Supreme Court No. 92388-4

Court of Appeals No. 31792-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH SCRIBNER,

Appellant

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Keith Scribner seeks review of the decision issued below.

B. DECISION BELOW

Scribner seeks review of the decision below issued on July 16, 2015. (Appendix A). A motion for reconsideration was filed, and on September 3, 2015 the Court of Appeals issued an error-filled *Order Denying Reconsideration and Denying Motion to Publish.* (Appendix B). After examining that order, Scribner contacted the Clerk of the Court below and pointed out that no one had ever filed a motion to publish, and that the order misidentified two of the three panel members who decided 34the case.[1] On September 15, 2015, the Court of Appeals issued an *Amended Order Denying Reconsideration*, which corrected the names of the panel judges deciding the case, and deleted the prior reference to a motion to publish. Appendix C).[2]

C. INTRODUCTION

In multiple act cases the jurors must be instructed that in order to convict the defendant they must identify at least one act that all twelve of them agree constituted the crime. When they are not so instructed, there is a violation of the right to a unanimous jury verdict. When that happens

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[1] The September 3rd *Order* identified the three panel members as Judges Brown, Korsmo and Siddoway. But in fact the three judges who heard argument and decided Scribner's case were Judges Brown, Fearing and Lawrence-Berrey.

[2] In the cover letter that accompanied the *Amended Order Denying Reconsideration*, the Clerk stated that Scribner had thirty days from the filing of the amended order in which to seek discretionary review. (Appendix C).

appellate courts must decide if the constitutional error was harmless.

But the law regarding the proper harmless error test for violation of the right to a unanimous jury verdict is in a state of utter confusion. This Court first adopted one test in *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). It then repudiated that test and adopted a different test in *State v. Kitchen,* 110 Wn.2d 403, 756 P.2d 105 (1988). Finally, in *State v. Camarillo,* 115 Wn.2d 60, 794 P.2d 850 (1990), this Court issued an opinion which made reference to *both* tests. While the two tests are radically different, the *Camarillo* opinion failed to recognize this, treated the two tests as if they were the same, and thus produced an opinion which is internally inconsistent. In the present case, the Court of Appeals, relied solely upon the one sentence in *Camarillo* that referred to the repudiated harmless error test of *Petrich*, while ignoring the parts of *Camarillo* that refer to the *Kitchen* test. In his reconsideration motion, Scribner pointed out the internal conflict in the *Camarillo* opinion and asked the Court of Appeals to recognize that it had erroneously applied the repudiated *Petrich* test. But the Court of Appeals denied reconsideration without discussing, or even acknowledging, the conflict between the two tests; without acknowledging the conflict *within* the *Camarillo* opinion; and without applying the *Kitchen* test.

D. ISSUES PRESENTED

1. **In a multiple-act case, what is the correct test for determining whether a violation of the right to a unanimous jury verdict was harmless? Is it the *Petrich* test, or the *Kitchen* test?**
2. **When one jury instruction conflicts with two other**

instructions, and there is a reasonable likelihood that the jury was confused and applied the wrong law, is a new trial required under the due process doctrine of cases like *Boyde v. California* and *State v. Lewis*?

3. **When a defendant is on trial for attempting to perpetrate an insurance fraud, and one of the investigators testifies that claim the defendant submitted was denied for "concealment or fraud," does the failure of defense counsel to object to such testimony constitute ineffective assistance of counsel in violation of the Sixth Amendment?**

4. **When a defendant's doctor fails to order an available medical diagnostic test, is that "a failure to exercise due diligence" in discovering evidence that could have been discovered prior to trial which precludes granting a new trial?**

E. STATEMENT OF THE CASE

Scribner was convicted of one count of Attempted Theft 1° and one count of Submitting a False Claim to an insurance company. CP 148-49. After a big snowstorm, an awning on the side of the home owned by Scribner's elderly mother, Marilyn Warsinke, collapsed from the weight of the snow. *Slip Opinion* ("*SO*"), *2.* Scribner helped his mother present a claim on her homeowner's policy to her insurance company. *SO, 2.* Ultimately, the insurance company never paid anything on the claim because it decided that the claim was fraudulent. *SO, 3.*

The claim made was premised on the representation that the collapsed awning was quite large, running the entire length of the house. *SO, 2.* The debris from the collapsed awning was cleared away and it was not until many months later that insurance investigators came to inspect the house. The investigators asked Scribner if there had ever been an appraisal of his mother's house, and whether his mother had any photos of

the house which showed the awning. Scribner said there had been no appraisal, and there were no pre-loss photos. But the insurance company eventually discovered that there *had* been an appraisal, and that photos *had* been taken. *SO, 2-3.* The appraisal photos showed that the collapsed awning was nowhere near as large as Scribner had said. *SO, 2.*

Scribner testified that he had made an honest mistake. He said: (1) that he truly (but erroneously) remembered that the awning was as large as he had said it was; (2) that he did not recall that his mother's house had been appraised; and (3) that he thought that there were no pre-loss photos of the house.

Although there was some medical evidence to support Scribner's claim that he had a faulty memory, Scribner did not present this evidence at his trial. Scribner told his counsel that he had some medical problems as a result of exposure to some toxic chemicals, but his counsel chose not to present any medical evidence to support Scribner's trial testimony that he had a poor memory.

At trial the State presented evidence that the insurance company did not believe Scribner and that it concluded that he had tried to defraud the company. One investigator testified that the company denied the insurance claim for four reasons. *SO, 4.* The prosecutor asked the investigator to confirm that one of those reasons was "concealment or fraud." *SO,4.* Defense counsel did not object, and the investigator responded, "Correct." *SO, 4.*

Scribner argued that his attorney's failure to object constituted

ineffective assistance of counsel. Two of the judges below were not persuaded that the investigator's testimony constituted an impermissible opinion on guilt, but ruled that "[e]ven assuming that the statement was inadmissible and defense counsel was deficient for not objecting, Mr. Scribner cannot establish prejudice." *SO, 13.* One judge concurred in this result, reasoning that investigator's "testimony that Liberty Northwest denied the claim based on fraud should have been objected to by Keith Scribner's counsel and should have been excluded," but agreed with the other judges that counsel's "failure to object to the testimony did not prejudice Keith Scribner." *Fearing, J., Concurring.*

As the Court below noted, the information charged Scribner with committing both offenses sometime during a period of 13-1/2 months:

> The State charged Mr. Scribner with submitting a false claim or proof to an insurance company and attempted first degree theft. The information specified Mr. Scribner committed each of the two charged crimes during the period of time "from July 31, 2009 to October 13, 2010." [Citation]. The charging period was from the date the insured made the claim (July 31, 2009) to the date Liberty Northwest denied the claim (October 13, 2010).

SO, 3.

Although there were only two charges, the trial judge gave the jury *three* to-convict instructions. Two of these instructions, (Nos. 8 & 12), specified what had to be proved in order to convict Scribner of the *two* charged crimes: causing the presentment of a *False Claim or Proof* (Count I) and *Attempted Theft 1°* (Count II). The *third* to-convict instruction (No. 15) told the jury what had to be proved in order to convict

Scribner of the *completed* offense of *Theft 1°*, even though Scribner was never charged with any completed theft offense.

The initial drafts of all three of these to-convict instructions stated that the prosecution had to prove that the crime in question occurred within the 13-1/2 month charging period. But on the last day of trial defense counsel pointed out that this created a jury unanimity problem because the prosecution was claiming that each of several different acts committed within that period constituted the crime charged. RP 1026-1028. Therefore, defense counsel argued that a *Petrich* multiple acts, jury unanimity instruction was required. The trial judge "instructed the parties to craft a *Petrich* instruction, but when they could not agree on the language," the trial judge modified the language of Instructions 8 and 12 "by changing the charging period [sic][3] of July 31, 2009 through October 13, 2010 to specify the single date of January 11, 2010." *SO, 4.* But the trial judge did not modify the language of Instr. No. 15 – the to-convict instruction on what the court referred to as "the underlying crime" of completed first degree theft – leaving the reference to the entire 13-1/2 month period in that instruction. *SO, 4-5.*[4]

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[3] The judge didn't actually change the "charging period" since she did not amend the information, but she did change the time period mentioned in these two instructions.

[4] "[I]nstruction [No. 15] contained the broader language of "July 31, 2009 to and including October 13, 2010" to convict Mr. Scribner of first degree theft. CP at 140. The court allowed the instruction because the "substantial step can be pinpointed at the [January 11, 2010] meeting, but your theft, the underlying crime, still has that range of dates that allows the State to argue this deception through these events." RP at 1134-35. Instruction 8 (to-convict on false claims of proof) and Instruction 12 (to-convict on attempted first degree theft) both limit the occurrence date to January 11, 2010." *SO, 5.*

Defense counsel objected that modifying Nos. 8 and 12, without also modifying No. 15, did not solve the problem because No. 15 still referred to a 13-1/2 month period during which Scribner committed several acts. RP 1138.[5] The trial judge noted defense counsel's exception to Instruction No. 15, refused to give a *Petrich* jury unanimity instruction, and gave both instruction Nos. 8 and 12 (which referred to one specific day) and No. 15 (which referred to the 13-1/2 month period.

The Court of Appeals acknowledged that there were multiple acts alleged to constitute the basis for each count, but held that any violation of the right to jury unanimity was harmless. The Court gave two reasons in support of this conclusion. First, despite the fact that in closing the prosecutor explicitly argued that each of several acts constituted attempted Theft 1°, the Court said there had been "an election" of the act committed on January 11, 2010 (that is, the act of stating that the collapsed awning had run the whole length of the house). Even though the prosecutor had *not* confined her argument to this one act, the Court of Appeals reasoned that the jury instructions had made such an election. *SO, 9.*

> ***The instructions as a whole informed the jury*** that in order to find Mr. Scribner guilty of false claims or proof and attempted first degree theft, ***it had to conclude Mr. Scribner misrepresented the size of the awning to Mr. Evans and Mr. Steele on January 11, 2010.*** This was clearly specified in the to-convict instructions on

[5] He noted that several acts were committed during that time period: (1) the cleaning up of the debris from the collapse of the awning in 2009; (2) the making of a statement on January 11, 2010 about the size of the collapsed awning; and (3) the making of additional statements later in 2010 that there had been no appraisal of his mother's home when she bought it; and (4) that there were no pre-loss photos of the awning.

these offenses (8 and 12).

SO, 9-10 (emphasis added).

The fact that Instruction No. 15 – the third to-convict instruction – did *not* specify a single date, and referred instead to a 13-1/2 month period, did not dissuade the Court of Appeals. According to the Court: "Instruction 15 did not conflict with instructions 8 or 12; rather, it was superfluous." *SO, 10.*[6]

Second, relying on one sentence in *Camarillo*, the Court of Appeals concluded that "any unanimity problem was harmless error because there was sufficient evidence for the jurors to have concluded that Scribner was guilty because each of the multiple acts occurred:

> We review the failure to give a multiple acts unanimity instruction for constitutional harmless error. [Citation]. Such an error is not harmless unless "a rational trier of fact could find that each incident was proved beyond a reasonable doubt." *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990) (quoting *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091 (1985).

SO, 9.

Instead of asking whether a rational juror ***could*** have had a ***reasonable doubt*** as to Scribner's guilt based ***on any one of the multiple acts***, the Court of Appeals considered whether a rational juror ***could*** have

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[6] Apparently the Court concluded that No. 15 was "superfluous" because it referred to the completed offense of Theft 1 and that crime was never charged. "Therefore" – the court reasoned – the jury must have paid no attention to it. Since the jury didn't convict Scribner of the completed offense of Theft 1 (how could it since no verdict form referred to that offense?), the court of Appeals reasons the jury must have just disregarded Instruction No. 15 entirely. The Court simply ignores the possibility that the jury used the time period specified in Instr. No. 15 – the instruction that defined the completed crime that Scribner was accused of attempting to commit – when deciding whether Scribner did in fact take a substantial step towards committing that crime.

been persuaded ***beyond a reasonable doubt*** that ***one*** of the acts alleged – misrepresenting the size of the collapsed awning -- constituted an attempt to deceive the insurance company into paying on his mother's claim:

> Moreover, any unanimity problem was harmless error. ***Substantial evidence established Mr. Scribner knowingly made a material misrepresentation when he told Liberty Northwest the awning destroyed was a large elaborate awning*** costing hundreds of thousands of dollars to adequately replace. Mr. Starkey, the prior homeowner, testified the awning was hand-built by him at the cost of approximately $300 and that it covered less than half the deck. The photographic exhibits, appraisal, and testimony established ***the prior awning did not cover the whole deck. A rational juror considering this evidence could solely conclude Mr. Scribner lied.***

SO, 10 (emphasis added). But the Court never asked whether a rational juror "could" conclude that the State had ***not*** proved that Scriber "knowingly made a material misrepresentation when he told Liberty Northwest" that there had been no appraisal when his mother bought the house, or when he told the company that there were no pre-loss photos of the awning. It did ***not*** ask whether a "rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt," as required by *Kitchen*, 110 Wn.2d at 406.

F. REASONS WHY REVIEW SHOULD BE GRANTED

1. **The law in this State is hopelessly confused as to which harmless error test applies to violations of the right to a unanimous jury verdict in a multiple acts case.[7] This is a constitutional issue of great importance.**

[7] Because there are so many conflicts both between and within the opinions of the Supreme Court and the Court of Appeals' opinion in *Gitchel, all* of the criteria in RAP 13.4(b) are met in this case.

(a) The issue is unsettled because *Camarillo* -- the last decision of this Court to address this issue – is internally contradictory. Part of *Camarillo* conflicts with the Court's previous decision in *Kitchen*.

This Court has struggled to identify the appropriate harmless error rule for the violation of the constitutional right to a unanimous jury verdict in multiple act cases. *Initially*, in *State v. Petrich*, 101 Wn.2d 566, 573, 683 P.2d 173 (1984), this Court adopted a test under which the error is harmless "if a rational trier of fact could have found each incident proved beyond a reasonable doubt." Four years later, in *State v. Kitchen*, 110 Wn.2d 403, 406, 756 P.2d 105 (1988), this Court acknowledged it had *misstated* the proper harmless error test, *repudiated* the *Petrich* test, and held that the violation of the right to a unanimous jury verdict in a multiple act case is harmless "only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." The *Kitchen* opinion states, "Aside from its enunciation of the harmless error test, *Petrich* remains good law." *Id.*

The difference between these two tests is enormous. The *Petrich* test is a "sufficient-to-find-guilt" test. Under the repudiated *Petrich* test, the error is harmless so long as it is possible that a jury could have found that each of the multiple acts constituted the crime charged. Only if the evidence is insufficient to support a guilty verdict for one of the multiple acts, does the error require reversal. Since prosecutors seldom make accusations for which they have no potentially credible evidence, the *Petrich* test is extremely easy to satisfy.

The *Kitchen* test, on the other hand, is extremely *difficult* to satisfy. Under the *Kitchen* test, the error is presumed to be prejudicial and a new trial is required unless it is *impossible* for any rational juror to have "entertained a reasonable doubt" as to any one of the multiple incidents. Thus, the *Kitchen* test is accurately described as "possible-to-acquit" or "possible to have a reasonable doubt" test. If it is possible for a rational person to have found that the State failed to prove guilt for *any one* of the multiple acts, then the error requires reversal because it is not harmless.

The *Kitchen* test is a much stricter test than the *Petrich* test. The set of cases that satisfy the *Petrich* test includes a huge number of cases that do *not* satisfy the *Kitchen* test. That is because in many cases where a rational juror "could" find that guilt was proved beyond a reasonable doubt for each incident, it is simultaneously true that a rational juror "could" have had a reasonable doubt as to one or more of the incidents. This is just another way of saying that there are many cases where a rational jury *could* reach *either* conclusion. Indeed, one would expect most tried criminal cases to be cases where it is *possible* for a rational jury to return *either* a guilty *or* a not guilty verdict. Moreover, it is quite possible for one rational juror to have a reasonable doubt while another juror does *not* have a reasonable doubt. Every one of these "it-could-go-either-way" cases would satisfy the *Petrich* harmless error test; but ***none*** of these cases would meet the stricter *Kitchen* harmless error test.

In *Kitchen* this Court partially overruled *Petrich* and changed the harmless error test from the sufficiency test (a rational juror could have

been convinced beyond a reasonable doubt) to the rational reasonable doubt case (a rational juror could have entertained a reasonable doubt). *Reply Brief* at 18-19. *Kitchen* explicitly recognized that the Court has erred in *Petrich*: "[In *Petrich*] we inadvertently employed the standard applicable to *alternative means* cases rather than the standard for multiple act cases." *Kitchen*, 110 Wn.2d at 410 (italics in original).

To correct its erroneous statement of the harmless error test in *Petrich*, in *Kitchen* this Court held that "the proper standard" for determining harmless error was stated in Judge Schofield's concurring opinion in *State v. Loehner*, 42 Wn. App. 408, 711 P.2d 377 (1985):

> [T]he error is not harmless if a rational trier of fact ***could have a reasonable doubt as to whether each incident established the crime*** beyond a reasonable doubt. *Loehner*, 42 Wn. App. at 411, 711 P.2d 377 (Schofield, J., concurring); [citation omitted]. ***This approach presumes that the error was prejudicial*** and allows for the presumption to be overcome ***only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.*** [Citations]. This standard best ensures that when constitutional error occurs, a conviction will not be upheld unless the error is "harmless beyond a reasonable doubt." [Citation].

Kitchen, at 411-412 (emphasis added). Because the State could not meet this strict harmless error test, Kitchen's conviction, and the conviction of the appellant in the companion case, were both reversed. *Id.* at 412.

(b) The Lead Opinion in *Camarillo* Is Internally Inconsistent. In Different Sentences the Lead Opinion Endorses Both the Old *Petrich* Test and the New *Kitchen* Test.

Having corrected the error made in *Petrich*, this Court proceeded to muddy the waters in *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850

(1990). The *Camarillo* lead opinion explicitly states the correct harmless error test several times. But it also states the incorrect test once. Camarillo was charged with a single count of indecent liberties but the one count information was based upon three distinct acts that allegedly occurred within a one year time period. The jury was not instructed that it had to unanimously agree that the defendant committed the crime on at least one of the three occasions. The Court's lead opinion states the applicable harmless error test several times. First, the opinion simply quoted from the Court's recent decision in *Kitchen*:

> *Kitchen* stated the standard of review when there is an error in multiple acts cases which puts jury unanimity in question, as follows: . . .
>
> ". . . the proper standard . . . is . . . . if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. . . .

Camarillo, 115 Wn.2d at 64-65, quoting *Kitchen*, 110 Wn.2d at 411. Thus this first portion of the *Camarillo* opinion states the correct test.

Unfortunately, the very next sentence in the *Camarillo* lead opinion states the *wrong* harmless error test, as follows: "Thus, in multiple acts cases the standard of review for harmless error is whether a "rational trier of fact could find that each *incident was proved beyond a reasonable doubt." Camarillo*, at 65, citing to *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091, *review denied*, 105 Wn.2d 1003 (1985).

In the next paragraph, *Camarillo* refers to *Kitchen* again, applies the correct harmless error test, and concludes that the error was not

harmless: "[A]s in Kitchen's case, the jury heard conflicting testimony "as to each of those acts and a rational juror could have entertained a reasonable doubt as to whether one or more of them actually occurred." *Camarillo*, at 65, quoting *Kitchen*, 110 Wn.2d at 412. Six pages later, the *Camarillo* Court again states the test correctly:

> Our task is to determine whether a rational trier of fact could have a reasonable doubt as to whether any of the incidents did not establish the crime.

Camarillo, at 71. But the very next sentence states the test incorrectly: "In other words, whether the evidence of each incident established the crime *beyond* a reasonable doubt." *Camarillo*, at 71.

The lead *Camarillo* opinion is simply oblivious to the fact that the two tests, (1) "could" have been convinced *beyond* a reasonable doubt (a sufficiency test), and (2) "could" have *had* a reasonable doubt (could have *not* been convinced *beyond* a reasonable doubt), are worlds apart. The lead opinion goes back and forth between the old repudiated *Petrich* test and the "new" *Kitchen* test. Ultimately, the lead opinion concludes that the error in Camarillo's trial was harmless because "the uncontroverted evidence upon which the jury could reach its verdict reveals no factual difference between the incidents." *Camarillo*, at 70.

In a concurring opinion, Justices Utter and Brachtenbach agree that the constitutional error was harmless. Unlike the lead opinion, the concurring opinion, is internally *consistent* in that it *always* cites and applies the correct harmless error test set forth in *Kitchen*:

In *State v. Kitchen, supra*, we held that constitutional error was

> presumed to be prejudicial. This presumption can only be *overcome* if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

Camarillo, at 73, citing *Kitchen*, 110 Wn.2d at 411 (Utter, J., concurring). Moreover, Justices Utter and Brachtenbach explained why *Camarillo* was the rare case where this type of constitutional error can be found harmless:

> I agree that given the credibility judgment the jury must have made, no reasonable juror could have concluded that the defendant was innocent of any of the acts alleged. Such a conclusion will never be appropriate if the record reveals any evidence which could justify a reasonable doubt in any juror's mind about any given incident, even if the jury obviously believed the victim and not the defendant.
>
> I wish to emphasize that most records do not permit such confident *inferences* about what the jurors must have concluded. ***Such inferences will be inappropriate in almost any other case.*** . . .

Camarillo, 115 Wn.2d at 74 (emphasis added). Justice Utter agreed that "[b]ecause no reasonable juror could have had a reasonable doubt about any of the acts alleged in this case," the error was harmless.

(c) One Erroneous Sentence in the Lead Opinion in *Camarillo* Cites to Division One's Opinion in *State v. Gitchel.* But *Gitchel* is Also Internally Inconsistent.

One of the erroneous sentences in the *Camarillo* lead opinion cites to *State v. Gitchel, supra*, as support for the application of the "sufficient to find guilt" test that the *Petrich* court used. But *Camarillo's* reliance on *Gitchel* was an obvious mistake. *Gitchel* was decided after *Petrich* ***but*** three years ***before*** *Kitchen.* In the first sentence in the first full paragraph on page 823, the *Gitchel* opinion explicitly cited to the *Petrich* formulation of the harmless error test. *Gitchel*, 41 Wn. App. at 823, citing to *Petrich*,

101 Wn.2d at 573. Ironically, two sentences after citing to the incorrect *Petrich* test ("a rational trier of fact could find that each incident was proved beyond a reasonable doubt"), the *Gitchel* Court stated the correct harmless error test ("a rational trier of fact could have entertained a reasonable doubt as to whether an act of sexual intercourse was established with respect to the July 2nd incident"). *Gitchel*, at 423. Thus in the later sentence, the *Gitchel* Court correctly anticipated the *Kitchen* decision, actually applied the correct harmless error test, and proceeded to reverse Gitchel's conviction because the error was not harmless. *Id.*

(d) This Court should grant review to correct the misstatements in *Camarillo* and *Gitchel* so that other appellate courts are not led astray by them.

Although no party cited *Camarillo* to the Court below, the Court relied on *Camarillo* and relied on the one sentence in it that misstates the harmless error test for violation of the right to a unanimous jury verdict in multiple act cases. This Court should grant review so that other panels of the Court of Appeals do not make this same mistake.

2. The Court Below Never Addressed Scribner's *Boyde* Claim.

Petitioner raised a due process claim based on the holding of *Boyde v. California*, 494 U.S. 370 (1990). He argued that there was a reasonable likelihood of juror confusion because the time period specified in Instruction No. 15 *conflicted* with the time period specified in Instruction Nos. 8 and 12. *Boyde* held that jury instructions are constitutionally inadequate if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that is unconstitutional.

Id. at 380. Relying on *Boyde* Scribner argued below that there is a reasonable likelihood that one or more jurors used the 13-1/2 month time period in No. 15 instead of the one day specified in Nos. 8 & 12. He argued that No. 15 conflicted with Nos. 12 & 8.[8]

The Court of Appeals failed to address both Scribner's *Boyde* claim, and the conflict between its decision and the Washington case law cited by Scribner. This Court should grant review to decide this claim.

3. The Decision Below Conflicts With This Court's Decisions In *State v. Quaale* and *Warren v. Hart.*

The Court below found no error in the failure to object to testimony that Scribner's insurance claim was denied because the company concluded he was engaged in "concealment or fraud." RP 735. The court reasoned that this testimony "assisted the jury in understanding the case." *SO, 13.* The Court analogized this testimony to police officer testimony about why they arrested a defendant. *Id.* Petitioner submits that this decision conflicts with cases that hold that such testimony is *not* admissible precisely because it constitutes impermissible opinion testimony from the officer that the officer believes the defendant is guilty. *See Warren v. Hart*, 71 Wn.2d 512, 514, 429 P.2d 873 (1967);[9] *State v.*

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[8] Scribner also relied on Washington due process cases that hold that where conflicting instructions are given in a criminal case, reversal is required. *See, e.g., State v. Lewis*, 6 Wn. App. 38, 491 P.2d 1062 (1971). He also cited to this court's precedent holding that even in civil cases the giving of "[c]ontradictory instructions necessarily lead to confusion" and always requires reversal without a showing of anything more. *Paysse v. Paysse*, 84 Wash. 351, 355-56, 146 P. 840 (1915).

[9] "While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent's negligence, this would not render the testimony admissible. ***It is not proper to permit a witness to give his opinion on questions of fact***

(Footnote continued next page)

Quaale, 182 Wn.2d 191, 193-195, 200, 340 P.3d 213 (2014).[10]

4. This Court should decide whether the "failure to exercise due diligence" when preparing for trial includes the failure to the defendant's doctor to order a medical diagnostic test that could have revealed helpful evidence.

Petitioner's trial occurred in 2013. Due to Scribner's peripheral neuropathy caused by exposure to carbon monoxide, in 2003 Scribner's doctor ordered an MRI of Scribner's brain. *Decl. Hal Bailey,* ¶6. That MRI revealed two brain lesions consistent with carbon monoxide poisoning. *Id.,* ¶ 30. Twelve years later, after having diagnosed Scribner with severe sleep apnea, and after Scribner reported having difficulty remembering things, Scribner's physician ordered a *second* MRI. *Id.,* ¶¶16-28. The second MRI revealed seven brain lesions, and, more significantly, it revealed shrinkage of the left front mammillary body. *Id.,* ¶¶ 30-31. Research has proven that there is a correlation to memory loss and a reduction in size of the mammillary bodies, and that such shrinkage impacts a person's ability to recall names, places and events. *Id.*, ¶32. Dr. Bailey opined that the data from the comparison of the 2003 MRI and the 2013 MRI showed "indisputable proof that Mr. Scribner has suffered short and intermediate-term memory loss during that time frame." *Id.*, ¶33.

Scribner argued that this newly discovered evidence of damage to

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requiring no expert knowledge, ***when the opinion involves the very matter to be determined by the jury . . . Therefore, the witness' opinion on such matter, . . . would not be acceptable as opinion evidence.***"

[10] Held "clearly inappropriate" and reversible error to admit officer's opinion that "there was no doubt" that Quaale's ability to operate a motor vehicle "was impaired."

the area of his brain that is associated with memory loss supported his testimony that he was not lying when he made his erroneous statements about the size of the awning, or about the nonexistence of an appraisal or of pre-loss photos. He just didn't remember these things. He sought a new trial based on this newly discovered medical evidence.

The Court of Appeals rejected this argument on the grounds that Scribner could have discovered the new evidence of brain damage if he'd exercised due diligence. *SO, 15-16.* The Court noted that Scribner knew about his brain damage caused by the carbon monoxide poisoning and yet chose not to present an impairment defense. *SO, 15.* But the Court ignored the fact that Scribner did *not* know that his brain damage had worsened a great deal due to more recently diagnosed severe sleep apnea, and did not have the benefit of the second MRI that showed shrinkage of the left front mammillary body.[11]

Scribner cited to and relied upon *Orndorff v. Commonwealth*, 271 Va. 486, 628 S.E.2d 344 (2006). That case specifically holds that when judging the merits of a motion for new trial based on newly discovered medical evidence, a court may *not* fault the defendant or his attorney for not exercising *medical* due diligence, because they are not doctors and have no medical knowledge: "The reasonable diligence inquiry addresses

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[11] Of course nothing prevented Scribner from asking his doctor to perform a second MRI before his criminal trial occurred. But Scribner's doctor explained that the damage to the mammillary body "could not have been discovered except by way of an additional MRI, and prior to June 2013 there was ***no known medical reason*** to obtain an additional MRI." *Decl. Bailey*, ¶37 (emphasis added).

the sufficiency of counsel's actions, not the actions of medical professionals retained by counsel." *Orndorff,* 628 S.E.2d at 353.

> The Court of Appeals . . . held that Orndorff did not meet the reasonable diligence component of the [after acquired evidence] . . . test because ***her experts could have discovered earlier the several symptoms of DID that they later identified. We disagree with this holding because it improperly shifted the focus of the reasonable diligence inquiry*** by effectively assigning to Orndorff's counsel the responsibility for reaching a different medical diagnosis.

Orndorff, 628 S.E.2d at 353 (emphasis added). The Virginia Supreme Court concluded that the Virginia Court of Appeals "erred in concluding that Orndorff failed to meet the reasonable diligence requirement for a new trial based on after-discovered evidence." *Id.* at 354.

The Court of Appeals did not decide this issue in Scribner's case. Even when Scribner pointed it out in his reconsideration motion, the Court did not discuss or even mention the *Orndorff* case. This Court should decide this issue which has never previously been addressed in this State.

G. CONCLUSION

For the reasons stated above, Petitioner Scribner asks this Court to grant review of the decision below, and to reverse his convictions.

Respectfully submitted this 13th day of October, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz, WSBA #8787
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document: **PETITION FOR REVIEW** on the below-listed attorneys and parties of record by the methods noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 13th day of October, 2015.

Deborah A. Groth, Legal Assistant

APPENDIX A

FILED
JULY 16, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. KEITH R. SCRIBNER, Appellant. In re Personal Restraint Petition of: KEITH R. SCRIBNER, Petitioner.	)	No. 31792-7-III Consolidated with No. 32576-8-III UNPUBLISHED OPINION

BROWN, J. — Keith Scribner appeals his convictions for (1) false claim or proof and (2) attempted first degree theft related to his filing an excessive insurance claim for his mother's damaged awning. He contends ineffective assistance of counsel and instructional error are reversible errors. In his consolidated personal restraint petition (PRP), Mr. Scribner alleges newly discovered evidence shows his medical condition caused him to be unable to recall events with specificity, warranting a new trial. We reject his contentions and decide his PRP lacks merit. Accordingly, we deny Mr. Scribner's PRP and affirm.

FACTS

The substantive facts supporting Mr. Scribner's convictions are not challenged for insufficiency. Generally, the evidence showed in 2008 Mr. Scribner arranged to purchase Scott Starkey's home (his next door neighbor) for his mother, Marilyn Warsinske. After a January 2009 snow storm damaged her deck awning, Ms. Warsinske, at Mr. Scribner's urging, reported the loss to Liberty Mutual Insurance. In August 2009, Mr. Scribner submitted a $203,000 insurance claim for loss, representing the awning as having covered the entire deck and more than twice the size of the pre-loss awning.

Critical to the outcome, on January 11, 2010 Mr. Scribner gave insurance adjusters Trevor Evans and Ben Steele building plans depicting a 320 square foot awning. He did not disclose the plans had been made four months before the loss to replace the existing smaller, and much less expensive awning that existed and was later damaged. Later, Mr. Scribner submitted $195,586 and $213,815 bids, apparently based on the plans.

Next in importance, in February 2010 while looking for photographs, Mr. Evans asked Mr. Scribner if any appraisal had been done for the home purchase. Mr. Scribner denied any existed, although he had indeed arranged for and received an appraisal. Mr. Steele later discovered an aerial photo in March 2010 showing the smaller awning. Then, special investigator Traci Johnson located Mr. Starkey for photographs and the insurance company located the denied appraisal done in Mr. Scribner's presence. In

October 2010, Liberty Northwest denied the claim based on its finding Mr. Scribner had misrepresented the awning size.

The State charged Mr. Scribner with submitting a false claim or proof to an insurance company and attempted first degree theft. The information specified Mr. Scribner committed each of the two charged crimes during the period of time "from July 31, 2009 to October 13, 2010." Clerk's Papers (CP) at 1-2. The charging period was from the date the insured made the claim (July 31, 2009) to the date Liberty Northwest denied the claim (October 13, 2010).

During trial, Ms. Johnson testified about her interview with Ms. Warsinke. Ms. Warsinke answered some of Ms. Johnson's questions, but she refused to answer others. When the prosecutor asked Ms. Johnson about this, Mr. Scribner's counsel unsuccessfully objected on hearsay grounds. On the next day of trial, the prosecutor asked Mr. Steele about an e-mail exchange that he had with Ms. Johnson about Ms. Warsinke's interview. Via e-mail, Ms. Johnson told Mr. Steele, "Yesterday did not go well. She hardly answered any questions. It was really a waste of time." Report of Proceedings (RP) at 811. Mr. Steele replied, "[D]id she really not know anything . . . was she evading?" RP at 811. Ms. Johnson responded, "[E]vading, definitely." RP at 812. Defense counsel did not object to the reading of this e-mail. The e-mail was admitted as a defense exhibit because it also contained a statement from Ms. Johnson to Mr. Steele, informing him she chose not to show Ms. Warsinske photographs the

insurance company obtained showing the prior awning. Mr. Steele responded, "Keep them guessing." RP at 781.

The prosecutor asked Mr. Steele the purpose of Liberty Northwest denying Ms. Warsinke's claim. He answered, without objection, "It was denied on four counts: really", Late reporting, lack of cooperation, concealment or misrepresentation, and lack of coverage." RP at 731. To clarify, the prosecutor asked, without objection, "[Y]ou had just testified before that the coverage was denied for lack of coverage, late reporting, lack of cooperation and concealment or fraud, correct?" RP at 735. Mr. Steele responded, "Correct." RP at 736.

At the conclusion of testimony, defense counsel requested a jury unanimity instruction for each count pursuant to *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In support, defense counsel argued two different acts could form the basis of false claims or proof and attempted first degree theft: Mr. Scribner's misrepresentation to Mr. Evans and Mr. Steele on January 11, 2010 regarding the size of the prior awning and Mr. Scribner's statement to Mr. Evans in February 2010 denying the existence of the appraisal. The State objected. The court instructed the parties to craft a *Petrich* instruction, but when they could not agree on the language, the court modified the to convict instructions by changing the charging period of July 31, 2009 through October 13, 2010 to specify the single date of January 11, 2010.

Defense counsel then objected to his own proposed instruction, instruction 15 (the to convict instruction on the underlying crime of first degree theft instead of

attempted first degree theft). This instruction contained the broader language of "July 31, 2009 to and including October 13, 2010" to convict Mr. Scribner of first degree theft. CP at 140. The court allowed the instruction because the "substantial step can be pinpointed at the [January 11, 2010] meeting, but your theft, the underlying crime, still has that range of dates that allows the state to argue this deception through these events." RP at 1134-35. Instruction 8 (to convict on false claims or proof) and instruction 12 (to convict on attempted first degree theft) both limit the occurrence date to January 11, 2010.

The jury found Mr. Scribner guilty as charged. He appealed and filed a PRP that this court consolidated with his appeal.

ANALYSIS

A. Ineffective Assistance of Counsel

The issue is whether Mr. Scribner was denied effective assistance of counsel based on instructional and evidentiary error. Many of Mr. Scribner's allegations are raised for the first time on appeal. Generally, we do not review instructional error allegations that were not presented to the trial court unless the alleged error involves a manifest error affecting a constitutional right. *State v. Scott,* 110 Wn.2d 682, 684, 757 P.2d 492 (1988). Ineffective assistance of counsel is a manifest error affecting a constitutional right and so we must review Mr. Scribner's claim even if it is raised for the first time on appeal. *State v. Brown,* 159 Wn. App. 1, 17, 248 P.3d 518 (2010) (citing RAP 2.5).

The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prevail on an ineffectiveness claim, the defendant must prove (1) counsel's performance was deficient and (2) the defendant was prejudiced by the deficient performance. *Id.* at 687. The deficient performance and prejudice showings are conjunctive, and this court may resolve an ineffective assistance claim against a defendant failing to make the necessary showing on either. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In deciding whether counsel's performance was deficient, we strongly presume counsel provided proper, professional assistance and "will not find deficient representation if counsel's actions were tied to a legitimate strategic or tactical rationale." *State v. Saunders*, 120 Wn. App. 800, 819, 86 P.3d 232 (2004) (citing *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 117 (1991)).

First, Mr. Scribner contends his defense counsel was deficient in proposing instruction 15 relating to first degree theft when the State did not charge him with first degree theft. Generally, review of such contention "is precluded under the invited error doctrine," however, "where the error is the result of ineffective assistance of counsel, review is not precluded." *In re Haghighi*, 178 Wn.2d 435, 446-47, 309 P.3d 459 (2013). The State concedes defense counsel's offering of a to-convict jury instruction on an uncharged crime may amount to deficient performance, but argues such error was not prejudicial.

The error of offering an uncharged means as a basis for conviction is prejudicial only if it is possible the jury might have convicted the defendant under the uncharged alternative. *State v. Doogan*, 82 Wn. App. 185, 189-190, 917 P.2d 155 (1996). Here, the jury did not convict Mr. Scribner of first degree theft. Rather, the guilty verdict forms explicitly show the jury found him guilty of false claim or proof and attempted first degree theft. While Mr. Scribner argues the jury may have been confused what offense the State charged him with, the record shows it was mentioned repeatedly during trial what were the exact charges. "One can always speculate about fanciful ways that an error might have affected the final verdict." *State v. Coristine*, 177 Wn.2d 370, 396, 300 P.3d 400 (2013) (Gonzalez, J., dissenting). But here, no reasonable possibility exists the jury convicted Mr. Scribner of an uncharged crime; thus, Mr. Scribner cannot show prejudice. Without this prong of an ineffective assistance of counsel claim, Mr. Scribner's claim fails. *See Strickland*, 466 U.S. at 687 (in order to prevail on an ineffectiveness claim, the defendant must show deficient performance and prejudice).

Mr. Scribner alternatively argues instruction 15 denied him his constitutional rights to jury unanimity and due process because it did not have the same specificity of dates as the other instructions. As discussed, the invited error doctrine generally precludes challenging a jury instruction proposed by the appellant. However, defense counsel proposed the instruction, then unsuccessfully challenged the instruction because it would implicate jury unanimity. In such cases, our Supreme Court has held, "we recognized an exception to [the] general doctrine of invited error . . . . '[t]he fact that

[the petitioner] proposed . . . the . . . instruction is no bar to his challenge to it, for he also proposed a curative instruction that was not given and, thus, did not invite the error that he complains of now.'" *State v. Vander Houwen*, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) (quoting *State v. Studd*, 137 Wn.2d 533, 552, 973 P.2d 1049 (1999)).

In Washington, a jury may convict a criminal defendant only if the members of the jury unanimously conclude that the defendant committed the criminal act with which he or she was charged. *Petrich*, 101 Wn.2d at 569. 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. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the evidence indicates that more than one distinct criminal act has been committed but the defendant is charged with solely one count of criminal conduct, the jury must be unanimous as to which act or incident constitutes the charged crime. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); *Petrich*, 101 Wn.2d at 572. The "jury must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct." *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007).

The determination of whether a unanimity instruction was required turns on whether the prosecution constituted a "multiple acts case." *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009) (emphasis omitted). A multiple acts prosecution occurs when "several acts are alleged and any one of them could constitute the crime charged." *Kitchen*, 110 Wn.2d at 411. For example, the prosecution for a single count

of rape based on evidence of multiple, separate acts, "each of which is capable of satisfying the material facts required to prove" the charged crime, constitutes a multiple acts case. *Bobenhouse*, 166 Wn.2d at 894; *see also Kitchen*, 110 Wn.2d at 405-06, 411. Thus, in multiple acts cases, either (1) the State must elect a specific act on which it will rely for conviction or (2) the trial court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. *Bobenhouse*, 166 Wn.2d at 893; *Noltie*, 116 Wn.2d at 843; *Petrich*, 101 Wn.2d at 572. The failure of the State to elect a specific act or the trial court's failure to issue a unanimity instruction in a multiple acts case "is constitutional error. 'The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction.'" *Bobenhouse*, 166 Wn.2d at 893 (alteration in original) (quoting *Kitchen*, 110 Wn.2d at 411).

We review the failure to give a multiple acts unanimity instruction for constitutional harmless error. *Bobenhouse*, 166 Wn.2d at 893. Such an error is not harmless unless "'a rational trier of fact could find that each incident was proved beyond a reasonable doubt.'" *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990) (quoting *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091 (1985)).

Here, an election of a specific act exists. The instructions as a whole informed the jury that in order to find Mr. Scribner guilty of false claims or proof and attempted first degree theft, it had to conclude Mr. Scribner misrepresented the size of the awning

to Mr. Evans and Mr. Steele on January 11, 2010. This was clearly specified in the to convict instructions on these offenses (8 and 12). Instruction 15 did not conflict with instructions 8 or 12; rather, it was superfluous. The jury did not ask any questions, and when polled all agreed that the verdict forms represented their individual and unanimous verdicts. The remaining jury instructions and the corresponding verdict forms combine to show instruction 15 did not impact Instructions 8 and 12.

Moreover, any unanimity problem was harmless error. Substantial evidence established Mr. Scribner knowingly made a material misrepresentation when he told Liberty Northwest the awning destroyed was a large elaborate awning costing hundreds of thousands of dollars to adequately replace. Mr. Starkey, the prior homeowner, testified the awning was hand-built by him at a cost of approximately $300 and that it covered less than half the deck. The photographic exhibits, appraisal, and testimony established the prior awning did not cover the entire deck. A rational juror considering this evidence could solely conclude Mr. Scribner lied. Mr. Scribner lived next door to the awning for several years and visited his mother's home often. Mr. Scribner discovered the awning had collapsed in January 2009. Given all, we conclude Mr. Scribner was not prejudiced by any perceived deficiency when his counsel proposed a superfluous jury instruction. The jury instructions properly limited the jury to convict for each crime. Instruction 15 was unnecessary, but harmless and, therefore, not a manifest constitutional error.

Second, Mr. Scribner contends his counsel was ineffective by failing to object to testimony showing Ms. Warsinske was evasive and that Mr. Scribner engaged in fraud. Mr. Scribner raises these arguments for the first time on appeal in the context of his ineffective assistance of counsel argument, rather than in the context of a properly preserved challenge to the trial court's discretionary evidentiary ruling. Thus, Mr. Scribner must show not only that his counsel's performance was deficient but also that this deficient performance prejudiced the trial's outcome. *Strickland*, 466 U.S. at 686. Mr. Scribner fails to establish resulting prejudice.

"'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. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (internal quotation marks omitted) (alterations in original) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because it violates a defendant's constitutional right to a jury trial, including the independent determination of the facts by the jury. *Demery*, 144 Wn.2d at 759. Thus, witnesses may not offer opinions on the defendant's guilt, either directly or by inference. *King*, 167 Wn.2d at 331 (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Whether testimony is an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" will generally depend on the specific case circumstances, including the type of witness involved, the specific nature of the

testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Testimony not directly commenting as to personal belief of the defendant's guilt or the veracity of a witness is helpful to the jury, and testimony based on inferences from the evidence is not improper opinion testimony. *State v. Blake*, 172 Wn. App. 515, 528, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013). "The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *Heatley*, 70 Wn. App. at 579. And constitutional error, if any, is harmless if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *See State v. Quaale*, 182 Wn.2d 191, 218, 340 P.3d 213 (2014) (discussing constitutional harmless error as applied to improper opinions on guilt).

Mr. Scribner argues his counsel provided ineffective assistance when he failed to object to a statement by Ms. Johnson to Mr. Steele via e-mail that Ms. Warsinske was "evading." RP at 812. Assuming the word "evading" is a comment on witness veracity, the statement was made in an email introduced by the defense because the email contained a statement from Ms. Johnson to Mr. Steele informing him she chose not to show Ms. Warsinske the photographs obtained showing a smaller awning. Mr. Steele responded, "Keep them guessing." RP at 781. Defense counsel chose to introduce this e-mail chain to show the insurance company was being deceptive. This is a tactical decision on behalf of defense counsel. We "will not find deficient representation if

counsel's actions were tied to a legitimate strategic or tactical rationale." *Saunders*, 120 Wn. App. at 819. Thus, Mr. Scribner fails to establish ineffective assistance. Moreover, any error outside the context of an ineffective assistance of counsel claim would be harmless under *Quaale*, 182 Wn.2d at 218. The overwhelming evidence offered by the State showing Mr. Scribner filed a false claim for a deck cover that did not previously exist would not have been undermined by a sustained objection to the e-mail.

Next, Mr. Scribner complains his counsel was ineffective for failing to object to Mr. Steele's testimony that Liberty Northwest denied his claim based on fraud. He unpersuasively argues this was inadmissible opinion testimony as to his guilt. Mr. Steele's testimony regarding why the claim was denied was part of the chronology of events that assisted the jury in understanding the case. The jury heard testimony throughout the trial regarding Mr. Scribner's actions and the jury was advised in opening statements the State charged Mr. Scribner with filing a false claim and attempted theft. Officers often similarly testify in criminal trials about why they arrested a defendant. Even assuming the statement was inadmissible and defense counsel was deficient for not objecting, Mr. Scribner cannot establish prejudice. The State's overwhelming evidence showed Mr. Scribner filed a false claim for a nonexistent deck cover, and the court would not have sustained an objection to Mr. Steele's consistent testimony. Given all, we conclude Mr. Scribner fails to show manifest constitutional error based on ineffective assistance of counsel, and while his trial was not perfect, it was fair.

C. PRP

Mr. Scribner, in his PRP, argues newly discovered evidence shows he lacked the mental capacity to remember the deck cover size before filing the insurance claim.

Under RAP 16.4(a), a petitioner may obtain relief by filing a PRP demonstrating the petitioner is under a "restraint" and the restraint is unlawful. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, is confined, is subject to imminent confinement, or is under some other disability resulting from a judgment or sentence in a criminal case. RAP 16.4(b). "Restraint" includes the continuing effects of an already-served unlawful confinement. *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 670, 675 P.2d 209 (1983).

Initially, we note the sentencing court ordered 240 hours of community service, 15 days of home arrest, and $7,200 in legal financial obligations, all completed. Mr. Scribner fails to explain how he is currently under restraint. Nevertheless, we assume he considers himself under the catchall "some other disability resulting from a judgment or sentence in a criminal case" to establish restraint. RAP 16.4(d).

To obtain PRP relief Mr. Scribner must show either constitutional error resulting in actual and substantial prejudice or nonconstitutional error resulting in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-13, 792 P.2d 506 (1990).[1] Additionally, Mr. Scribner must support his error claims with a statement of

[1] Mr. Scriber argues he should not be held to the complete miscarriage of justice standard because he is requesting relief based on newly discovered evidence. (Petitioner's Reply Br. at 13 n.2) Solely constitutional issues are reviewed under the

facts on which his claim of unlawful restraint is based and the evidence available to support his factual allegations; he cannot rely solely on conclusory allegations. RAP 16.7(a)(2); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *see also Cook*, 114 Wn.2d at 813-14.

Mr. Scribner requests relief based on a magnetic resonance imaging (MRI) performed after he was sentenced. He argues the MRI shows brain damage affecting his ability to recall facts about the prior awning and the appraisal. Mr. Scribner chose at trial to not introduce evidence he was mentally impaired. He made this decision to prevent the State from presenting evidence that in a prior disability claim based on carbon monoxide brain damage, the State found Mr. Scribner not impaired.

To obtain PRP relief based on a claim of newly discovered evidence under RAP 16.4(C)(3), the petitioner must show the new evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *In re Pers. Restraint of Lord*, 123 Wn .2d 296, 319-20, 868 P.2d 835 (1994). When one factor is absent, we need not consider whether the other factors are present. *State v. Macon*, 128 Wn.2d 784, 803-04, 911 P.2d 1004 (1996).

While several of the above factors would be difficult for Mr. Scribner to establish, the third factor is particularly problematic. Mr. Scribner consciously chose not to raise an impairment defense. To now inconsistently claim he's found impairment evidence

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actual and substantial prejudice standard. *In re Brett*, 142 Wn.2d 868, 874, 16 P.3d 601 (2001).

and it could not be discovered before trial lacks persuasiveness. Moreover, this argument, like some of his other arguments, implicates the invited error doctrine. Without a showing of this factor, we need not discuss this contention further. *Macon*, 128 Wn.2d at 803-04.

Because Mr. Scribner cannot show relief is warranted based on newly discovered evidence, he cannot show that the exclusion of this evidence amounted to a complete miscarriage of justice. Given all, Mr. Scribner fails to show he is unlawfully restrained. Thus, his PRP should be denied.

Affirmed. PRP denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, A.C.J.

I CONCUR:

Lawrence-Berrey, J.

No. 31792-7-III

Fearing, J. — (concurrence) Keith Scribner complains his counsel was ineffective for failing to object to Ben Steele's testimony that Liberty Northwest denied his claim based on fraud. He argues that Steele's remark was inadmissible opinion testimony as to his guilt. I agree with the majority that Steele's testimony constituted factual, rather than, opinion testimony. Steele stated the ground on which the insurance company rejected payment rather than providing his view as to whether Keith Scribner committed fraud or was guilty of a crime.

I write separately because Ben Steele's testimony that Liberty Northwest denied the claim based on fraud should have been objected to by Keith Scribner's counsel and should have been excluded by the trial court on the ground of relevance. ER 401, 402. The insurance company's reason for denying Scribner's claim did not render Scribner's guilt for filing a false claim or attempting a theft more probable than not. I concur in the affirmation of the guilty verdict because the failure to object to the testimony did not prejudice Keith Scribner. Scribner fails to show ineffective assistance of counsel or a manifest constitutional error.

I CONCUR:

Fearing, J.

APPENDIX B

Renee S. Townsley
Clerk/Administrator

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September 3, 2015

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CASE # 317927
State of Washington v. Keith R. Scribner/PRP
SPOKANE COUNTY SUPERIOR COURT No. 111034748

Dear Counsel:

Attached is a copy of the Order Denying Motion for Reconsideration and Motion to Publish filed by this Court today in the above-referenced case.

In accordance with RAP 16.14(c) and RAP 13.5(a), (b) and (c), review of this Order may be obtained only by filing a Motion for Discretionary Review in the Washington State Supreme Court within 30 days after the filing of this Order. A copy must be filed with the Court of Appeals.

The address for the Washington State Supreme Court is Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:mk
Attach.
Keith R Scribner
P.O. Box 8262
Spokane, WA 99203

FILED
Sept. 03, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, **Respondent,** **v.** **KEITH R. SCRIBNER,** **Appellant.** **In re Personal Restraint Petition of:** **KEITH R. SCRIBNER,** **Petitioner.**	**No. 31792-7-III** **Consolidated with** **No. 32576-8-III** **ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH**

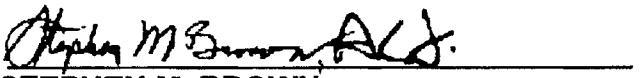
THE COURT has considered appellant's motion for reconsideration and motion to publish this court's decision of July 16, 2015, and having reviewed the records and files herein, is of the opinion the motions should be denied. Therefore,

IT IS ORDERED, the motions are hereby denied.

DATED: September 3, 2015

PANEL: Jj. Brown, Korsmo, Siddoway

FOR THE COURT:



STEPHEN M. BROWN
ACTING CHIEF JUDGE

APPENDIX C

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September 15, 2015

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CASE # 317927
State of Washington v. Keith R. Scribner/PRP
SPOKANE COUNTY SUPERIOR COURT No. 111034748

Dear Counsel:

Attached is a copy of the Amended Order Denying Motion for Reconsideration filed by this Court today in the above-referenced case.

In accordance with RAP 16.14(c) and RAP 13.5(a), (b) and (c), review of this Order may be obtained only by filing a Motion for Discretionary Review in the pWashington State Supreme Court within 30 days after the filing of this Order. A copy must be filed with the Court of Appeals.

The address for the Washington State Supreme Court is Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:mk
Attach.
Keith R Scribner
P.O. Box 8262
Spokane, WA 99203

FILED
Sept. 15, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, **Respondent,** **v.** **KEITH R. SCRIBNER,** **Appellant.** **In re Personal Restraint Petition of:** **KEITH R. SCRIBNER,** **Petitioner.**	**No. 31792-7-III** **Consolidated with** **No. 32576-8-III** **AMENDED** **ORDER DENYING MOTION FOR RECONSIDERATION**

THE COURT has considered appellant's motion for reconsideration this court's decision of July 16, 2015, and having reviewed the records and files herein, is of the opinion the motions should be denied. Therefore,

IT IS ORDERED, the motion is hereby denied.

DATED: September 15, 2015

PANEL: Jj. Brown, Fearing, Lawrence-Berrey

FOR THE COURT:

STEPHEN M. BROWN
ACTING CHIEF JUDGE