He continued his deception when he claimed there were no photos when, in fact, he knew Mr. Hill took photos because he was there when they were taken. . . He continued his deception when he falsely claimed there was no appraisal . . . ." RP 1238.

1288 (2006) in an effort to persuade this Court that Scribner "must affirmatively prove prejudice by showing that the error had an actual, but just a conceivable, effect on the outcome." *BOR* at 19. But *Crawford* is not on point. There was no issue in *Crawford* regarding conflicting jury instructions. Instead, the issue there had to do with defense counsel's failure, in a three strike case, to investigate Crawford's prior convictions.[12] The State also purports to rely on *State v. Barry*, 179 Wn. App. 175, 317 P.3d 528 (2014), but again that case has nothing to do with jury instructions which conflict with each other.[13]

The State argues that there is no possibility of prejudice because "[j]urors are presumed to follow the court's instructions" and therefore this Court can presume that the jury followed Instruction No. 15. *BOR*, at 20. It is difficult to follow the State's logic here. No. 15 permitted the jury to consider acts done anytime between July 31, 2009 and October 13, 2010. CP 140. But Nos. 8 and 12 limited the jury to considering the defendant's conduct on January 11, 2010. Thus, these two instructions

---

[12] Crawford had a prior Kentucky conviction which defense counsel failed to investigate because he mistakenly thought it was a misdemeanor. The Court held this failure to investigate was deficient conduct, but also held that this deficient performance did not prejudice Crawford because even if defense counsel had investigated and had discovered the true nature of the Kentucky conviction, there was no indication that the prosecutor would have offered Crawford a plea bargain under which Crawford could have escaped serving a sentence of Life Without Parole.

[13] *Barry* simply involved one erroneous jury instruction which informed the jury that it could consider the defendant's courtroom demeanor during deliberations. But the defendant failed to put anything in the record regarding what his courtroom demeanor was. Since there was no indication that the defendant's demeanor was unruly, or unflattering in any way, there was zero possibility that the improper instruction prejudiced him.

conflicted with Instruction No. 15. It is precisely because they conflict with each other that no court can presume that Scribner's jury followed all three instructions. It simply isn't possible to consider only the defendant's conduct committed on one day and at the same time to consider all of his conduct committed over a fourteen month period.

9. The State misstates the proper harmless error test. The correct test is whether a juror could have entertained a reasonable doubt that each incident established the crime.

The State claims that the failure to protect Scribner's right to a unanimous jury verdict was harmless error. The State cites to the original harmless error test adopted by the Court in *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984) which focused on the sufficiency of the evidence of each act to prove the crime. There the Court said that "the error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt." *Petrich,* 101 Wn.2d at 573, quoted in *State v. Kitchen*, 110 Wn.2d 403, 405, 756 P.2d 105 (1988). The State cited to this page of *Kitchen* and represents to this Court that this is the proper harmless error test. *BOR* at 27.

This is not the correct test. *Kitchen* changed the test so that instead of focusing on the sufficiency of the evidence[14] it now focuses on the possibility of reasonable doubt: "[T]he error will be harmless only if no rational trier of fact could have entertained a reasonable doubt that each

[14] The *Kitchen* Court recognized that in *Petrich* it has "inappropriately relied" on a prior alternative means case, where unanimity is not required, whereas in a multiple acts case unanimity is required. *Kitchen*, 110 Wn.2d at 410.

incident established the crime beyond a reasonable doubt." *Kitchen*, 110 Wn.2d at 406, citing *State v. Loehner*, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Schofield, J., concurring). "Applying the correct standard of review," the *Kitchen* Court held the error was *not* harmless in that case. *Id.* at 407. The question is not whether a juror could have found the State's evidence sufficient to establish that each of the multiple acts constituted the crime charged, but rather whether any juror could have found the State's evidence *insufficient* because it left them with a reasonable doubt as whether any one of those acts constituted the crime.

> ***This approach presumes that the error was prejudicial*** and allows the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

Kitchen, 110 Wn.2d at 411 (emphasis added).

In this case, the jurors could have based its guilty verdicts on any one of three statements made by the defendant, provided that they found Scribner made the statement knowing that it was false:

1. stating the collapsed awning covered the whole deck;

2. stating that no appraisal was ever done ; and

3. stating that there were no photos of the prior collapsed awning.

The defense claimed that each of one these erroneous misstatements was made by mistake, without any intent to deceive. The harmless error question then, is this: Is it possible for a rational juror to have entertained a reasonable doubt as to whether one of these erroneous statements was made with a deliberate intent to deceive the insurance company?

Obviously, it is possible for a rational juror to have had such a doubt as to one or more of these three statements. Particularly in light of the other things that were going on in Scribner's life,[15] some jurors may have thought one or more of his erroneous statements was simply the product of an innocent mistake or a bad memory. Hence, the State cannot carry its burden of overcoming the presumption of prejudice.

B. Testimony That Johnson Felt That the Defendant's Mother Was "Evasive" Violated Scribner's Right to Trial By Jury. Defense Counsel Should have Objected to it.

The State argues that it would have been futile for defense counsel to have objected to the portion of the email chain that contained Johnson's statement that Warsinke was "evading" because that portion of the e-mail would have been admissible under the rule of completeness codified in ER 106. The State erroneously treats ER 106 as if mandates the admission of any other part of the writing that the other party wants to have admitted. In fact, the rule states that when a portion of a writing is admitted, the court "***may***" admit "any other part" of the writing "which ought in fairness to be considered contemporaneously with it."

Defense counsel elicited testimony about the portions of an e-mail chain where Johnson stated that she did *not* show a photo of the collapsed awning to Warsinke, that she had no intention of doing so, and that Steele endorsed the idea that she should not show it to Warsinke. Def. Exhibit

---

[15] Scribner was taking care of twin 2 year olds while his wife was in the hospital, and his mother's boyfriend was in a bad car accident. RP 1066.

205.[16] But counsel did not elicit the portion of the e-mail chain where Steele asked her if Warsinke was evading and Johnson replied, "Evading, definitely." This latter portion was then elicited by the prosecutor.

The State argues it would have been futile to object to the latter portion, but never explains why. The State never explains why the comment "Evading, definitely," is something that "ought in fairness to be considered along with the testimony that Johnson concealed the photo of the collapsed awning from Warsinke. The State would have this Court believe that in fairness the evading comment had to be included because it explained ***why*** Steele agreed with Johnson that she should not show Warsinke the photo and that the best thing to do was to keep Warsinke guessing. But in fact, the record shows this is not true. Steele was explicitly asked ***why*** he felt they should keep Warsinke guessing and in his answer he did ***not*** refer to Warsinke's evasiveness. Instead, he explained that the photo wasn't shown to Warsinke simply because the insurance company's investigation was ongoing. RP 812.[17]

---

[16] The chain began at 8:17 a.m. on April 7, 2010 with Traci Johnson sending an email to Benjamin Steele that said identified the subject as "Warsinke" and which said, "Here is a brief of the r/s. I did not make much headway yesterday with her and her atty. Sorry." *Id.* Steele replied 40 minutes later: "Thanks Traci, Hopefully they can provide us with the requested documentation. Did you show them the photo? What were their thoughts to the photo?" *Id.* Johnson replied, "Given how the statement went, no, I did not show it to them, have no intention of it at this point." *Id.* Steele then replied, "That works for me. Keep them guessing." *Id.* Johnson answered, "Yesterday did not go well. She hardly answered any questions. It was really a waste of time." *Id.*

[17] Q. [Defense] counsel asked about your statement. It was guessing or keep them guessing. Do you remember that?
A. I do.
Q. ***Why*** did you say that?

(Footnote continued next page)

ER 106 only applies if the other part of the writing "ought in fairness to be considered contemporaneously" with the part of the writing already admitted. "The trial judge need only admit the remaining portions of a statement which are necessary to clarify or explain the portion already received." *State v. Simms*, 151 Wn. App. 677, 692, 214 P.3d 919 (2009), quoting *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). Since the State was able to explain the "keep them guessing" comment *without* referring to Warsinke's perceived "evasiveness," the rule simply did not apply. Had defense counsel objected, his objection likely would have been sustained. Here, as in *Simms* and *Larry*, it is highly likely that had defense counsel objected to admitting the "evasive" portion of the statement, the trial judge would have exercised his discretion by excluding it as unnecessary, especially since testimony about the credibility of another witness violates the constitutional right to a jury trial.

Finally, it should be noted that there was no possible strategic reason for not objecting. Since the rule expressly recognizes the judge's discretion, at the very least there was a strong possibility that his objection would be sustained. Nothing was to be gained by failing to object.

The State claims that the defendant's mother was an unimportant witness and takes pains to note that she was only one of 19 witnesses called at trial. BOR at 41. But 15 of those witnesses were prosecution

---

A. Basically, at that point, we had an investigation. ***We were in the midst of an investigation*** and, you know, Traci was not in a position where she wanted to share that information ***because***, again, ***the investigation was ongoing,*** and I was in agreement with that. (Emphasis added).

witnesses. She testified on the last day of trial during which evidence was presented, so her testimony would have been fresh in the jurors' minds. She testified that she herself did not know the size of the awning (which had collapsed more than a year before she spoke to the insurance adjustors). Her testimony was not unimportant. The failure to object to the opinion that she was "evading" was highly prejudicial.

C. Steele's Testimony That Scribner's Claim was Denied on Grounds of Fraud and Concealment Violated Scribner's Right to Trial By Jury. Defense Counsel Should Have Objected to it.

Scribner presented a claim for replacement of a collapsed awning that he said – incorrectly – had covered the entire deck. After locating some appraisal photos of the collapsed awning – that Scribner incorrectly has said did not exist -- the insurance company denied the claim because in fact the awning had not covered the entire deck. The State contends that Steele's testimony that the company denied the claim on grounds of fraud and concealment "was factual testimony" and "not opinion testimony regarding Scribner's guilt." *BOR* at 43. The State argues that Steele's testimony "simply connected Scribner's misrepresentation to the charge of Attempted Theft in the First Degree." *Id.*

This is sheer sophistry. Simply because an opinion provides the motive for a person's action, that does not convert the opinion into something other than an opinion. Put another way, it is a "fact" that the insurance adjustors believed that Scribner had tried to defraud them. In their opinion he deliberately concealed the appraisal photos and deliberately misrepresented the size of the collapsed awning because he

was trying to deceive them. But while it is a "fact" that they held these opinions, and a "fact" that the awning did not cover the entire deck, it is nevertheless an "opinion" that the adjustors believed Scribner acted with the specific intent to deceive them. Moreover, this was an "opinion" on the sole contested issue at trial: Did Scribner make incorrect factual statements deliberately or accidentally and without any intent to deceive?

Witness Steele went beyond testifying to the fact that the appraisal photo showed that the collapsed awning wasn't that big. He testified as to what he thought was going on inside Scribner's mind. This testimony violated the constitutional right to a jury trial in the same way that testimony that the defendant was a "smart drunk" did:

> Officer Fitzgerald's testimony that Easter was evasive in response to pre-arrest questioning and was a "smart drunk" was elicited to insinuate Easter's guilt, and was in violation of the trial court's pretrial order excluding such commentary. [FN 11]. **This testimony embodied Officer's Fitzgerald's *opinion* Easter was hiding his guilt.** As such, it was impermissible.

State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (emphasis added).

Scribner has raised *two* claims regarding Steele's opinion testimony: violation of the constitutional right to trial by jury (Issue No. 6) and violation of the right to effective representation of counsel (Issue No. 5). The State addresses only the latter claim.[18]

---

[18] In conflict with its argument that there was nothing objectionable about the testimony, the State argues that defense counsel probably had a strategic reason for failing to object. The State argues that he probably didn't object to Steele's opinion that Scribner committed fraud and concealment because that would just have drawn more attention to Steele's testimony. First, if this were true, then no attorney would ever object

(Footnote continued next page)

The State completely ignores Scribner's claim that the testimony violated the right to jury trial and focuses solely on the claim of ineffective assistance of counsel. There are markedly different prejudice rules for the two claims. For the IAC claim, Scribner bears the burden of establishing prejudice, which means he must show there is a reasonable probability that the opinion testimony influenced the outcome of the trial. But for the right to jury trial claim, it is the State that bears the burden of proof:

> [T]he admission of such testimony is constitutional error. [Citation]. Any error that infringes on a constitutional right is presumed prejudicial. And the State must show that the error was harmless beyond a reasonable doubt.

State v. Dunn, 125 Wn. App. 582, 593, 105 P.3d 1022 (2005). Here the State cannot show that Steele's inadmissible opinion that Scribner committed fraud did not contribute to the jury's verdicts.

III. CONCLUSION

For these reasons, appellant Scribner asks this Court to reverse his convictions and remand for a new trial.

Respectfully submitted this 29th day of August, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz, WSBA 8787
Attorneys for Appellant

---

to such blatantly inadmissible testimony. Second, defense counsel could have asked for a side bar and made his objection there, or he could have made his objection at the next opportunity when the jury was not present. Third, the State's contention that defense counsel did not want to draw more attention to it conflicts with the State's argument that the testimony was not prejudicial.

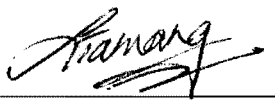
CERTIFICATE OF SERVICE

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 August 29, 2014, I served a true and correct copy of the foregoing document on the following via **US MAIL**:

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

Mr. Keith Scribner
P. O. Box 8262
Spokane, WA 99203

SIGNED at Seattle, Washington this 29th day of July, 2014.



Lily T. Laemmle
Legal Assistant to James E. Lobsenz