No. 43218-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Chadwick Kalebaugh,

Appellant.

Lewis County Superior Court Cause No. 11-1-00772-8

The Honorable Judge Richard Brosey

Appellant's Reply Brief

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I. THE TRIAL COURT'S MISSTATEMENT OF THE LAW IN THE ADVANCE ORAL INSTRUCTION REQUIRES REVERSAL.

One of the first things jurors heard from the trial judge in this case was an erroneous statement of the law. After correctly defining reasonable doubt as "a doubt for which a reason can be given," the court went on to make the following nonstandard pronouncement:

> If after your deliberations you do not have a doubt for which a reason can be given as to the defendant's guilt, then, you are satisfied beyond a reasonable doubt. On the other hand, if after your deliberations you do have a doubt for which a reason can be given as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt.

1 VRP 9. Cf. WPIC 1.01 ("Advance Oral Instruction"). These statements clearly and unambiguously indicated that jurors should convict unless able to articulate a reason for any doubt. Cf. State v. Walker, 164 Wash.App. 724, 731-32, 265 P.3d 191 (2011).

A pronouncement of this sort is "a misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' [and] constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." State v. Johnson, 158 Wash.App. 677, 685-86, 243 P.3d 936 (2010) review denied, 171 Wash.2d 1013, 249 P.3d 1029 (2011)

(quoting State v. Bennett, 161 Wash.2d 303, 315, 165 P.3d 1241 (2007)). Although the court did not specifically use the phrase "fill in the blank"—which is misconduct if employed by a prosecutor[1]—the court's advance oral instruction directed jurors to acquit only if they could state a reason for their doubt. 1 VRP 9.

The error here is more prejudicial than the misconduct that required reversal in Walker and Johnson because in this case the misstatement came in the form of an instruction from the judge. Furthermore, because it came at the very beginning of the case, the erroneous instruction served as the lens through which jurors viewed every piece of evidence introduced at trial.

Nor was the error corrected by the absence of the offending phrase in the jury instructions at the close of the case. Instruction No. 2, which defined reasonable doubt and outlined the burden of proof, was entirely consistent with the court's initial misstatement. It did not instruct jurors they could acquit without articulating a reason. CP 21.

Juries are presumed to follow the court's instructions;[2] accordingly, jurors took the court's advance oral instruction at face value,

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[1] Walker, supra; Johnson, supra.

[2] Diaz v. State, ___ Wash.2d ___, ___, 285 P.3d 873 (2012).

had it in mind while listening to the evidence, and had no reason to disregard it when it came time to deliberate. The end result was the same as if the erroneous instruction had been included in the court's written instructions: the jury deliberated with the understanding that they had to articulate a reason for acquittal. This violated Mr. Kalebaugh's Fourteenth Amendment right to due process. Walker, at 731-732; Johnson, at 685-686.

The issue may be raised for the first time on review because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). The Supreme Court has concluded that errors such as the one in this case are automatically manifest. State v. Scott, 110 Wash.2d 682, 688 n. 5, 757 P.2d 492 (1988); see also State v. Phillips, 160 Wash.App. 36, 48, 246 P.3d 589, review denied, 171 Wash.2d 1024, 257 P.3d 663 (2011); State v. Jensen, 149 Wash.App. 393, 398, 203 P.3d 393 (2009). Further, instructional errors of this type "obviously affect a defendant's constitutional rights by violating an explicit constitutional provision." State v. O'Hara, 167 Wash.2d 91, 103, 217 P.3d 756 (2009).

The error here is structural error, for the reasons set forth in the Opening Brief. However, even if it were not structural error, the state has

failed to show that it was harmless under the stringent standard applicable in cases where an instruction infringes the accused person's right to due process.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Irby, 170 Wash.2d 874, 886, 246 P.3d 796 (2011); City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. Lorang, at 32. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

First, the error was not "trivial, formal, or merely academic." Lorang, at 32. The advance oral instruction mislead the jury regarding its duty, leaving them with the understanding that they could not acquit unless they were able to articulate a reason to do so. 1 VRP 9. Because the burden of proof forms part of the bedrock upon which the entire criminal justice system rests, errors in communicating the standard will seldom, if ever, be considered harmless.

Second, there is at least some possibility that the deficient instruction prejudiced Mr. Kalebaugh and affected the final outcome of the case. Lorang, at 32. The evidence of sexual contact was slim and indirect. A reasonable factfinder could have concluded that Mr. Kalebaugh did not have sexual contact with H.R.S. Under these circumstances, it cannot be said that the evidence of recklessness was so overwhelming that it necessarily lead to a finding of guilt. Burke, supra.

For all these reasons, the state cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. Lorang, at 32. Accordingly, the conviction must be reversed and the case remanded for a new trial. Id.

II. THE STATE FAILED TO PROVE THE CHARGED CRIME WHEN IT FAILED TO ESTABLISH MR. KALEBAUGH HAD SEXUAL CONTACT WITH THE VICTIM.

Mr. Kalebaugh rests on the argument set forth in the Opening Brief.

III. THE TRIAL COURT'S NONSTANDARD INSTRUCTION DEFINING "SEXUAL CONTACT" RELIEVED THE PROSECUTION OF ITS BURDEN TO PROVE AN ELEMENT OF CHILD MOLESTATION.

Mr. Kalebaugh objected to the court's nonstandard instruction defining "sexual contact," which added three sentences to the standard

instruction. Compare 2 VRP 169 with WPIC 45.07. The court's written instruction told jurors that "[c]ontact is 'intimate' if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper." When the judge read the instruction aloud, he replaced the word "conduct" with the word "contact." 2 RP 169; CP 25.

Jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wash.2d 856, 864, 215 P.3d 177 (2009). Both the written instruction and the oral recitation failed to make the correct standard manifestly apparent; accordingly, Mr. Kalebaugh's conviction must be reversed.

The trial court committed error by misreading the written instruction. See State v. Sanchez, 122 Wash.App. 579, 590, 94 P.3d 384 (2004) ("[A] trial court's failure to recite an instruction to the jury is analogous to giving an erroneous, ambiguous, or misleading instruction.") The court's oral recitation failed to convey the correct standard, and did not inform jurors that they were required to examine Mr. Kalebaugh's conduct and not merely the place where the touching occurred. See Appellant's Opening Brief, pp. 34-35.

In addition, the classification of a part as "intimate" is inextricably intertwined with the actor's purpose in touching it: jurors are required to examine the context in which the touching occurred. See, e.g., Matter of Welfare of Adams, 24 Wash.App. 517, 520, 601 P.2d 995 (1979) ("hips are a sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited, particularly if that touching is incidental to other activities which are intended to promote sexual gratification of the actor") (emphasis added).

Furthermore, the instruction misled jurors by suggesting all body parts could be considered intimate, even if they were not in close proximity to the primary erogenous areas. State v. Harstad, 153 Wash.App. 10, 21, 218 P.3d 624 (2009); see also State v. Powell, 62 Wash.App. 914, 917 n. 3, 816 P.2d 86 (1991). The error was especially grievous in this case, because it gave support to the prosecutor's improper argument that "[a]nywhere in that zone"—between knees and belly button—"is intimate." 3 RP 11- 12.

The instructional error significantly broadened the definition of sexual contact, relieved the state of its burden of proving touching of an intimate area, and allowed jurors to convict even if they believed Mr.

Kalebaugh rubbed H.R.S.'s knee. Accordingly, the conviction must be reversed and the case remanded for a new trial.

IV. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT REQUIRING REVERSAL.

The prosecutor made two arguments that violated Mr. Kalebaugh's right to a fair trial. First, the prosecutor told jurors "you as a jury get to decide what counts as an intimate part of the person's body," suggesting they were free to use their own judgment without any limitation imposed by the law. 3 RP 11. Second, the prosecutor followed this up by telling jurors

> Even if [any touching] was closer to the knees or closer to the bellybutton, rubbing on her, that's an intimate area. Anywhere in that zone is intimate.
> 3 RP 11-12.

This, too, was a misstatement of the law: the knees and belly button are not intimate areas because they are not in close proximity to the primary erogenous areas; furthermore, even areas near the primary erogenous areas are not "intimate" absent some showing of sexual intent. Harstad, at 21; Adams, at 520.

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In re Glasmann, ___ Wash.2d ___, ___, 286 P.3d 673 (2012). Given the slight evidence that Mr. Kalebaugh actually touched H.R.S. in an intimate area, it is quite likely the

misconduct affected the jury's decision in this case. Furthermore, the court compounded the problem by overruling Mr. Kalebaugh's objections, thereby "giving additional credence to the argument." State v. Gonzales, 111 Wash.App. 276, 283-284, 45 P.3d 205 (2002).

Accordingly, Mr. Kalebaugh's conviction must be reversed and the case remanded to the trial court for a new trial. Glasmann, at ___.

V. CUMULATIVE ERROR REQUIRES REVERSAL.

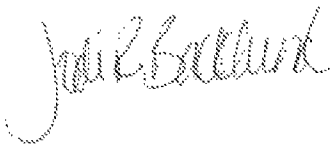
Mr. Kalebaugh rests on the argument set forth in the Opening Brief.

CONCLUSION

For the foregoing reasons, Mr. Kalebaugh's conviction must be reversed and the charge dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on November 13, 2012,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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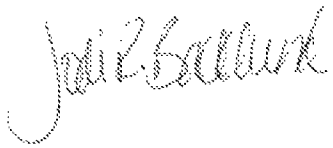
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 13, 2012.



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