NO. 31792-7

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

KEITH SCRIBNER,

Appellant.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

MELANIE TRATNIK
Assistant Attorney General
WSBA # 25576 / OID #91093
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430
Attorneys for the State of
Washington

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I. INTRODUCTION

In January 2009, a deck awning owned by Marilyn Warsinske collapsed under the weight of snow. RP 990, 1057-58. Appellant, Keith Scribner, is Warsinske's son. RP 935. On July 31, 2009, Warsinske called her insurance company, Liberty Northwest, to make a claim for the damaged awning. RP 376-77, 816. Thereafter, Scribner took over the handling of the claim. RP 299, 301, 716, 848.

The collapsed awning was hand-built by the prior homeowner at a cost of $300. RP 79-81. The deck was 356 square feet, and this awning covered less than half the deck. RP 144. The purchase of this home closed on September 1, 2008. RP 139. On September 5, 2008, Scribner's architect drew up plans for an awning covering the entire deck. RP 409-12. This occurred four days after the purchase of the house closed, and four months before the awning even collapsed.

On January 11, 2010, Scribner told the insurance company that the prior awning covered the entire deck. RP 281-82. Scribner submitted a construction bid of $203,000 to build a replacement awning covering the entire deck. RP 856. Liberty Northwest located the prior homeowner who submitted photos showing that the cheaply constructed $300 awning covered less than half the deck. RP 545-51. Based on Scribner's

misrepresentation regarding the size of the deck, Liberty Northwest denied the claim. RP 740.

Scribner was charged with False Claims or Proof ("insurance fraud") and Attempted Theft in the First Degree. CP 1-3.[1] After a seven-day jury trial which included the testimony of 19 witnesses and the introduction of 87 exhibits, Scribner was found guilty of both charges. CP 1245-46.

On appeal, Scribner claims his counsel provided ineffective assistance of counsel by inadvertently submitting a jury instruction for the uncharged crime of Theft in the First Degree occurring during a different date range than specified in the "to convict" instructions, for admitting an email chain purporting to show that Liberty Northwest was acting in bad faith and which included a description of Warsinske's behavior as "evasive," and choosing not to object to testimony regarding why Liberty Northwest denied the insurance claim.[2]

Scribner's claims fail because the instruction did not prejudice him. The instruction was for an uncharged crime, did not have a

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[1] A Corrected Information was subsequently filed correcting a scrivener's error which changed the insurance claim number from "Y08882975" to "Y0882975." CP 24-26.

[2] Scribner was represented by Carl Oreskovich and Courtney Garcia. Since all the alleged errors raised by Scribner were committed by Mr. Oreskovich, Mr. Oreskovich will be referred to as "Scribner's counsel" or "defense counsel" throughout the State's brief.

corresponding verdict form, and there is no evidence to support Scribner's speculative claim that the jury was misled by the instruction. Defense counsel's decision to admit an email chain designed to malign the insurance company was a strategic decision and his failure to object to testimony as to why the insurance claim was denied would not have been sustained as this testimony was admissible. Scribner's counsel performed at an objective standard of reasonableness. Scribner was not prejudiced by his counsel's performance. Scribner's convictions should be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did Scribner receive adequate assistance of counsel where defense counsel inadvertently offered a superfluous jury instruction that did not prejudice Scribner?

B. Did Scribner receive adequate assistance of counsel where defense counsel made a strategic decision to admit an email chain which depicted the insurance company as acting deceptively towards its insured and which described Scribner's mother as "evading?"

C. Did Scribner receive adequate assistance of counsel where defense counsel did not object to admissible factual testimony regarding why the insurance claim was denied, and where such testimony did not prejudice him?

III. STATEMENT OF THE CASE

A. Facts Pertaining To Trial Testimony

In 1975 Scott Starkey purchased a home located at 505 East 14th Avenue in Spokane. RP 57. The home had a cotton awning which was attached to the house with screws and supporting posts. RP 64-69. After

moving into the home Starkey replaced the cotton cover with a more durable canvas cover. RP 69-70. Around 1990 Starkey replaced the canvas cover with polycarbonate panel which he built and installed himself. RP 69-77. It cost Starkey approximately $300 in materials to build the hard-cover polycarbonate awning. RP 79-81. This awning is pictured in State's exhibits 7, attached as *Appendix A.* RP 73-74.

The deck had a chimney on it. The awning did not extend beyond the chimney. RP 84; *Appendix A.* The entire awning constructed by Starkey covered less than half the deck. RP 86. After building the awning, Starkey would sometimes swap out the polycarbonate panel with the canvas cover and then back again. RP 81. The covers were small and light enough that Starkey was able to do this by himself. RP 81. When he took off the polycarbonate cover, Starkey stored the panels by leaning them against the garage on the west side of the house. RP 82. Eventually Starkey stopped swapping between the canvas and polycarbonate awning and left the polycarbonate cover up permanently. RP 81.

Appellant Keith Scribner bought a house next to Starkey's in 1999, and his driveway ran along the west side of Starkey's home. RP 96. Scribner drove down his driveway daily during the nine years he was Starkey's neighbor. RP 101. There is a gate at the end of the driveway that had to be opened and shut for Scribner to get to his home. RP 102.

Starkey used to talk to Scribner while Scribner was in the driveway and Starkey was on his deck. RP 104. Starkey's awning was visible to Scribner when he stood at the end of his driveway. RP 103-04.

Shortly after Scribner bought the home next door to Starkey in 1999, he repeatedly asked Starkey to sell his home so Scribner could buy it for his mother. RP 1034, 1045-47. In 2008, in response to repeated requests from Scribner to sell the house, Starkey gave Scribner an inflated sales price of $500,000 in an effort to get Scribner to stop his repeated requests to purchase the home. RP 90-91. Scribner made no effort to negotiate the price, and despite the grossly inflated price agreed to purchase the home for $500,000 even though he had never been inside it. RP 91-92, 95, 1047, 1049.

Scribner has a background in banking and insurance, and makes his living purchasing commercial properties. RP 1039-44. Despite this experience, Scribner grossly overpaid for the Starkey home. The home was appraised for $375,000, an amount so far below the $500,000 purchase price that the appraiser contacted the bank to express concern. RP 146-47. Scribner expressed regret to others for having overpaid for the home. RP 518.

On September 1, 2008, the sale of the home closed. RP 139. After the purchase, Scribner and his mother Marilyn Warsinske toured the

inside and outside of the home including the deck with the awning. RP 92-94. At the time of these tours the polycarbonate awning was the permanent awing. RP 94. On September 5, 2008, four days after the house closed, architect Martin Hill drew up plans for Scribner for an awning that covered the entire deck. RP 409-12.

Warsinske began moving into the home in October 2008 and began living there permanently in May 2009. RP 986-87. During this interval, Scribner checked on the home whenever Warsinske left to attend to other matters. RP 989-90. In January 2009, Scribner discovered that the awning had collapsed under the weight of snow. RP 1057-58. Scribner called Warsinske in January 2009 to notify her of this. RP 990.

On July 31, 2009, Warsinske called her insurance company, Liberty Northwest, to report that the awning had collapsed under the weight of snow. RP 376-77, 816. Warsinske made the call at Scribner's urging. RP 994-96, 1071. Scribner knew that if they waited too long they may not be able to collect the insurance money to pay for the $200,000 awning covering the entire deck which Scribner's architect had designed. RP 994-96, 1071.

Warsinske's insurance claim was received by adjuster Jamie Milsom. RP 374-77. Milsom set the reserve amount at $5,000. RP 378. A reserve amount is an estimate of the amount that the insurance company

believes is likely to be paid out for the claim. RP 378, 383. Milsom commonly handles damaged awning claims, and such claims were particularly common in Spokane during the winter of 2008 and 2009 due to the heavy snowfalls during those years. RP 378, 847-48.

After Warsinske made the initial report, Scribner took over the handling of the claim. RP 299, 301, 716, 848. On August 3, 2009, field adjuster Tim Sothen went to the Warsinske home to inspect the loss. RP 844, 847. Scribner explained that there were code issues involved in building a new awning, and that he was waiting for more information from the building department and an architect. RP 849. Scribner was about to leave for a three-week trip to Europe, so the men decided to wait for his return before proceeding further with the claim. RP 849. Sothen commonly inspected damaged awning claims due to the heavy snowfall occurring in Spokane during this time period. RP 847-48, 855. Based on his experience, Sothen left the property estimating that the claim payout would be $5000 or less. RP 881.

After Scribner returned from Europe, Liberty Northwest received a $203,000 bid from him to build a replacement awning. RP 856. Sothen had never seen such an expensive awning bid in the more than 10 years he has been an insurance adjuster. RP 856. Given the surprisingly high bid,

Sothen recommended that the claim be reassigned to Liberty Northwest's large loss unit. RP 856-57.

On January 11, 2010, Trevor Evans and Ben Steele of Liberty Northwest's large loss unit visited the Warsinske home in order to determine the size and composition of the pre-loss awning. RP 281, 287, 717-18. Evans and Steele observed that the deck that was under the awning was a terracotta-colored tile deck shaped like a half-circle. The deck was accessed by a door from the home. The deck had black metal railing around it and had a chimney on it that was wider at the bottom. RP 276, 719-20; Exhibits 7, 10, 11.

Scribner walked the men around the deck and described to them how the prior awning had covered the entire deck. 281-82. Evans did not see any indication that an awning had been attached around the chimney. Evans questioned Scribner as to how the awning could have wrapped around the sizeable chimney which protruded onto the deck. RP 283-88. Scribner was unable to explain how the awning fastened around the chimney, but he did not waiver from his claim that it covered the entire width and length of the deck. RP 271, 283-84, 290.

Scribner provided Evans with a set of the building plans which Evans took with him when he left that day. RP 290, 722. These plans depicted a 320 square foot awning covering the entire deck. RP 188-89,

1076. The prior awning stopped at the chimney, and its actual size was approximately 124 to 170 square feet.[3] Unbeknownst to Evans and Liberty Northwest, architect Martin Hill had designed the awning covering the entire deck for Scribner on September 5, 2008, four months before the old awning collapsed. RP 409-12.

Evans left the home and continued trying to determine the size and composition of the pre-loss awning. Evans asked Scribner if he had any photos of the prior awning and Scribner said he did not. RP 302-04; Ex. 72. Evans knew the home had been recently purchased so he asked Scribner if an appraisal had been done knowing that the appraisal may include photos of the home. RP 305. Scribner responded that no appraisal had been done. RP 305-07; Ex. 73. A subsequent investigation revealed that Scribner scheduled an appraisal back on August 19, 2008 and met the appraiser at the home to let him in on August 21, 2008. RP 131-34.

Evans was unsuccessful in obtaining any information, photos or otherwise, that established the size and composition of the pre-loss awning. The only information Evans had was Scribner's claim that the pre-loss awning covered the entire deck. Evans proceeded to process the

[3] Bennie Hamilton, an investigator with the Office of the Insurance Commissioner, used photos showing where the prior awning poles attached and indicators on the Warsinske home such as attachment notches to take measurements. He used these measurements to determine that the original awning was approximately 124 square feet. RP 649-55, 1189. Engineer Mark Schaeffer used photos of the prior awning to estimate its size at 170 square feet. RP 202-03, 230-31.

claim of replacing an awning that would cover the entire deck to include code upgrades. RP 308-10. Evans advised Scribner that Liberty Mutual would pay for a new awning covering the entire deck as shown in the building plans Scribner had provided. Evans asked Scribner to provide two additional constructions bids. RP 308-11; Ex. 316. Scribner complied, providing additional bids of $195,586 and $213,815. RP 311-12; Ex. 74. These bids were for an awning covering the entire deck. RP 1107.

Evans subtracted out the betterment items[4] and calculated the cost of paying the claim at $187,184.14. RP 313-14. Evans had reservations because the large payout for the claim relied exclusively on Scribner's unconfirmed representations that the previous awning covered the entire deck. However, due to the absence of any contrary information, Evans recommended to his superiors that Liberty Northwest pay $187,184.14 on the claim. RP 319.

Before making a final decision on the claim, Liberty Northwest management directed that one last effort be made to exhaust all

[4] Insurance policies pay to put a homeowner back in the position he or she was in prior to the loss. "Betterment" refers to improvements or upgrades a homeowner may wish to make when replacing a damaged structure. RP 312-13. Here, the betterment items included in the original Ball construction bid submitted by Scribner were exterior gypsum (drywall), exterior paint on gypsum (drywall), insulation with vapor barrier, screen venting, and decorative fiberglass columns, including base and sub. *See* Ex. 319. Liberty Northwest subtracted out $1,453.00 for the betterment items sought by Scribner. *See* Ex. 317.

possibilities for obtaining information regarding the pre-loss structure. RP 320. On March 16, 2010, Steele found an aerial photo of the Warsinske home which appeared to show that the prior awning covered only a small portion of the deck. RP 320, 728-29, 748. Steele forwarded the aerial photo to upper management. RP 729.

Liberty Northwest put Scribner's claim on hold after receipt of this photo and assigned the matter to its Special Investigations Unit (SIU). RP 320-21, 730. On March 19, 2010, SIU investigator Tracy Johnson was assigned to look further into the claim and to try and determine the size of the prior awning. RP 543.

Johnson was able to locate Starkey, the prior home owner, and obtain two photos of the prior awning from him. 545-51; Exhibits 1 and 5. The information obtained from Starkey, in conjunction with the photo obtained by Steele showing the small awning, established that the awning destroyed by the heavy snow was much smaller and of much lower value than Scribner claimed. On October 13, 2010, Liberty Mutual denied the claim based on its finding that Scribner had misrepresented the size of the awning. RP 740.

After the claim was denied, the Special Investigations Unit of the Office of the Insurance Commissioner (OIC) conducted an independent investigation of this claim. RP 530, 533. OIC investigators used the

photos of the prior awning and indicators on the Warsinske home to take measurements. OIC concluded that the original awning was approximately 124 square feet, which was considerably smaller than the 320 square foot awning described by Scribner in his insurance claim. RP 649-55, 1189.

During the seven-day trial, defense counsel cross-examined the State's fifteen witnesses, introduced twenty-six exhibits into evidence, presented the testimony of his client, and presented testimony of three additional defense witnesses. In his closing argument, defense counsel presented a defense of his client utilizing the theory he proffered in opening statement and supported by exhibits and facts he elicited from the State's witnesses and his own witnesses throughout the trial.

B. Facts Pertaining To Jury Instructions

On November 11, 2011, the State filed an Information in Spokane County Superior Court which charged Scribner in Count I with False Claims or Proof ("insurance fraud") and in Count II with Attempted Theft in the First Degree CP 1-3.[5] The Information accused Scribner of committing each of the two charged crimes during the period of time from July 31, 2009 to October 13, 2010. CP 24-26. The charging period was

[5] A Corrected Information was subsequently filed correcting a scrivener's error which changed the insurance claim number from "Y08882975" to "Y0882975." CP 24-26.

from the date the insured made the claim (7/31/09) to the date Liberty Northwest denied the claim. *See* RP 376-77, 740.

At the conclusion of testimony defense counsel requested a jury unanimity for each count pursuant to *State v. Petrich.* RP 116; 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

In support of a *Petrich* instruction, defense counsel argued there were two different acts which could form the basis of False Claims or Proof and Attempted Theft in the First Degree. The first was Scribner's misrepresentation to Evans and Steele on January 11, 2010 regarding the size of the prior awning. Defense counsel argued that the second was Scribner's statement to Evans in February 2010 denying the existence of the appraisal. RP 1027-28.

The State objected to a *Petrich* instruction. The prosecutor argued that the alleged deception[6] was an ongoing act which occurred throughout the period of time specified in the charging document. RP 1030. Notwithstanding the ongoing nature of the deception, the prosecutor told the court that she intended to argue that the singular act forming the basis

[6] Defendant was charged with attempted theft by deception. Instruction 17 provides: "Deception occurs when an actor knowingly creates or confirms another's false impression that the actor knows to be false or fails to correct another's impression that the actor previously has created or confirmed." CP 142. As stated in the instruction, deception is ongoing in nature and can include not just a specific act or statement of deception but also the ongoing act of failing to correct a person's misperception. A continuing course of conduct occurs where there is evidence that a defendant took "a series of actions intended to secure the same objective." *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294 (1195).

of Scribner's guilt on both charges was his misrepresentation to Evans and Steele on January 11, 2010, regarding the size of the prior awning. RP 1029, 1118, 1126. The prosecutor further advised that while she did not think a *Petrich* instruction was necessary, it would not affect how she intended to present her closing argument. RP 1125.

The Court instructed the parties to craft a *Petrich* instruction. RP 1128. When the parties could not agree on the wording of the instruction, the Court itself modified the "to convict" instructions by striking the charging period July 31, 2009 through October 13, 2010, and replacing them with the singular date of January 11, 2010. RP 1131, 1134, 1136; CP 133, 137.

The State objected to the Court's modified instructions which specified a single date, arguing that the Court was essentially amending the Information on its own motion. RP 1137. Defense counsel withdrew his request for *Petrich* instruction in light of the court's modifications (specifying a singular date) to Instructions numbers 8 and 12.[7] RP 1142-43; CP 133, 137. Defense counsel objected to the court's intention to give Instruction 15[8] which was initially proposed by the defense and which

[7] Instructions 8 and 12 are instructions which outline the elements of the crimes and are commonly referred to as "to convict" instructions. Instructions 8 and 12 had corresponding verdict forms.

[8] Instruction 15 is also a "to convict" instruction but for the uncharged crime of Theft in the First Degree. Instruction 15 did not have a corresponding verdict form.

erroneously referenced a charge of "Theft in the First Degree" committed during the time period from July 31, 2009 through October 13, 2010. RP 1138-39; CP 140. Defense counsel apparently overlooked that the instruction referred to "Theft in the First Degree" instead of the charged crime of "Attempted Theft in the First Degree," but he did notice and object to the expanded charging period that was not consistent with the court's other instructions. The court gave Instruction 15 over defense counsel's objection. CP 140.

The jury never expressed any concern or confusion related to Instruction No. 15 after it retired for deliberations. The "to convict" instructions (instructions 8 and 12) correctly referenced the two charged crimes of False Claims or Proof and Attempted Theft in the First Degree; and specifically noted the alleged date of each crime as January 11, 2010. CP 133, 137.

On March 13, 2013, the jury returned verdicts of "guilty" on each of the two verdict forms provided to the jury in their jury instructions. RP 1245-46, Appendix *B and C.* These verdict forms specifically referenced the two charged crimes of False Claims or Proof in Count I and Attempted Theft in the First Degree in Count II, and each charge was listed on the verdict form in all capital letters. *Appendix B and C.* Scribner received a standard range sentence. CP 257-267. This appeal follows. CP 268-281.

IV. LAW AND ARGUMENT

A. Scribner's Convictions Should Be Affirmed Because He Received Adequate Assistance Of Counsel

A claim of ineffective assistance of counsel requires the defendant to show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable possibility that, but for the deficient conduct, the outcome of the trial would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). There is a strong presumption that counsel's representation was not deficient. *Id.* at 131.

The objective standard of reasonableness is "highly deferential and courts will indulge in a strong presumption of reasonableness." *Reichenbach*, 153 Wn.2d at 226. Deference is given to trial counsel's performance in order to "eliminate the distorting effects of hindsight." *In re Rice,* 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). Reviewing courts presume that counsel's conduct constituted sound trial strategy. *Id.* at 888. As such, decisions regarding trial strategy or tactics will not establish deficient performance by counsel. *State v. McNeal,* 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Reviewing courts ascertain prejudice by asking whether the defendant received a fair trial. *State v. Carter*, 56 Wn. App. 217, 224, 783

P.2d 589 (1989). Here, Scribner's challenges fail because he can show neither inadequate representation nor prejudice.

1. Trial Counsel's Inadvertent Offering Of A Superfluous Jury Instruction Did Not Prejudice Scribner

A *Petrich*[9] instruction was never warranted in this. Regardless of the disagreement between the State and the defense as to whether a *Petrich* instruction was initially necessary, Scribner concedes that once the trial court modified Instructions 8 and 12 to specify a singular date on which the charged crimes were committed that any alleged unanimity issue related to multiple acts committed over a period of time was cured.

Scribner nevertheless claims he received ineffective assistance of counsel because his counsel proposed, and the court gave, a jury instruction for the charge of Theft in the First Degree, a crime for which Scribner was not charged. Scribner contends that because Instruction 15 specified a time range for the uncharged crime of Theft in the First Degree from July 31, 2009 to October 13, 2010, he was denied his right to a unanimous jury verdict on the crimes of False Claims or Proof and Attempted Theft in the First Degree.

Scribner's arguments fail because jury unanimity was not compromised by an unnecessary instruction. Rather, the jury instructions

[9] 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

as a whole adequately required the jury to find Scribner guilty only if the jurors unanimously agreed that the State proved beyond a reasonable doubt that Scribner committed each element of False Claims or Proof and Attempted Theft in the First Degree on January 11, 2010. Accordingly, Scribner suffered no prejudice and he cannot establish a claim of ineffective assistance of counsel.

Here, had defense counsel not offered the instruction in the first place, or had he realized the instruction was for an uncharged crime, the trial court may very well have not given the instruction. Scribner's counsel later objected to his own proposed instruction, realizing that it referenced a charging period different than what was in the "to-convict" instructions. However, Scribner's trial counsel neglected to note that the instruction also referenced an uncharged crime. Given the erroneous information in Instruction 15, defense counsel clearly did not submit Instruction 15 for any strategic purposes. As such, defense counsel's action of submitting an instruction for an uncharged crime may constitute deficient performance.

Regardless of whether or not defense counsel's act of offering Instruction 15 constituted deficient performance, Scribner cannot prevail on an ineffective assistance of counsel claim because the instruction did not prejudice him. Scribner claims he was prejudiced because Instruction

15 conflicted with Instructions 8 and 12. CP 133, 137, 140. The instructions did not conflict with each other because they each defined a different crime: Instruction 15 provided the elements necessary to convict Scribner of the uncharged crime of Theft in the First Degree; Instruction 8 provided the elements necessary to convict Scribner of the charged crime of False Claims or Proof; and Instruction 12 provided the elements necessary to convict Scribner of the charged crime of *Attempted* Theft in the First Degree. CP 133, 137, 140. Instruction 15 did not provide the jury with any information that conflicted with Instructions 8 and/or 12. CP 133, 137, 140. Instruction 15 was simply an unnecessary and superfluous instruction. CP 140.

An error by trial counsel, even if professionally unreasonable, will only warrant setting aside the judgment if the alleged error affected the judgment. *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Thus, to set aside the judgment, the defendant must affirmatively prove prejudice by showing the error had an actual, not just a conceivable, effect on the outcome. *Id.* at 99.

Prejudice resulting from a jury instruction cannot be established based on pure speculation. *State v. Barry* is illustrative. 179 Wn. App. 175, 317 P.3d 528 (2014). In *Barry,* the trial court instructed the jury that it could consider the defendant's courtroom demeanor during

deliberations. The appellate court ruled that although this instruction was improper, Defendant's challenge failed because he was unable to demonstrate how he was actually prejudiced by the instruction. The Court explained that "merely stating that a jury *may have* considered a defendant's demeanor without any information about that demeanor cannot establish prejudice." *Id.* at 182, emphasis added.

Similarly, Scribner's reliance on *Boyde v. California* for the argument that Instruction 15 misled the jury is without merit. 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). Scribner's claim that the jury misread Instruction 15 to state "attempted theft" instead of "theft" is pure speculation. Jurors are presumed to follow the court's instructions. *State v. Russell,* 125 Wn.2d 24, 84-85, 882 P.2d 747 (1994). There is no reason to believe that the jury did not scrupulously follow the court's instructions and find Scribner "guilty" of Counts I (False Claims or Proof) and II (Attempted Theft in the First Degree) after following the "to-convict" instructions and completing the corresponding verdict forms accordingly. CP 133, 137; *Appendix B and C.* There was no verdict form that corresponded to Instruction 15, and no reason to believe that the jury confused "attempted theft" with "theft." The court should conclude that Scribner has failed to affirmatively demonstrate prejudice, and that there is

no reasonable likelihood the jury applied Instruction 15 in an unconstitutional manner.

Even if proof of such a misreading existed, the impact would have been limited to the Attempted Theft charge only. Scribner concedes as much given that his entire argument rests on his claim that "the jurors viewed Instruction 15 as applying to Count II, the Attempted Theft First Degree charge." App. Brief at 31.

There is no evidence in the record suggesting that the jury was confused or otherwise influenced to the detriment of the defendant by Instruction 15. CP 140. Instruction 8, the to-convict instruction for False Claims or Proof, identified the crime of False Claims or Proof as being "charged in Count I." CP 133. Instruction 12, the to-convict instruction for Attempted Theft in the First Degree, identified the crime of Attempted Theft in the First Degree as being "charged in Count II." CP 137.

The verdict form for Count I asked the jury to determine if the defendant was Not Guilty or Guilty "of the crime of FALSE CLAIMS OR PROOF as charged in Count I." *Appendix B.* The verdict form for Count II asked the jury to determine if the defendant was Not Guilty or Guilty "of the crime of ATTEMPTED THEFT IN THE FIRST DEGREE as charged in Count II." *Appendix C.* Both verdict forms listed the charges in capital letters, and both verdict forms connected the name of the crime

with the numbered count. *Appendix B and C.* Notably, Instruction 15 did not list a charge number for the crime of Theft in the First Degree, and there was no verdict form for this uncharged crime.

The jury was also given Instruction 3, which advised that "[a] separate crime is charged in each count" and the jury "must decide each count separately." CP 128. The jury was further instructed in instructions 2 and 21 that in order to return a verdict of guilty their verdicts must be unanimous. CP 127, 147. Read together, the jury instructions accurately informed the jury that in order to find Scribner guilty of False Claims or Proof they had to unanimously agree that he committed that crime on January 11, 2010. Read together, the jury instructions accurately informed the jury that in order to find Scribner guilty of Attempted Theft in the First Degree they had to unanimously agree that he committed that crime on January 11, 2010.

In reviewing whether a jury instruction prejudiced the defendant, a reviewing court considers all of the instructions provided to the jury, as well as the closing arguments in determining whether a jury instruction prejudiced the defendant. *State v. Corbett,* 158 Wn. App. 576, 593, 242 P.3d 52 (2010). In *State v. Corbett*, the trial court gave the jury four identical "to convict" instructions for four counts of rape of a child. Each instruction listed the crime as having occurred "on or about the period

between the 1st day of January, 2005 and the 31st day of August, 2005[.]" *Id.* at 585-86. The court also gave a unanimity instruction, instructed the jury that "a separate crime is charged in each count," and that "the State relies upon evidence regarding a single act constituting each count of the alleged crime." *Id.* at 585-86.

On appeal, the defendant argued that the jury instructions did not adequately inform the jury that they had to enter unanimous verdicts based on separate and distinct acts. *Corbett,* 158 Wn. App. at 591. In finding that the defendant had failed to show the jury instructions prejudiced him, the Court emphasized that "during closing arguments, the State clearly connected the trial evidence of four separate incidents to the four separate 'to-convict' instructions." *Id.* at 592-93. [10]

Here, like *Corbett,* the State's closing argument made it clear to the jury that in order to find the defendant guilty of False Claims or Proof and Attempted Theft in the First Degree it had to find that Scribner misrepresented the size of the awning to Trevor Evans and Ben Steele on January 11, 2010. After going through several individual jury instructions, the prosecutor began her argument by explaining how the crime of False Claims or Proof was committed.

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[10] "We note that Corbett does not raise an ineffective assistance of counsel claim related to the proposing of the jury instructions and that even if raised, such a claim would fail for lack of prejudice." *Corbett,* 158 Wn. App. at 593, FN 12.

> Count I is charged in jury instruction number 8. ... The heart of this case is elements one and two, which is that on January 11th, 2010, the defendant presented or caused to be presented a false or fraudulent claim or proof in support of such claim. And that's what he did here. He doesn't file the claim; his mother does. The proof in support of such a claim is a statement about the size of the deck that he makes to Mr. Evans and that he makes to Mr. Steele on January 11th, 2010.

RP 1164-65.

The prosecutor went on to discuss how the crime of Attempted Theft in the First Degree was committed.

> This is an attempted theft. So you have a definition in your jury instructions of substantial step. ... And here the substantial step is, again, this act on January of 2010 of misrepresenting the size of the prior awning.

RP 1167-68.

Defense counsel's closing also made it clear that the basis of the charges was the January 11, 2010 misrepresentation regarding the size of the prior awning.

> If he's going to make a false claim, he's got to offer false proof, and I ask you use your collective experience and your collective minds to talk about, does it make sense he's going to make a false statement on January 11th after giving all this stuff to them?

RP 1226.

Scribner further argues that even if defense counsel's performance was not deficient he is still entitled to a new trial because he was

nevertheless denied his right to a unanimous jury verdict. This argument fails because the invited error doctrine precludes a challenge to a jury instruction that was proposed by the complaining party. *State v. Henderson,* 114 Wn.2nd 867, 868, 792 P.2d 514 (1990). Therefore, Scribner is precluded from directly challenging Instruction 15.

However, a defendant may argue on appeal that his counsel's act of offering an instruction that was given by the court constituted ineffective assistance of counsel. *State v. Kyllo,* 166 Wn.2d 856, 861, 215 P.3d 177 (2009). This Court's review is therefore limited to determining whether Scribner is able to meet his burden of establishing a claim of ineffective assistance of counsel. *State v. Bradley,* 96 Wn. App. 678, 682, 980 P.2d 235 (1999).

Scribner's claim fails to establish prejudice either way. Jury instructions are "not erroneous if, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his or her theory of the case. *State v. Wilson*, 117 Wn. App. 1, 17, 75 P.3d 573 (2003). As explained above, the instructions as a whole properly informed the jury that in order to find Scribner guilty of False Claims or Proof and Attempted Theft in the First Degree, it had to conclude that Scribner misrepresented the size of the awning to Trevor Evans and Ben Steele on January 11, 2010. Defendant was not prevented

from arguing, as he did, that he was not guilty of these crimes because he forgot the size of the prior awning. RP 1090, 1108, 1112.

The inclusion of Instruction 15 pertaining to an uncharged crime did not render the instructions as a whole misleading. Even if Scribner were able to convince this Court that Instruction 15 was misleading, his claim still fails because a reviewing court will not overturn a finding of guilt based on a misleading instruction unless the complaining party shows prejudice. *State v. Aguirre,* 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

Regardless of whether the instruction is reviewed directly or through an ineffective assistance of counsel claim, Scribner cannot establish prejudice. Jury Instruction 15 did not conflict with jury Instructions 8 or 12. CP 140, 133, 137. Instruction 15 was superfluous, but there is no evidence or even likelihood that the jury misapplied it. CP 140. The jury did not ask any questions, and when polled all agreed that the verdict forms represented their individual and unanimous group verdicts. RP 1245-49. The clear instructions provided by the remaining jury instructions, the corresponding verdict forms, and the closing arguments combine to show that Scribner was not prejudiced by Instruction 15. Scribner has failed to affirmatively show that there is a reasonable possibility that, but for his counsel's deficient conduct, the

outcome of the trial would have differed. Consequently, his ineffective assistance of counsel claim fails.

2. Any Error Was Harmless Error

Even if Instruction 15 created a jury unanimity issue it was harmless error. A defendant may be convicted only if a unanimous jury concludes he committed the criminal act charged in the information. *State v. Petrich,* 101 Wn.2d 566, 569, 683 P.2d 173 (1984). If the State presents evidence of multiple acts that could form the basis of one charged count, the State must tell the jury which act to rely on or the court must instruct the jury to agree on a specific act. *State v. Kitchen,* 110 Wn.2d 403, 409, 756 P.2d 105 (1988). If neither of these options is utilized the error is harmless if any rational trier of fact would have found that each criminal incident was established beyond a reasonable doubt. *Id.* at 405-06. The State bears the burden of showing a constitutional error was harmless. *State v. Easter,* 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Here, defense counsel conceded there were only two acts which could form the basis of the False Claims or Proof and Attempted Theft in the First Degree charges; the first being Scribner's January 2010 misrepresentation to Evans and Steele regarding the size of the prior awning and the second being Scribner's February 2010 statement to Evans denying the existence of the appraisal. RP 1027-28.

Scribner conceded during trial testimony that he told Evans and Steele that the prior awning extended beyond the fireplace. RP 1090. Scribner admitted that he'd seen the prior awning, but claimed he simply did not recall how much of the deck it covered. RP 1108, 1112. Scribner also admitted that he told Evans that there was no appraisal. Scribner testified he didn't remember getting the appraisal or letting the appraiser in, but he believed the appraiser's testimony that this is what had occurred. RP 1099-1100.

Substantial evidence established that Scribner knowingly made a material misrepresentation when he told Liberty Northwest that the awning that was destroyed was a large elaborate awning that cost hundreds of thousands of dollars to adequately replace. Starkey, the prior homeowner, testified that the awning was hand-built by him at a cost of approximately $300 and that it covered less than half the deck. RP 79-81, 86. The photographic exhibits and testimony established that the ramshackle awning did not cover the entire deck and established overwhelmingly that anyone who saw it regularly, like Scribner, would remember that. *See, Appendix A.* A rational juror considering this evidence could only conclude that Scribner lied, as opposed to "misremembering" so substantially the size and composition of the prior awning.

This is especially true where Scribner lived next door to the awning for nine years. RP 1034, 1045-47. During that time he had a clear line of sight to it, at times talking to Starkey as Starkey stood underneath the small awning. RP 104. When Starkey removed the awning cover he would lean it up against his garage which was next to Scribner's driveway and again in Scribner's plain view. RP 82. Scribner drove by the awning cover daily on his way up and down the driveway. RP 101. Scribner toured the inside and outside of the home on two occasions, including walking across the deck and underneath the awning. RP 92-94.

The purchase of the home was finalized on September 1, 2008. RP 139. Scribner visited the home from October 2008 to May 2009 to check in on the home whenever Warsinske left town. RP 989-90. It was Scribner who discovered the awning had collapsed in January 2009. RP 1057-58.

The black poles that held up the prior awning remained on the deck from the time of its collapse in January 2009 until the end of summer 2009. RP 516, 522-23. The jury reviewed photographic evidence showing that the black poles holding up the awning cover clearly did not extend beyond the chimney. *See* Ex. 41, 45, attached as *Appendix D and E.* These photos show what Scribner saw for over six months as he supervised the cleanup of the debris and the painting of the home from the

January 2009 collapse until the completion of this work at the end of the summer of 2009. RP 512-18. A rational juror considering these photos in light of the other evidence could only conclude that Scribner knowingly misrepresented the size and composition of the prior awning in order to deceive Liberty Northwest into paying for a large, elaborate and expensive awning he was not entitled to under the policy.

Scribner also had a substantial motive to lie about the size of the prior awning. Scribner regretted that he paid $500,000 for a home that was valued at only $375,000. RP 518. Scribner began planning to replace the small cheap awning with a full-size awning four days after the sale of the home closed and four months before the awning collapsed. RP 409-12. Scribner urged his mother to file a claim with Liberty Northwest to build the nearly $200,000 awning Scribner had asked his architect to design. RP 996, 1071. By lying about the size of the prior awning Scribner was almost successful in getting Liberty Northwest to pay $187,184.14 to build the full-size awning he wanted, thereby recouping the $125,000 loss he incurred when he paid $500,000 for a home that was valued at $375,000.

Given the size of the prior awning and Scribner's repeated, extended, and continued exposure to it, Scribner's claim that he thought the prior awning depicted in Attachment "A" covered the entire deck is

unsupported by any evidence and completely contradicted by the evidence and common sense. Any rational trier of fact would have found beyond a reasonable doubt that Scribner's statement to Evans and Steele that the prior awning covered the entire deck was an intentional misrepresentation calculated to defraud Liberty Northwest into paying nearly $200,000 to replace an awning worth $300.

Substantial evidence also establishes that Scribner's claim that he "forgot" that an appraisal had been done was a lie. Scribner worked as a loan consultant for Washington Mutual Bank from 1992 to 2003 and made his living purchasing commercial properties. RP 1039-44. Scribner would have been acutely aware that a bank would not loan money for a home purchase without first obtaining an appraisal. Scribner was the only contact person listed on the appraisal request form, and he met the appraiser at the door and let him into the home. RP 131-34. Scribner's claim at trial that he "forgot" that an appraisal was done stretches the bounds of credulity, a fact the jury was entitled to consider and compare to the other evidence. Any rational trier of fact would have found beyond a reasonable doubt that Scribner intentionally lied to Evans when he claimed that no appraisal was competed before the house was bought.

The only rational conclusion for the jurors to draw from the evidence was that Scribner made false statements and used deception in an

attempt to defraud Liberty Northwest. Scribner was not prejudiced by any perceived deficiency when his counsel proposed a superfluous jury instruction. The jury instructions only allowed the jury to convict for each crime if they unanimously agreed that the State proved each element of each charge beyond a reasonable doubt. The State did that. Instruction 15 was unnecessary, but harmless.

3. Trial Counsel Performed At An Objective Standard Of Reasonableness When He Made The Strategic Decision To Admit An Email Chain Which Depicted The Insurance Company As Acting Deceptively Towards Its Insured

In order to prevail on an ineffective assistance counsel claim based on a failure to object to the admission of evidence, a defendant must show (1) that an objection to the evidence would likely have been sustained, (2) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Scribner argues that his counsel provided ineffective assistance of counsel when he failed to object to a statement by Traci Johnson made to Ben Steele that Marilyn Warsinske, Scribner's mother, was "evading" when she refused to answer questions posed to her by Johnson during an

interview.[11] Scribner's argument fails because the statement describing Warsinske as "evading" was admissible as part of an email chain introduced into evidence by his counsel under ER 106; was used for the strategic purpose of painting Liberty Northwest as acting in bad faith; and Scribner has not shown the results of the trial would have been different if the evidence had not been admitted.

4. Defendant's Exhibit 205 Was Admissible In Its Entirety

Any objection to publishing the admitted exhibit would not have been sustained since Defendant's exhibit 205 had already been admitted into evidence by the defendant. Therefore, the prosecutor's request to have Steele read the remaining portions of the exhibit out loud amounted to nothing more than publishing the exhibit.

Defense counsel admitted Defendant's exhibit 205 into evidence during his cross examination of Steele. RP 778. *Appendix F.* Defendant's exhibit 205 is an email chain between Liberty Northwest employees Steele and Johnson. In Defendant's exhibit 205, Steele asks Johnson if she showed Warsinske the aerial photo discovered by Steele which appears to show the prior awning covering only a small portion of the deck. *Appendix F.* Johnson replies by telling Steele she did not show

[11] Scribner claims the interview referred to by Johnson was made under oath. The interview in question was not a deposition and was not an "examination under oath." The interview was conducted by a Liberty Northwest investigator, not an attorney, and there is no evidence in the record that the interview was conducted under oath.

Warsinske the photo, to which Steele responds: "That works for me. Keep them guessing." *Appendix F.*

On redirect, the prosecutor asked Steele to read the remainder of the email exchange between Steele and Johnson documented in Defendant's exhibit 205, and to explain why he made the "keep them guessing" comment. RP 809-12. The remainder of this exchange contained in Defendant's exhibit 205 includes Johnson's statement that Warsinske was "evading." RP 811-12; *Appendix F.*

An objection to the rest of the exhibit, to include the "evading" statement, would have been futile since Defendant's exhibit 205 was admissible in its entirety under ER 106. ER 106, commonly referred to as the rule of completeness, provides that "[w]hen a writing or recorded statement or part thereof is introduced by the party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." Under this rule, where one party has introduced a conversation, the opposing party is entitled to introduce the rest of the conversation in order to explain, modify or rebut the evidence presented by the first party as long as the remaining conversation related to the same subject matter and is relevant to the issue addressed. *State v. West,* 70 Wn.2d 751, 754, 424 P.2d 1014 (1967). Here, the prosecutor's

introduction of the rest of Defendant's exhibit 205 was unobjectionable since the exhibit was admissible under ER 106.

ER 106 applies even if the evidence introduced to complete the conversation may have been inadmissible prior to the opposing party's admission of the conversation. *West,* 70 Wn.2d at 754. The rule of completeness overrides the hearsay rule. *State v. Hartzell,* 153 Wn. App. 137, 221 P.3d 928 (2009), *review granted, case remanded on other grounds,* 168 Wn.2d 1027, 230 P.3d 1054 (2010). Pursuant to ER 106, the prosecutor's publishing of the remainder of the email conversation was proper and unobjectionable. Similarly, this rule would have prohibited any attempt by defense counsel to redact any portion of Defendant's exhibit 205 prior to admitting it into evidence.

a. Johnson's Description Of Warsinske's Demeanor As "Evading" Did Not Constitute Opinion Testimony

Scribner assigns error to the admissible testimony about witness Warsinske's demeanor by mischaracterizing the statement as inadmissible opinion testimony. In evaluating alleged opinion testimony, courts may consider the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Here, the comment describing Warsinske as evading does not

constitute opinion testimony regarding credibility. Instead, the statement simply describes Warsinske's demeanor. Testimony describing a person's behavior or demeanor is admissible. *State v. Rafay,* 168 Wn. App. 734, 807-08, 285 P.3d 85 (2012) (testimony that defendant's grin "kind of shocked" an officer and that Defendant appeared "robotic" could not reasonably be construed as direct comment on guilt or veracity; rather, "the comments were primarily an attempt to describe the defendant's demeanor").

Even if the description of Warsinske as evasive is construed as opinion testimony the description was not improper because opinion testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or veracity, and is otherwise helpful to the jury, does not constitute an opinion on guilt. *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Comments based on factual observations that support a witness's conclusion are not improper. *See for e.g., State v. Craven*, 69 Wn. App. 581, 585, 849 P.2d 681 (1993) (emergency room worker properly testified that defendant's behavior was unusual); *State v. Allen,* 50 Wn. App. 412, 416-19, 749 P.2d 702 (1988) (police officer properly testified that defendant's sobbing did not look genuine or sincere); *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988) (opinion testimony regarding defendant's reaction is

admissible when based on proper foundation of factual observations that directly support the conclusion).

Since Scribner failed to show that an objection would have been sustained, his claim of ineffective assistance of counsel fails.

5. The Admission Of Defendant's Exhibit 205 Was Trial Strategy

Legitimate decisions of trial strategy or tactics are within the complete discretion of a defendant's trial counsel. *State v. Lord,* 117 Wn.2d 829, 833, 822 P.2d 177 (1992). "Whether to object is a classic example of trial tactics." *State v. Madison,* 53 Wn. App. 754, 673, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* at 763 (citations omitted); *See also, State v. Neidigh,* 78 Wn. App. 71, 77, 895 P.2d 423 (1995).

Here, Defense counsel made a strategic decision to admit Defendant's exhibit 205 into evidence. This strategic decision cannot form the basis of an ineffective assistance of counsel claim. *See, State v. Kyllo,* 166 Wn.2d 856, 863, 215 P.3d 177 (2009) (attorney's performance is not deficient if it can be characterized as a legitimate trial tactic).

Prior to Steele's testimony, defense counsel led Johnson into testifying that she communicates honestly with people insured by Liberty

Northwest. RP 587. Thereafter, Johnson had to concede that she did not share Steele's photo showing an apparently small awning with Warsinske, at which point defense counsel accused her of not doing so because she wanted to "keep her guessing." RP 595, 600.

Defense counsel introduced the email chain after getting Steele to agree that Scribner and Warsinske were not shown photos of the prior awning, and after getting Steele to concede that no mention was made in the claim file that the photo was never shown to Warsinske. RP 773-77. After these concessions were made, defense counsel confronted Steele with the email in which he wrote "[k]eep them guessing." Defense counsel continued to press Steele about the fact that this statement was part of an email chain, but was not documented in the claim file. RP 779. Defense counsel then lead Steele into proclaiming that, during this same time period, he was not trying to determine if there was enough information available upon which to deny coverage; only to turn around and confront Steele with another email which Defendant claims suggests otherwise. RP 781-85.

Defense counsel used the "keep them guessing" comment throughout closing argument to argue that Liberty Northwest was acting deceptively and in bad faith in dealing with its insured, invoking the quote five times and repeatedly threading it throughout his closing argument.

See, e.g., RP 1211 ("Did Liberty Mutual ever take the time to sit down and talk to Keith Scribner and ask him anything? Do you want to talk about deception? How about, let's keep them guessing? Do you think that was deception?"); RP 1229 ("When you deal with your insurance company, do they get to say to you, we're gonna keep you guessing? Do they? If you make a mistake, don't you think that it's fair for them to say to you, gosh, did you make a mistake?"); *See also*, RP 1211, 1214, 1219, 1220, 1221, 1224, 1225, 1226, 1228, 1229.

Defense counsel also elicited testimony from Johnson that she asked Warsinske a list of standardized questions, but did not tell her at the time she set up the meeting that she would be doing this. RP 607. Warsinske testified that she answered all of Johnson's questions which she was prepared to answer, and did not answer some questions because she could not remember everything or because she felt some of the questions were unreasonable. PR 963-64. Warsinske further testified that Johnson had told her Liberty Northwest had some new pertinent information about the claim, but that Johnson would not tell her what it was and never showed her any photos. RP 966, 968.

During closing argument, defense counsel challenged Johnson's description of Warsinske as "evading," relying on testimony he elicited from Warsinske and Johnson about the circumstances under which

Warsinske did not answer all of Johnson's questions. RP 1225. The State never mentioned the "evading" comment during its initial closing argument, and only mentioned it briefly in rebuttal in response to defense counsel's closing argument regarding the "evading" comment and Johnson's decision to not share the photo with Warsinske. RP 1231-32.

Defense counsel made a strategic decision to admit Defendant's exhibit 205, and he used to his advantage Johnson's description of Warsinske as "evading" too further his argument that Liberty Northwest employees were acting in bad faith in how they communicated with their insured. This well-executed strategic decision cannot form the basis of an ineffective assistance of counsel claim.

6. Scribner Was Not Prejudiced By The Admission Of An Email Chain Which Described His Mother's Demeanor As "Evading"

Lastly, Scribner's ineffective assistance of counsel claim fails because he has failed to meet his burden of showing that the result of the trial would have been different had the evidence not been admitted. Likewise, Scribner's argument on appeal that the demeanor testimony about witness Warsinske invaded the providence of the jury and prejudiced him fails because the evidence was properly admitted, and Warsinske was a minor witness whose testimony added no value to the defense.

The impact of Warsinske being described as evasive is minimal, if not non-existent, given that Warsinske was a brief defense witness and was not the defendant in this case.[12] Warsinske was one of 19 witnesses who testified during a seven day trail. The complained of description was contained in an email introduced by the defense; this email was one of 87 exhibits admitted into evidence. Lastly, the jury was given jury instruction number one which advised them that they are the sole judges of the credibility of the witnesses. CP 125.

Scribner has failed to meet his burden of establishing ineffective assistance of counsel. His counsel's decision to enter Defendant's exhibit 205 into evidence constitutes a legitimate trial strategy, and therefore cannot form the basis of an ineffective assistance of counsel claim. Once Defendant's exhibit 205 was introduced into evidence any objection to publishing the remainder of the email would not have been sustained. Lastly, Scribner is unable to demonstrate how a one-word description of an inconsequential witness prejudiced him.

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[12] Scribner's claim that Warsinske was "a key defense witness" is not supported by the record. App's brief at 39. Warsinske largely testified to facts already in evidence, and the main purpose of her testimony appears to have been to garner sympathy for the defendant. See Warsinske's testimony in full, RP 933-1011.

B. Trial Counsel Performed At An Objective Standard Of Reasonableness When He Did Not Object To Admissible Factual Testimony Regarding Why The Insurance Claim Was Denied

In order to prevail on an ineffective assistance of counsel claim based on a failure to object to the admission of evidence, a defendant must show (1) that an objection to the evidence would likely have been sustained, (2) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Scribner claims his counsel provided ineffective assistance of counsel because he did not object when the prosecutor asked the claims adjuster "why was the claim denied," and "[w]hat was the concealment or fraud that caused the claim to be denied." RP 731, 740. Scribner claims these questions and resulting answers constituted opinion testimony that Scribner was guilty. Scribner's claim is without merit, because the prosecutor's questions and resulting testimony pertained to relevant factual information. An objection was not warranted, and would not have been sustained. Scribner has not shown that any prejudice resulted from this admissible evidence since the results of the trial would not have been different had the evidence not been admitted.

1. An Objection To Testimony Regarding Why The Insurance Claim Was Denied Would Not Have Been Sustained

The general rule is that witnesses are to state facts, not express inferences or opinions. *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662, *review denied,* 113 Wn.2d 1002 (1989). Testimony explaining why the insurance claim was denied was factual testimony which identified the act upon which the claim was denied, not opinion testimony regarding Scribner's guilt; therefore it did not invade the province of the jury.

The prosecutor's question and resulting testimony does not amount to rendering an opinion on defendant's guilt. Instead, this testimony simply connected Scribner's misrepresentation regarding the size of the awning to the charge of Attempted Theft in the First Degree.

One element of Attempted Theft in the First Degree is that Scribner took a substantial step towards committing Theft in First Degree, which is committed when a person uses deception "to obtain control over the property or services of another, or the value thereof, with intent to deprive the other party of such property or services." CP 137, 139. To prove this element, the State needed to establish the substantial act which made this an attempted theft and not a completed theft. To do this, the State had to present testimony showing that the insurance claim was denied because of Scribner's misrepresentation and not for some other

reason. Without such testimony, the jury would not know whether or not Scribner's misrepresentation made a difference to the insurance company.

The jurors were aware the insurance claim was denied and that no monies were received, hence no theft was charged. But without Steele's testimony there is an endless list of other reasons why the claim could have been denied such as expiration of the policy, failure to pay premiums, or damage which fell outside the policy limits. If, for example, awnings were simply not covered under the policy, then a jury may not have found that a misrepresentation about the size of the awning was a substantial step toward obtaining money that the insured was entitled to receive.

This evidence did not invade the province of the jury whose duty it was to determine whether Scribner was guilty of this crime. Why the claim was denied provides the reason the insurance company denied the claim but does not prove whether Scribner's action constituted a substantial step, what Scribner's intent was, or where the crime occurred. Therefore, this evidence simply constituted admissible evidence towards proving one of the elements of the crime of Attempted Theft in the First Degree.[13]

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[13] Scribner does not argue that Steele's testimony invaded the province of the jury in regards to the False Claims or Proof charge. Nevertheless, Steele's testimony is similarly admissible for that charge.

Even if Steele's testimony was construed as opinion testimony it would still be admissible. Under ER 704 "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See, e.g., State v. Fisher*, 74 Wn. App. 804, 874 P.2d 1381 (1994), *aff'd in part, vacated in part on other grounds,* 127 Wn.2d 322, 899 P.2d 1251 (1995) (in a prosecution for possession of cocaine with intent to deliver, an opinion that the defendant was "involved in the transaction or he was the one running the show"); *State v. Baird*, 83 Wn. App. 477, 922 P.2d 157 (1996) (in a prosecution for assault, physician's opinion that cuts on victim's face appeared to have been inflicted deliberately); *City of Seattle v. Heatley,* 70 Wn. App. 573, 854 P.2d 658 (1993) (in a driving under the influence case, an officer's opinion that the defendant "was obviously intoxicated and ... [that the defendant] could not drive a motor vehicle in a safe manner").

Evidence Rule 701 allows a lay witness to testify in the form of opinions or inferences if the testimony is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701(b).[14] The prosecutor's questions and Steele's resulting testimony

[14] Steele was also qualified to testify as an expert on this matter pursuant to ER 702 as he is the person whose job it was to determine if a loss is covered by the insurance policy. RP 274-75, 723-24.

provided the necessary factual link connecting Scribner's alleged misconduct to the charge of Attempted Theft in the First Degree. This testimony was proper and useful to the jury, and therefore an objection to it would not have been sustained.

2. The Decision To Not Object To Steele's Testimony Was A Legitimate Trial Strategy

Legitimate decisions of trial strategy or tactics are within the complete discretion of a defendant's trial counsel. *Lord,* 117 Wn.2d at 833. "Whether to object is a classic example of trial tactics." *State v. Madison,* 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* at 763 (citations omitted); *See also, State v. Neidigh,* 78 Wn. App. 71, 77, 895 P.2d 423 (1995). Even if Steele's testimony was objectionable, defense counsel's decision not to shine a bright light on the question is a legitimate trial strategy. Defense counsel's decision not to object to Steele's testimony, especially when viewed in the entirety of the seven day trial, does not rise to the level of an egregious circumstance justifying reversal.

3. Scribner Was Not Prejudiced By Testimony Regarding Why The Insurance Claim Was Denied

Lastly, Scribner has failed to establish that that the result of the trial would have been different had Steele's testimony not been admitted.

Steele's testimony regarding why the claim was denied was inconsequential testimony which was simply part of the chronology of events which assisted the jury in understanding the case.

The jury heard testimony throughout the trial regarding Scribner's actions as discussed above and they were advised in opening statement that Scribner was charged with insurance fraud and Attempted Theft in the First Degree based on these actions. RP 20. Steele's testimony connecting Scribner's conduct to the reason the claim was denied simply closed the factual loop necessary for the jury to understand the case. No prejudice resulted from this brief and straight forward testimony.

V. CONCLUSION

"The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined based upon the entire record below." *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001) (*citing State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969). Here, defense counsel vigorously cross-examined the State's fifteen witnesses, introduced twenty-six exhibits into evidence, presented the testimony of his client and three additional defense witnesses, and presented an opening statement and

closing argument which presented a clear and coherent defense of his client over the course of a seven day trial. Scribner has not met his high burden of demonstrating that his trial counsel's performance was deficient, and that he was prejudiced. His ineffective assistance of counsel claim fails. For the foregoing reasons, the State requests that this Court affirm Scribner's convictions.

RESPECTFULLY SUBMITTED this 30th day of July, 2014.

ROBERT W. FERGUSON
Attorney General of Washington

MELANIE TRATNIK
WSBA #25576 / OID #91093
Assistant Attorney General

Appendix A

Appendix B

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

We, the jury, find the defendant _____ (Not Guilty or Guilty) of the crime of FALSE CLAIMS OR PROOF as charged in Count I.

_____
PRESIDING JUROR

Appendix C

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

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

_____
PRESIDING JUROR

Appendix D

Appendix E

Appendix F

[redacted]

[redacted]

[redacted]

[redacted]

From: JOHNSON, TRACI L
Sent: Wednesday, April 07, 2010 9:01 AM
To: STEELE, BENJAMIN C
Subject: RE: Warsinske

Evading, definitely!

From: STEELE, BENJAMIN C [mailto:Benjamin.Steele@Safeco.com]
Sent: Wednesday, April 07, 2010 9:01 AM
To: Johnson, Traci
Subject: RE: Warsinske

Sorry about that. Did she really not know anything or was she evading

Ben Steele
SPI Personal Lines Property Analyst I
Safeco Insurance
22425 E. Appleway Ave
Liberty Lake, WA 99019
509-944-2657
800-332-3226 ext. 522657
Fax: 888-268-8840
Benjamin.Steele@Safeco.com

sender. Thank you for your cooperation.

From: JOHNSON, TRACI L
Sent: Wednesday, April 07, 2010 9:00 AM
To: STEELE, BENJAMIN C
Subject: RE: Warsinske

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

From: STEELE, BENJAMIN C [mailto:Benjamin.Steele@Safeco.com]
Sent: Wednesday, April 07, 2010 9:00 AM
To: Johnson, Traci
Subject: RE: Warsinske

That works for me. Keep them guessing.

Ben Steele
SPI Personal Lines Property Analyst I
Safeco Insurance
22425 E. Appleway Ave
Liberty Lake, WA 99019
509-944-2657
800-332-3226 ext. 522657
Fax: 888-268-8840
Benjamin.Steele@Safeco.com

From: JOHNSON, TRACI L
Sent: Wednesday, April 07, 2010 8:59 AM
To: STEELE, BENJAMIN C
Subject: RE: Warsinske

Given how the stmt went, no, I did not show it to them, have no intentions of it at this point

From: STEELE, BENJAMIN C [mailto:Benjamin.Steele@Safeco.com]
Sent: Wednesday, April 07, 2010 8:57 AM
To: Johnson, Traci
Subject: RE: Warsinske

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

Ben Steele
SPI Personal Lines Property Analyst I
Safeco Insurance
22425 E. Appleway Ave
Liberty Lake, WA 99019
509-944-2657
800-332-3226 ext. 522657

Fax: 888-268-8840
Benjamin.Steele@Safeco.com

From: JOHNSON, TRACI L
Sent: Wednesday, April 07, 2010 8:17 AM
To: STEELE, BENJAMIN C
Subject: Warsinske

Here is a brief of the r/s. I did not make much headway yesterday with her and her atty. Sorry. << File: mwarsinske.doc >>

NO. 317927

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

KEITH SCRIBNER,

Appellant.

DECLARATION OF SERVICE

On the 30th day of July, 2014, I sent via U.S. mail, first class delivery, postage prepaid, true and correct copies of the State of Washington's Opening Brief and Declaration of Service addressed as follows:

James Elliot Lobsenz
CARNEY BADLEY SPELLMAN
701 5th Avenue, Suite 3600
Seattle, WA 98104-7010

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of July, 2014, at Seattle, Washington.

LISSA TREADWAY