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King County Prosecutor
Appellate Unit

NO. 61776-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHAD PIERCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable George T. Mattson, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Chad Pierce is appealing his convictions for two counts of child molestation, allegedly committed against his stepdaughter, B.L. B.L. did not report the alleged abuse until about ten months after it reportedly occurred. She alleged that after having a nightmare one night, she left her room and crawled into bed with her mother and stepfather. Unable to wake her mother, B.L. got in on Pierce's side. She claimed that while lying next to Pierce, he rubbed her chest and crotch underneath her clothes. She claimed a similar contact occurred about a month later after she had another nightmare. B.L. told the forensic interviewer the touching stopped when Pierce "woke up."

The defense theory of the case was two-fold. First, the defense posited no inappropriate touching occurred. When Pierce woke up, he was surprised to find B.L. next to him and his hands folded together between her legs.

The defense theorized that during the ten months between the alleged contact and B.L.'s allegation, B.L.'s sisters – who admittedly hated Pierce – manipulated B.L. to lie about, or at least misconstrue, the contact. Significantly, about nine months before her disclosure, B.L. told a social worker no one at school or her

home had been touched inappropriately. B.L. also admitted both of her sisters encouraged her to tell lies about Pierce.

Second, the defense theorized that if any inappropriate touching occurred, Pierce was asleep. This defense was corroborated by a sleep expert, who opined – after reviewing all discovery – Pierce was most likely asleep when the contact occurred.

Despite the expert's testimony, defense counsel failed to request the court to instruct the jury that unconsciousness is a defense to child molestation. Defense counsel also failed to call the social worker whom B.L. told there had been no abuse, a statement B.L. made after the date she would later allege the inappropriate contact occurred. Pierce asserts he was deprived of his right to a fair trial for these reasons and others set forth infra.

B. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his right to effective assistance of counsel by his attorney's failure to request an instruction informing the jury that it is a defense to the charge of child molestation that the defendant's acts were involuntary.

2. Appellant was deprived of his right to effective assistance of counsel by his attorney's failure to call social worker Erik Applebee to testify on appellant's behalf.

3. Prosecutorial misconduct deprived appellant of his right to a fair trial.

4. Defense counsel's failure to request a curative instruction to obviate the prejudice engendered by the prosecutor's misconduct deprived appellant of his right to effective assistance of counsel.

5. The trial court erred in denying appellant's pro se motion for a new trial following his convictions.

6. Appellant was deprived of his right to a unanimous jury verdict.

7. To the extent defense counsel contributed to the unanimity error, appellant was deprived of his right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Where the evidence supported an instruction that unconsciousness or somnambulism is a defense to child molestation and there was no tactical reason not to request it, as it was one of the defense's two main theories, was appellant Chad

Pierce deprived of his right to a fair trial by defense counsel's failure to request the instruction?

2. Where defense counsel was aware social worker Applebee would provide materially exculpatory evidence, but defense counsel failed to call him based on a mistaken belief the court had excluded Applebee's testimony, was Pierce deprived of his right to effective assistance of counsel?

3. Pierce was on probation for an unrelated, nonsexual offense at the time B.L. alleged inappropriate contact had occurred. During a routine visit with his community corrections officer (CCO), Pierce informed the CCO of B.L.'s allegation. In response, the CCO scheduled a polygraph examination for which Pierce did not appear.

The court excluded evidence of the threatened polygraph. Nevertheless, the state sought to introduce evidence through the CCO that Pierce left town or "fled" when the allegations arose, on grounds it showed consciousness of guilt. In denying the state's motion, the court reasoned Pierce's trip to Kelso was more indicative of his fear of the threatened polygraph, rather than consciousness of guilt. On the state's motion for reconsideration, the court ruled it would not reconsider its decision regarding "flight."

a. Was appellant deprived of his right to a fair trial, where the prosecutor made “flight” the centerpiece of her closing argument equating Pierce’s trip to Kelso with a consciousness of guilt?

b. Was appellant deprived of his right to a fair trial by the prosecutor’s closing argument, where by virtue of the court’s exclusion of the unfairly prejudicial, threatened-polygraph evidence, the prosecutor was allowed to argue there was no reasonable explanation for Pierce’s trip to Kelso other than a consciousness of guilt?

4. Was Pierce deprived of his right to a unanimous jury verdict where the state presented evidence of four acts that could have formed the basis for the two counts charged, the state failed to elect which acts the jury should rely on, and the court failed to give a unanimity instruction?

5. Where the need for a unanimity instruction was raised by the court, but was subsequently rejected by the court and prosecutor, and defense counsel failed to interject its necessity, did defense counsel contribute to the court’s failure to insure jury unanimity, thereby providing ineffective assistance of counsel?

C. STATEMENT OF THE CASE

1. Underlying Facts

The state charged Chad Pierce with two counts of first degree child molestation, allegedly committed against his stepdaughter B.L. in 2004. CP 1-8. In 2004, Pierce was married to Connie Lawrence, the mother of 8 year-old B.L., 18 year-old Mika, 21 year-old Darrel and 24 year-old Jackie. CP 1-6; RP 132-33, 1100.¹

By all accounts, B.L. had a good relationship with Pierce during the charging period. RP 819, 1181-1182. In contrast, Mika, Darrel and Jackie did not. RP 1107, 1126, 1179. To such an extent that all three eventually moved out or were kicked out of the family's Des Moines apartment.² RP 1086, 1106-1107, 1163, 1182, 1204. Pierce was strict with the kids, and Mika and Jackie, in particular, hated him. RP 1126, 1179, 1206.

By the time B.L. reported the alleged inappropriate contact, Pierce was no longer living in Des Moines. RP 333, 819-820,

¹ The trial transcripts are contained in a set of 15 bound volumes, consecutively paginated and referred to as "RP," although most of volume 12 and volumes 13-15 are transcripts of post-trial proceedings. Pierce's pro se motion for a new trial consists of 7 bound volumes, consecutively paginated and referred to as "1RP." Voir dire was also ordered to investigate a potential issue and is not referred to in this brief.

1165-1166. In Fall 2004, Pierce and Lawrence moved to Everett, while Mika, Jackie and Jackie's daughter Tia moved back into the apartment with B.L. RP 819-820, 1166-1167, 1185-86, 1205.

B.L. and Mika's father, Michael Chapman – who also disliked Pierce – would take B.L. and Mika for visitation on weekends. RP 135, 343-44. Because Chapman was homeless, he would take the girls to a friend or relative's to stay. RP 135-37. It was against this backdrop that B.L. disclosed the alleged abuse. RP 350-53, 826.

On February 10, 2005, Des Moines police officer Emly received information regarding B.L.'s allegation and went to the Des Moines apartment to investigate. RP 837. B.L. was still at school, but Lawrence was home. RP 838. Emly explained police had received a report B.L. may have been inappropriately touched. RP 839-40.

Emly asked if B.L. ever said anything about Pierce touching her. RP 840. Lawrence said yes, but explained Pierce had told her it was an accident. Pierce told Lawrence he did not realize B.L. had come to bed with them and inadvertently put his hands

² Lawrence estimated Mika was the last to leave in April 2004. RP 1188-89. From the CPS file admitted as exhibit 1 in Pierce's pro se motion for a new trial, this estimate appears correct. Ex 1, SER 7564626; see also RP 1752.

between her legs, thinking it was Lawrence.³ RP 841. Once he realized it was not Lawrence, he moved his hands. RP 841. Accordingly, when B.L. told Lawrence about it a couple of months earlier, Lawrence told her it was an accident. RP 842-44.

Emly returned later to talk to B.L. RP 844. Lawrence voluntarily left them alone in the living room. RP 845. Emly asked if B.L. had “ever gone to her mother about something bad that happened to her with touching.” RP 846. When B.L. said yes, Emly asked what she told her mother. RP 847. B.L. explained she went into her mother and stepfather’s room after having a nightmare. RP 847.

B.L. claimed she woke Pierce and lay down next to him. RP 847. Lawrence was in the bed, too. RP 848. B.L. stated that as she lay there, Pierce put his hands around her and “rubbed [her] like this.” RP 848. According to Emly, B.L. said Pierce started to rub her breast and crotch area. B.L. said it was under her pajamas. RP 849. B.L. claimed this happened only once. RP 854.

Detective George Jacobowitz took over the investigation February 15 and contacted Lawrence to set up a meeting. RP 886,

³ At trial, Lawrence testified Pierce told her what happened the day he woke up in that inadvertent situation. RP 1164.

889-91. On February 17, Lawrence came to the police station, apologized for not having an appointment, but explained, “she wanted to get things taken care of.” RP 891. She also explained what Pierce had told her about inadvertently touching B.L. RP 892.

Lawrence agreed to bring B.L. for an interview on February 23, but did not show up. RP 893. Lawrence left a message for Jacobowitz on March 8 and contacted him again on March 15. RP 894-895. Although Lawrence said she was out of town,⁴ she ultimately agreed to bring B.L. back for an interview on March 18. RP 895-98. Lawrence did not believe anything untoward had happened to B.L. Instead, she believed her daughters Mika and Jackie were improperly influencing B.L. RP 897.

After an interview on March 18 – during which B.L. disclosed “nothing really did happen” – the authorities took B.L. into custody. RP 899, 921; Trial Exhibit 4, page 5. Based on B.L.’s statement that she did not know the names of the people with whom she had been staying, interviewer Ashley Wilske believed Lawrence had coached B.L. not to say anything. RP 918-919, 996-997. During the interview and almost immediately, Wilske asked B.L., “Did mom

⁴ As will be discussed *infra*, Lawrence, Pierce and B.L. were visiting Debra Colby and her fiancé Bill Booth in Kelso, Washington.

say not to tell?” Trial Exhibit 4, page 4. Wilske continued with this line of questioning, asking: “and what else didn’t mom want you to tell me today?” Trial Exhibit 4, page 4. Significantly, when Wilske asked, “So did she tell you if I asked you any question that you were supposed to tell me nothing happened,” B.L. responded, “When . . . nothing really did happen.” Trial Exhibit 4, page 5.

Pediatrician Rebecca Wiester interviewed and examined B.L. on March 24.⁵ RP 1141. According to Wiester, B.L. indicated by words and gestures that her stepfather had touched her crotch with his hand inside her underwear on one occasion. RP 1149. It did not hurt, and her stepfather never directed that she not tell anyone about it. RP 1150. B.L. said she told Mika, who told her father. RP 1150. Wiester testified the results of B.L.’s examination were normal. RP 1153.

Wilske was given a second opportunity to interview B.L. on April 5. RP 901, 914. Wilske wanted “to know what went on with Chad.” Trial Exhibit 5, page 8. B.L. responded, “I don’t get what you’re saying.” Id. After Wilske prompted she heard B.L. “got

⁵ At the time, B.L. was staying with her cousin and had regular, unsupervised visits with her father. RP 1085.

scared” one night, B.L. said “it was kind of when I was like last year.” Id.

B.L. stated that when she could not wake her mother, she went to Pierce’s side of the bed. B.L. continued: “I told him I was scared and then he told me to get in bed and then I got in bed and then he started doing it to me.” Id. When asked what he had started to do, B.L. stated: “rubbing my belly and trying to touch down there.” Id. B.L. said it was underneath her underwear. Trial Exhibit 5, page 10. When asked how long the touching occurred, B.L. responded, “Until he woke up.” Trial Exhibit 5, page 11.

B.L. claimed this event happened in February and that “the same thing” happened in March, after she had another nightmare. Trial Exhibit 5, page 13. B.L. did not say anything about it until approximately nine months later, when Mika asked: “has Chad done anything bad to me so I told her.” Trial Exhibit 5, page 12; see also page 15; RP 1039. B.L. said Pierce never told her to keep any secrets. RP 1037.

Before the authorities took B.L. into custody, B.L. had been staying with her mother and Pierce at the home of family friends, Debra Colby and Bill Booth, in Kelso, Washington. RP 1050-51. Lawrence testified it was her idea to go, because she wanted to

see how B.L. interacted with Pierce. As Lawrence explained, she was molested as a child, and wanted to observe B.L. and Pierce together for signs of abuse. She did not see any. RP 1169-70.

Nor did Colby. Regarding B.L.'s interactions with Pierce, Colby testified B.L. would "run into his arms" when he returned home from working with Colby's fiancé. RP 1074. B.L. appeared very comfortable with Pierce, and Colby observed nothing unusual. RP 1074.

Colby testified Lawrence and Pierce told her of the touching allegation. RP 1052-53, 1055. Pierce told Colby "he had woke up and it was on the wrong place or something to that effect" and "that he removed his hand." RP 1076.

Colby also testified they went to the Longview police in order for B.L. to make a statement, but the police said she would have to go to King County, since that is where the investigation was ongoing. RP 1060; see also RP 1173. Thereafter, C.L. returned to King County with B.L. so she could be interviewed. RP 1063.

At trial, B.L. testified that after having a bad dream one night, she unsuccessfully tried to wake her mother. She reportedly woke up Pierce, who told her to climb into bed. RP 1109. B.L. testified that while lying between her mother and Pierce, she "felt something

uncomfortable” around her private areas. RP 1110. B.L. was unsure what she felt and how long after climbing into bed she felt it. RP 1112-1113. She was also unsure whether Pierce was awake. RP 1112.

B.L. elaborated there were three or four nights she had nightmares and felt uncomfortable “[b]eing near Chad.” RP 1118. B.L. claimed Pierce touched her every time she had a nightmare. RP 1119-1121. She stated it happened three or four times. RP 1123.

B.L. acknowledged Mika and Jackie did not like Pierce. 1126. Although B.L. claimed she had not done so, she admitted Jackie told her – on two separate occasions – to “tell a bad lie about Chad.” RP 1126, 1130. During an interview with the defense investigator, B.L. also admitted Mika told her to tell lies about Pierce, but she said Jackie encouraged her to lie more than Mika. RP 1246.

Psychiatrist Ralph Pascauly – director of the Swedish Sleep Medicine Institute and expert in the field of sleep medicine – testified about the probability Pierce was asleep when he reportedly touched B.L. RP 1292. In reaching his opinion, Pascauly reviewed discovery and interviewed Pierce. RP 1308-09. Pascauly

described Pierce as “matter of fact;” he “didn’t embellish the answer;” and he appeared not to have any particular knowledge about sleep behavior. RP 1317, 1321.

Before offering his opinion, Pascauly testified about certain aspects of parasomnia behavior. For instance, Pascauly explained sleep amnesia is common. Typically, our memory system does not work well if we are sleepy, entering sleep or coming out of sleep. As a result, an individual who is watching television but about to fall asleep will often forget the last few minutes of what he or she saw. If someone were to ask when the individual fell asleep, he or she might say: “oh, I fell asleep when the guy was doing this or that.” RP 1299. In reality, however, the individual “probably fell asleep a little bit after that” and does not remember. RP 1299.

The same phenomenon happens when someone wakes up. For instance, an individual can “wake up, make a phone call, talk to someone in the middle of the night, and then you’ll go to sleep, and the next morning, you may not remember you did it at all.” RP 1299. In fact, Pascauly testified people can perform highly complex tasks when asleep, such as making a sandwich or even driving a car. RP 1305. Pascauly testified it is normal to be woken up in the middle of the night and not remember it the next day. RP 1307.

Turning to the facts of this case, Pascauly testified Pierce reported that B.L. was not accustomed to sleeping with her mother and stepfather.⁶ RP 132-33. Pierce also reported B.L. came into the room of her own accord. RP 1323. When he awoke, Pierce was unaware of the manner in which B.L. entered, but found B.L. in a spooning position with him, which Pascauly testified is often an automatic sleeping behavior. RP 1323. Pierce explained his surprise at finding B.L., whereupon he moved her to the other side of the bed. RP 1323. Pascauly testified Pierce's action was consistent with an individual who was asleep, but became conscious and realized an abnormal situation. RP 1323.

In Pascauly's opinion, Pierce's behavior was most consistent with someone who was engaging in parasomnia behavior. RP 1325. He testified his opinion was corroborated by: the absence of other evidence of sexual abuse; the absence of evidence Pierce attempted to sleep in B.L.'s room; the absence of any history of wakeful behavior that would give Pierce an opportunity to abuse B.L.; and Pierce's direct and unembellished responses during the interview. RP 1324.

⁶ Lawrence testified Pierce actually had a rule about no children in the bed. RP 1163-64.

2. Defense Counsel's Failure to Call Erik Applebee as a Witness

As indicated above, B.L. did not make any allegations until February 2005. RP 837. She told Wilske the inappropriate touching occurred in February and March 2004. Trial Exhibit 5, page 13.

Coincidentally, at that time in 2004, CPS was investigating an allegation Pierce molested Mika. Mika ultimately denied any abuse, and the case was closed as "unfounded." CP 19. Interestingly, however, as part of the investigation, social worker Erik Applebee interviewed B.L. at school on April 21, 2004.⁷ As recounted in defense counsel's trial brief:

On April 21, 2004, Erik Applebee went to Brandai's school and asked her in front of the school counselor if she knew the difference between a good touch or a bad touch. Brandai said she did. Mr. Applebee then asked her if anyone talked about being badly touched or if anyone was badly touched and she said no. He then asked her if she has ever been uncomfortable at home, Brandai said no.

CP 19.

⁷ The substance of Applebee's report will be set forth verbatim in the relevant argument section, *infra*. The CPS record was admitted in the post-trial proceedings to show what information defense counsel knew of at the time of trial. 1RP 257.

During pretrial proceedings, defense counsel indicated his intent to call Applebee as a witness. RP 441-43. The court ruled Applebee's testimony was relevant and admissible:

That's relevant evidence. I'm not saying it's not relevant evidence if you want to present that information. But I just wanted to make sure I haven't somehow misconstrued everything by thinking that she made some really early disclosure in fact.

RP 443. Counsel did not call Applebee, however.

Following his convictions, Pierce filed several motions for relief from judgment. See e.g. CP 75-88 (Motion to Dismiss Charges); CP 89-100 (Motion for New Trial); CP 101-108 (Motion to Dismiss); CP 120-175 (CrR 7.8 Motion and Declarations); and CP 319-854 ("Motion to Show State, Prosecutor and Government Fraud").

Within these motions, Pierce argued inter alia that counsel's failure to call Applebee amounted to ineffective assistance of counsel. CP 89-91, 98; RP 1534, 1748-49; 1RP 257, 264-266, 324. During the hearing on Pierce's motion for a new trial, defense counsel testified he wanted Applebee to testify, but the court ruled he could not:

He asked Brandai – I remember this very specifically because I brought it up in a pretrial motion that was denied – he asked Brandai if anything, if

anyone at her school had been touched inappropriately and Brandai said no. . . .

I can't recall if he was located at the school when he asked her, but he did ask her has anybody at your school been inappropriately touched and she said no. And this was after the allegations against Mr. Pierce, which I thought, my recollection, I thought that was very relevant information. I tried to get that introduced in pretrial and it was denied. It was suppressed.

1RP 461-62; See also Motion for New Trial Exhibit 38 (Defense Counsel's letter to the bar association stating same).

The court did not address this ineffective assistance of counsel claim in its memorandum decision denying Pierce's post-trial motion. CP 1019-1025.

3. Facts Pertaining to Prosecutorial Misconduct Issue

At the time the allegations arose, Pierce was on probation for an unrelated, nonsexual offense. RP 679. He met regularly with his CCO Shandra Robertson at her Everett office. RP 79-80. At a hearing to determine the admissibility of certain statements Pierce reportedly made to Robertson, Robertson testified Pierce told her he was being investigated for allegedly touching B.L. RP 84. Upon hearing this, Robertson scheduled a polygraph examination for March 8, 2005, but Pierce did not show up. RP 86-87, 90.

The court excluded any mention of the scheduled polygraph. RP 680. However, the prosecutor wanted to elicit that Pierce and Lawrence thereafter took B.L. to visit Colby and Booth in Kelso, on grounds it was evidence of "flight." RP 681. The state also wanted to elicit that Pierce and Lawrence later went to Wenatchee, where Pierce was arrested on the warrant for failing to appear for the polygraph. RP 681, 761. The court noted that Robertson's testimony would be cumulative of Colby's and that flight evidence is only "marginally probative" anyway. RP 694-95. The court accordingly excluded Robertson's proposed testimony. RP 694-95.

The state later renewed its request to present evidence of "flight" through CCO Robertson. CP 9-12; RP 747-48. The state alleged Pierce's actions showed consciousness of guilt. RP 750.

Defense counsel responded the Kelso visit did not show consciousness of guilt, as there were several reasons Pierce and Lawrence went there. Primarily, Lawrence wanted to observe B.L.'s interactions with Pierce "in a different environment" without "all these allegations being thrown around" to see if there was evidence of abuse. RP 753. RP 753.

For at least two reasons, the court sided with the defense. First, the court noted it would be in a similar quandary about the proposition of a polygraph test:

And to me that is just as reasonable a perception as to why he gave flight in the sense of not wanting to get himself stuck in the flypaper of a polygraph outcome when it seems to me questionable that they should even have been engaging in that kind of stuff with regard to what he had just revealed.^[8]

RP 766. In other words, the court opined Pierce left – not because of a guilty conscious – but fear of the polygraph. RP 766.

Second, it appeared to the court that Lawrence “had her own agenda as to what she wanted to do[.]” RP 766. To the court, “it’s just way to[o] speculative to say that the reason he didn’t show up was just as much the product of his concern about having to take a polygraph as it was flight,” especially since Pierce had already gone to his probation officer and informed her of the investigation. RP 766. The court ruled it would not “reconsider the flight.” RP 769.

Despite the court’s ruling, the prosecutor alleged in her opening statement that Pierce and Lawrence “fled the area,” during the investigation. RP 800. Worse still, however, the prosecutor

⁸ During an interview with defense counsel, Robertson stated the polygraph had nothing to do with B.L.’s allegations. RP 97. RP 92. Robertson could not recall, however, whether she so informed Pierce. RP 97.

made flight the main theme of her rebuttal closing argument, setting the stage with this theory:

Because, let's think about it. What do guilty people do? They change their story. They run. And they hide. And in this case, the Defendant did all three.

RP 1423-24.

The prosecutor asserted Pierce's trip to Kelso was tantamount to running and hiding:

Second, what does a guilty person do? They run. And when the police wanted to have Brindai start to meet with a child interviewer, when the police started getting concerned about what was happening in that house, they ran. They showed up on Debbie Colby's doorstep and they said that, we're in town, can we stay with you for a while.

Ms. Lawrence admitted it. She said, I just wanted to get away from here. She also – she said that she was going to Debbie Colby's for a visit. Now you heard Ms. Colby say they called when they were in town. They didn't plan this visit. They didn't intend to come ahead of time. They just drove to somewhere that they knew no one would find them.

Now I want you to remember what Connie Lawrence told the detective on March 15th. The detective testified that Connie Lawrence called him and she said, Brindai and I are out of the state, we're not coming back, and I have no idea where the Defendant is. What are they doing? They're trying to hide. They're trying to prevent the police from having contact, finding out what's going on with Brindai. What do they also – what do people do? They hide.

And Connie Lawrence herself admitted it. She said she didn't want anybody to know where they were.

RP 1426.

The prosecutor asserted Pierce and Lawrence fled again once B.L. was taken into custody, after her interview with Wilske: "And Connie Lawrence, as hard as she had tried to make sure that Brindai wouldn't say a word, she couldn't be convinced, and so they left and they moved again." RP 1426.

In post-trial proceedings, Pierce argued inter alia the prosecutor violated the court's in limine ruling by arguing the trip to Kelso was evidence of Pierce's guilt. See e.g. CP 82, 105-06, 157-58, 162; RP 1781. In response, the state claimed the court excluded evidence of flight only as it related to Pierce's refusal to submit to polygraph testing. The prosecutor claimed evidence Pierce left Snohomish County and went to Kelso was always admissible. Supp. CP __ (sub. no. 231, State's Response, 10/18/07). The court ultimately reserved on the issue until transcripts could be obtained. RP 1808.

Before adjourning for the day, however, the court stated:

I could see if she got up and said he took flight, which would be a violation of my pretrial ruling in any event, apparently unobjected to, but let's assume that's all by the board, and she knew there were

several pieces of information from which someone could infer it was not flight, like you were being evicted and there were other issues that pertain to why you couldn't be found right then and never told the defense or never gave them the evidence, say, of the outcome of the CPS investigation or something like that, then we might have a problem.

...
Because (a), there'd be the issue of whether or not there was a Brady violation, and (b), there'd probably be some kind of duty on the part of the state not to **mislead** independent of that.

RP 1810 (emphasis added).

At a latter post-trial evidentiary hearing, Pierce offered the prosecutor's closing argument as an exhibit and reiterated his argument that it violated the court's pre-trial ruling. Motion for New Trial Exhibit 25; 1RP 213, 241-42.

In response, the prosecutor pointed out Lawrence testified she wanted to go to a different environment to observe B.L. and Pierce interact. 1RP 1085. Counsel therefore posited:

It's perfectly reasonable to believe that these are individuals who, when faced with this investigation, did leave. But there was nothing that we talked about in reference to polygraphs. There was nothing in reference to the defendant leaving because polygraph examinations were being administered.

1RP 1086.

Because there was evidence Pierce and Lawrence went to Kelso, the prosecutor argued her characterization of such action as flight was not flagrant or ill intentioned:

And so based on that, the fact that this evidence was going to be coming in, that it was going to be discussed, the interpretation of leaving and taking off I would argue does not amount to such flagrant and ill-intentioned behavior, given that it was not objected to[.]

1RP 1087.

The court did not address this prosecutorial misconduct claim in its memorandum decision denying Pierce's post-trial motion. CP 1019-1025.

D. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION REGARDING UNCONSCIOUSNESS AS A DEFENSE DEPRIVED PIERCE OF HIS RIGHT TO A FAIR TRIAL.

Although defense counsel presented evidence Pierce was asleep at the time of the alleged touching, counsel failed to offer an instruction informing the jury that unconsciousness is a defense to child molestation. CP 38-52 (Defendant's Proposed Instructions). Without such an instruction, jurors would not know how to weigh the sleep evidence vis-à-vis the elements of the offense. Indeed,

without such an instruction, jurors could convict even if they believed Pierce was asleep at the time of the alleged touching. Because the evidence supported the instruction, and counsel had no tactical reason not to request it, counsel's failure amounted to ineffective assistance of counsel.

(i) The Evidence Supported the Instruction

"A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence." State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681 (1999) (citing State v. Washington, 36 Wash.App. 792, 793, 677 P.2d 786 (1984)), review denied, 139 Wash.2d 1027, 994 P.2d 845 (2000); State v. Hackett, 64 Wn. App. 780, 827 P.2d 1013 (1992). "Instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury on the applicable law." State v. McLoyd, 87 Wash.App. 66, 71, 939 P.2d 1255 (1997), aff'd sub nom. by State v. Studd, 137 Wash.2d 533, 973 P.2d 1049 (1999) (citing Flint v. Hart, 82 Wn. App. 209, 223, 917 P.2d 590 (1996)).

There are two components of every crime. One is objective – the actus reus; the other subjective – the mens rea. The actus

actus reus is the culpable act itself, while the mens rea is the criminal intent with which one performs the criminal act. However, the mens rea does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the actus reus itself. This is the element of volition. State v. Utter, 4 Wn. App. 137, 139, 479 P.2d 946 (1971) (citing Sim, The Involuntary Actus Reus, 25 Modern L.Rev. 741 (1962)).

To establish the actus reus of a crime, the state must prove the defendant acted voluntarily:

It is sometimes said that no crime has been committed unless the harmful result was brought about by a 'voluntary act.' Analysis of such a statement will disclose, however, that as so used the phrase 'voluntary act' means no more than the mere word 'act.' An act must be a willed movement or the omission of a possible and legally-required performance. This is essential to the actus reus rather than to the mens rea. 'A spasm is not an act.'

Utter, 4 Wn. App. at 140 (omitting footnotes and quoting R. Perkins, Criminal Law 660 (1957)).

A person who is unconscious is incapable of committing a culpable act:

Where, at the time of the killing, the slayer was clearly unconscious thereof, such unconsciousness will constitute a defense, as

in the case of a homicide committed by one in a state of **somnambulism**, or while delirious from disease.

(Footnotes omitted.) O. Warren and B. Bilas, 1 Warren on Homicide s 61 (perm. Ed. 1938).

If a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefore. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.

R. Anderson, 1 Wharton's Criminal Law and Procedure s 50 (1957).

Utter, 4 Wn. App. at 141-42 (emphasis added).

A defendant is entitled to an instruction on the defense of unconsciousness where there is sufficient evidence to support it.

Utter, at 143. The issue in Utter was whether defendant Claude Utter was entitled to have the issue of unconsciousness presented to the jury as a defense to manslaughter. Utter was accused of killing his son.

Utter and his son were living together when the son was killed. He was seen to enter his father's apartment and afterward heard to say, "Dad, don't." Shortly thereafter he was seen collapsing in the hallway, having been stabbed in the chest. He died after stating, "Dad stabbed me." Utter, at 138.

Utter had served as a combat infantryman in World War II, was honorably discharged and living on a disability pension. The day his son was killed, he had been drinking excessively. Utter ran out of liquor by noon, but went to the liquor store to get more. He and another resident of the apartment building continued drinking. Utter remembered drinking with his friend and then waking up in jail after his son's death, but nothing in the interim. Utter, at 138-39.

Utter presented evidence of "conditioned response" or automatism during the trial. A psychiatrist defined conditioned response as "an act or a pattern of activity occurring so rapidly, so uniformly as to be automatic in response to a certain stimulus." Utter, at 139. Utter testified that as a result of his jungle warfare training and experiences in World War II, he had on two occasions in the 1950s reacted violently towards people approaching him unexpectedly from the rear. Utter, at 139.

The trial court ruled that conditioned response was not a defense in Washington, however, and instructed the jury to disregard all evidence on the subject. Utter was convicted and appealed to this Court. He argued "that a person in an automatic or unconscious state is incapable of committing a culpable act – in this case, a homicidal act." Utter, at 141.

This Court agreed there was authority to support Utter's theory, and that he was entitled to present it to the jury if there was sufficient evidence to support it.

The issue of whether or not the appellant was in an unconscious or automatistic state at the time he allegedly committed the criminal acts charged is a question of fact. Appellant's theory of the case should have been presented to the jury if there was substantial evidence to support it.

Utter, at 143. This Court nevertheless found the evidence insufficient to present the issue to the jury because there was no evidence from which the jury could reasonably infer what happened in the room at the time of the stabbing. In other words, "the jury could only speculate on the existence of the triggering stimulus." Utter, 4 Wn. App. 137.

Unlike Utter, Pierce presented sufficient evidence to support an unconsciousness instruction. Through Pascauly, Pierce's out-of-court statements to Lawrence and B.L.'s own statements that the touching occurred until Pierce "woke up" constituted more than sufficient evidence to support the giving of an unconsciousness instruction. Under this Court's decision in Utter, the court would have been required to give it had defense counsel asked. Utter, at 143.

(ii) Counsel's Failure to Request the Instruction Was Not a Valid Tactic and Prejudiced Pierce.

Pierce had the right to effective assistance of counsel at trial. U. S. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 553, 551, 973 P.2d 1049 (1999); State v. Gentry, 125 Wn. 2d 570, 646-47, 888 P.2d 1105 (1995); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Doogan, 82 Wn. App. at 188 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Defense counsel was ineffective in failing to propose an instruction on unconsciousness as a defense to child molestation. State v. Thomas, 109 Wn.2d 222, 227-28, 743 P.2d 816 (1987) (counsel's failure to request an involuntary intoxication instruction where the evidence supported it constituted ineffective assistance of counsel).

There was no legitimate tactical reason for counsel not to request the instruction, as it was supported by the evidence and would have informed jurors how to consider the sleep evidence during its deliberations. Without such an instruction, the relevance of the sleep evidence to the elements of the offense is not apparent. The “to convict” instructions say nothing about volition or the actus reus of the offense. CP 64-65. The instructions merely require the jury to find Pierce “had sexual contact.” CP 64-65.

There is a reasonable probability that counsel's failure to request the instruction affected the outcome of the case. Pascauly testified people can perform highly complicated tasks while in a state of sleep, such as making a sandwich or driving a car. There is no reason a person could not also engage in sexual contact while asleep. In that instance, the person could be acting – in his or her state of sleep – for the purpose of sexual gratification, albeit involuntarily. Because jurors were not instructed that involuntary sexual contact “is in reality no act at all,”⁹ jurors might have convicted even if they believed Pierce was asleep. Because of counsel's failure to request an instruction on unconsciousness or somnambulism, Pierce's convictions may rest on involuntary action

⁹ Utter, at 143

for which he is not culpable. Pierce was prejudiced by his counsel's deficient performance.

In response, the state may argue any prejudice resulting from defense counsel's failure to request the instruction was ameliorated by the instruction on "sexual contact," which provided:

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.

CP 66.

The state may try to argue that because the definition requires that the actor to touch the person **for the purpose of** sexual gratification, Pierce was able to argue he was incapable of having this purpose because he was asleep. The problem with the state's anticipated argument is that the emboldened language pertains to the required mental state, not the act itself. It says nothing about volition. Because the instruction does not indicate that the touching itself must be a voluntary act, jurors still could have convicted even if they believed Pierce acted involuntarily. Accordingly, the jury instructions as a whole did not properly inform the jury of the applicable law, and Pierce's convictions must be reversed.

2. DEFENSE COUNSEL'S FAILURE TO CALL ERIK APPLEBEE AS A WITNESS DEPRIVED PIERCE OF HIS RIGHT TO A FAIR TRIAL.

Defense attorneys have a duty to make a reasonable investigation. In re Personal Restraint of Davis, 152 Wash.2d 647, 721, 101 P.3d 1 (2004). A lawyer who "fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." Riley v. Payne, 352 F.3d 1313, 1318 (9th Cir.2003), cert. denied, 543 U.S. 917, 125 S. Ct. 39, 160 L.Ed.2d 200 (2004).

Defense counsel must, "at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." Davis, 152 Wash.2d at 721, 101 P.3d 1 (quoting In re Personal Restraint of Brett, 142 Wash.2d 868, 873, 16 P.3d 601 (2001)). "An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." Davis, 152 Wash.2d at 722, 101 P.3d 1 (citations omitted). Although failure to interview a

witness to a crime may be deficient performance, counsel “need not interview every possible witness to have performed proficiently.” Riley, 352 F.3d at 1318.

Defense counsel’s failure to call a witness with exculpatory evidence may constitute deficient performance. See e.g. Riley, 352 F.3d at 1321 (defense counsel performed deficiently where he failed to interview and call a witness who would have said the victim was the first aggressor); Lord v. Wood, 184 F.3d 1083, 1096 (9th Cir.1999) (counsel’s performance was deficient where counsel failed to interview three witnesses who had material evidence as to their client’s innocence); Brown v. Meyers, 137 F.3d 1154 (9th Cir. 1988) (failure to investigate and present available alibi witnesses prejudicial where, without corroborating witnesses, defendant’s bare testimony left him without a defense).

There was no tactical reason in this case for defense counsel not to call Applebee. In fact, defense counsel himself stated he wanted Applebee to testify. Moreover, the court ruled Applebee’s testimony was relevant and admissible. The sole reason defense counsel did not call Applebee was counsel’s mistaken perception the court excluded his testimony. No reasonably competent attorney would have made such a mistake.

In response, the state may argue counsel made a tactical decision not to call Applebee, because it would have opened the door to the CPS investigation regarding Mika, which counsel successfully moved to exclude. RP 665-668. For several reasons, however, any such argument should be rejected. First, it is not supported by the record. Defense counsel testified he did not call Applebee because he believed the court excluded his testimony. Second, the court never suggested Applebee's testimony would open the door to the Mika investigation. Nor could it.

In fact, during the post-trial proceedings, defense counsel indicated he would have limited Applebee's testimony:

The only thing I wanted to present to the jury in a limited fashion was that Eric Applebee asked Brandai if she was ever touched, or if anyone at her school was touched at home, and Brandai said no. That's the only thing I wanted to introduce. I didn't want to introduce that whole scenario.

1RP 853.

"[W]hen a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17

(1969) (citing State v. Stevens, 69 Wn.2d 906, 421 P.2d 360

(1966)). This rule is aimed at fairness and truth-seeking:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

Gefeller, 76 Wn.2d at 455.

The subject matter that would have been raised by counsel's limited questioning is B.L.'s conversation with Applebee, not the Mika investigation. Defense counsel's proposed question opened the door to cross-examination on the former not the latter. Under the opening-the-door rule, the state would be free to cross-examine B.L. about her statement to Applebee.

Accordingly, any argument suggesting defense counsel's decision not to call Applebee was tactical should be rejected. The record shows counsel wanted him to testify and would have limited his testimony so as not to open the door to the Mika investigation. The sole reason counsel did not call Applebee was his mistaken

impression the court excluded his testimony. Counsel's mistake constituted deficient performance.

Pierce was prejudiced by his attorney's deficient performance. B.L. claimed the touching occurred in February and March 2004. However, B.L.'s statements to Applebee in April 2004, belie B.L.'s claim. As reported by Applebee:

04-21-04 this SW spoke with B.L.-C. at Elementary in the presence of the school counselor. .

.. This SW asked if she knew about good touch/bad touch and she said yes. This SW asked if she was concerned for anyone at school or at home who might have talked about bad touch or been bad touched and she said no. This SW asked if she has ever been uncomfortable at home and she said no. . . . This SW asked if she felt safe at home and she said yes.

Motion for New Trial, Exhibit 1.

Had counsel produced this testimony, there is a reasonable probability the outcome of the case would have been different. Applebee's testimony would have bolstered the defense's theory that B.L. was manipulated between the time the touching allegedly occurred and her later disclosure of it. Otherwise, why would B.L. say she had not been abused as of April 2004, but several months later allege – after living with her sisters who hated Pierce – she was abused back in February and March 2004. Counsel's failure to

call Applebee to enable Pierce to make this critical argument to the jury constituted ineffective assistance of counsel. This Court should reverse Pierce's convictions.

3. PROSECUTORIAL MISCONDUCT DEPRIVED
PIERCE OF HIS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const., art. 1, § 22 (amend. 10). State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant is deprived of a fair trial when there is a "substantial likelihood" that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing State v. Reed, supra, at 147-48). Prosecutorial misconduct requires reversal even where there was no defense objection if the prosecutor's remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have been neutralized by a curative instruction to the jury. Belgarde, 110 Wn.2d at 507; State v. Echevarria, 71 Wn. App. 595, 597-98, 860 P.2d 420 (1993).

The purpose of orders in limine is to clear up questions of admissibility before trial to prevent the admission of highly

prejudicial evidence. See State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981); State v. Austin, 34 Wn. App. 625, 633, 662 P.2d 872 (1983), aff'd sub nom., State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984); see also ER 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements . . . in the hearing of the jury").

When a trial court makes an in limine ruling excluding evidence, the attorneys must abide by the ruling. Washington courts often have found prejudicial misconduct where a prosecutor's actions violate an in limine ruling. See, e.g., State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (prosecutor's violation of motion in limine excluding evidence of defendant's prior drug-related offense was "flagrantly improper"); State v. Ransom, 56 Wn. App. 712, 713 n.1, 785 P.2d 469 (1990) (citing State v. Stephans, 47 Wn. App. 600, 736 P.2d 302 (1987)).

The prosecutor's closing argument equating Pierce's trip to Kelso with consciousness of guilt constituted prejudicial misconduct. First, the prosecutor's argument relied more on

Lawrence's actions than Pierce's. For instance, she used Lawrence's testimony that she wanted to "get away" to observe B.L. and Pierce interact as evidence of Pierce's consciousness of guilt. RP 1426. Similarly, the prosecutor used Lawrence's statements to the detective that she was out of state and not coming back as evidence of Pierce's consciousness of guilt. But Lawrence's actions do not reflect on Pierce's state of mind. Rather, they reflect on Lawrence's state of mind.

Second, and perhaps more importantly, the prosecutor's argument violated the court's in limine ruling. In excluding the CCO's testimony, the court specifically found that Pierce more likely left – not because of a guilty conscious – but because of a threatened polygraph of questionable legality. Moreover, the court found the trip appeared to be more Lawrence's idea than Pierce's. For those reasons, the court found it too speculative to suggest Pierce left due to a consciousness of guilt. The prosecutor's closing argument to the contrary flew in the face of the court's ruling.

In response, the state may argue – as it did below – that the court's ruling merely excluded the CCO's testimony, not argument based on reasonable inferences from the evidence. The problem is

the state's argument is not a reasonable inference from the evidence. As the court stated, the inference of flight was speculative.

Worse yet, the prosecutor's argument was misleading, as she was aware there were other reasons why Pierce left, i.e. the polygraph, which the jury never heard about. The court hit the nail on the head when preliminarily addressing Pierce's post-trial prosecutorial misconduct argument:

I could see if she got up and said he took flight, which would be a violation of my pretrial ruling in any event, apparently unobjected to, but let's assume that's all by the board, and she knew there were several pieces of information from which someone could infer it was not flight, like you were being evicted and there were other issues that pertain to why you couldn't be found right then and never told the defense or never gave them the evidence, say, of the outcome of the CPS investigation or something like that, then we might have a problem.

...
Because (a), there'd be the issue of whether or not there was a Brady violation, and (b), there'd probably be some kind of duty on the part of the state not to **mislead** independent of that.

RP 1810 (emphasis added).

Here, there was no Brady violation, since the defense was aware of the threatened polygraph. But the state's argument equating Pierce's trip to Kelso with a consciousness of guilt –

knowing full well there were other **excluded** reasons explaining Pierce's trip – was utterly misleading. By virtue of the prosecutor's slight of hand, jurors were left with only one reasonable explanation for Pierce's trip – he must be guilty. A curative instruction would have been ineffective to unring the bell. In fact, there was no fair curative instruction that could be given. It would be unreasonable to suggest that the defense could have objected and asked the jury to be instructed that Pierce most likely left because he was threatened with a polygraph examination immediately after disclosing B.L.'s allegations to the CCO. Accordingly, the prosecutor's remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have been neutralized by a curative instruction to the jury. This Court should reverse.

4. PIERCE WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT.

A criminal defendant has the right to a unanimous jury verdict. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts the State is

relying on for a conviction or the court must instruct the jury to agree on a specific criminal act. Coleman, 159 Wn.2d at 511. These precautions assure that the unanimous verdict is based on the same act proved beyond a reasonable doubt. Coleman, 159 Wn.2d at 511-12.

A recent decision by Division Two is directly on point. State v. York, __ Wn. App. __, 216 P.3d 436 (2009). Richard York was convicted of four counts of second degree child rape. The first three counts were based on three specific instances described by the complainant, S.B. S.B. also testified the sex occurred on many other occasions, but she could not remember specific dates or instances other than those already identified. Rather, she testified she spent the night at Cindy York's house "like, every Friday night" and that York would have sex with her "[m]ost of the time." York, 216 P.3d at 437 (citation to record omitted).

In closing argument, the prosecutor supported count four by stating that:

[S.B.] talked about a pattern ... she said it happened a lot.... It's not anything you can hang a number on. And she said it happened all the time or some of the time or none of the time. RP at 430.

York, 216 P.3d at 437.

The Court of Appeals reversed York's conviction, reasoning:

Here, the evidence supporting count four was S.B.'s testimony that she spent the night at Cindy's house once a week for about a year and that York had sex with her on most of those occasions. This evidence presented the jury with multiple acts of like misconduct, any one of which could form the basis of count four. See Coleman, 159 Wash.2d at 511, 150 P.3d 1126. Because the State did not specify an act for count four, the trial court should have given a unanimity instruction to ensure that the jurors agreed that a specific act, out of the multiple acts S.B. described, supported the count four conviction beyond a reasonable doubt.

Id.

The same is true here. B.L. gave differing accounts of how many times the touching allegedly occurred. She told Emly and Wiester it happened once. She told Wilske it happened twice. She told her aunt Amy Rhodes it happened "a few, but she could only remember a couple." RP 824. At trial, she said it happened three or four times. In closing argument, the prosecutor did not specify which of these four acts the jury should rely on to convict Pierce of two counts of child molestation. RP 1369-1388. Instead, she addressed B.L.'s multiple allegations generally. See e.g. RP 1375 (told Wilske "no, that wasn't the only time that this happened"), RP 1376 ("and she talked about that it happened, in court she said, three or four times"), RP 1379 ("nobody disputes there was some

touching”); RP 1383 (“multiple occasions”). Nor did the court instruct the jury it must be unanimous as to which of the acts Pierce committed. CP 53-68. The court’s failure to so instruct the jury violated Pierce’s right to a unanimous jury verdict.

Constitutional error is presumed prejudicial and the state bears the burden to prove that it was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). The state cannot do so here. Importantly, Pierce presented expert testimony his actions were most consistent with parasomnia behavior. But the expert’s testimony was premised on Pierce’s explanation that he inadvertently touched B.L. one time. Accordingly, it is possible some jurors believed that on that one occasion, Pierce was asleep. But it is also possible those same jurors believed it happened more than once, and therefore, the later occurrences less likely inadvertent, since Pascauly offered no opinion about those occasions. In contrast, it is possible some jurors rejected Pascauly’s opinion and convicted based on B.L.’s statements to Wilske. Based on this record, there is no way to know. The instructions failed to insure jury unanimity and the state cannot show Pierce was not prejudiced thereby.

In response, the state may argue Pierce waived the error, because the need for a unanimity instruction was discussed and rejected by the court and prosecutor, and defense counsel did not assert otherwise. RP 1358-59. But to the extent counsel's failure to alert the court to the necessity of the instruction contributed to the error, Pierce received ineffective assistance of counsel.

Pierce had the right to effective assistance of counsel. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. Studd, 137 Wn.2d at 551; Doogan, 82 Wn. App. at 188. To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Doogan, 82 Wn. App. at 188.

As set forth above, the instructions were inadequate because they failed to require unanimity as to the acts relied upon to convict. Because the instructions allowed jurors to convict even if they disagreed as to which acts he committed, Pierce was prejudiced. This Court should reverse his convictions.

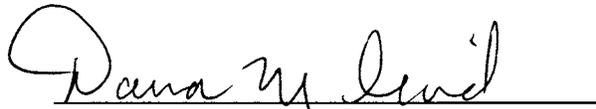
E. CONCLUSION

Pierce was deprived of his right to a fair trial by ineffective assistance of counsel and prosecutorial misconduct. He was also deprived of his right to a unanimous verdict. This Court should reverse his convictions and remand for a new trial.

Dated this 30th day of October, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, reading "Dana M. Lind", written over a horizontal line.

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 61776-1-1
)	
CHAD PIERCE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF OCOTBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHAD PIERCE
DOC NO. 714567
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2079
AIRWAY HEIGHTS, WA 99001

2009 OCT 30 11:44
COURT OF APPEALS
STATE OF WASHINGTON
FILED

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCOTBER, 2009.

x Patrick Mayovsky