

67560-5

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NO. 67560-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH KALEBU,

Appellant.

REC'D

FEB 28 2013

King County Prosecutor
Appellate Unit

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

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
FEB 28 2013 PM 4:20

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to strike the entire jury venire under CrR 6.4(a).

2. Appellant was denied his federal and state constitutional right to be present at trial when he was excluded from a critical hearing conducted in the trial judge's chambers.

3. Appellant was denied the opportunity to make a knowing, voluntary and intelligent decision on whether to waive his right to remain silent and testify at trial.

Issues Pertaining to Assignments of Error

1. By statute and court rule, all jurors must be summoned from the proper county case assignment area. This requirement was violated in appellant's case. Where there has been a material departure from this requirement, the only remedy is to strike the entire panel. Did the trial court err when it refused to strike the panel at appellant's trial?

2. Did the failure to follow required procedures for summoning jurors also violate appellant's due process rights?

3. Appellant was excluded from a hearing in chambers to discuss whether he would testify, the manner in which he would be permitted to testify, and the possible negative consequences

should he ultimately choose to testify. Did appellant's exclusion from this hearing violate his federal and state constitutional right to be present for all critical stages of trial?

4. Appellant was prone to changing his mind and had not definitively decided whether to testify at the time of the in-chambers hearing. Ultimately, however, without knowing what occurred at that private hearing, he chose to testify and – as predicted at the hearing – undermined his trial defenses and ensured his convictions on the most serious charges. In light of appellant's absence from the hearing, was he denied the opportunity to make a knowing, intelligent, and voluntary waiver of his right to remain silent?

B. STATEMENT OF THE CASE

1. Charges and Pretrial Proceedings

The King County Prosecutor's Office charged Isaiah Kalebu with five criminal offenses stemming from the July 2009 attack on Teresa Butz and Jennifer Hopper in Butz's South Park home:

- Count 1 Aggravated Murder in the First Degree (Butz)
- Count 2 Murder in the First Degree (Butz)
- Count 3 Attempted Murder in the First Degree (Hopper)
- Count 4 Rape in the First Degree (Hopper)

Count 5 Burglary in the First Degree

CP 1-7, 138-141. All five charges included a deadly weapon sentencing enhancement (an allegation that Kalebu was armed with a knife), and counts 2 through 5 each included one or more aggravating factors in support of an exceptional sentence. CP 138-141. The Honorable Michael Hayden presided. 1RP¹ 1-2.

Kalebu's mental health became a frequent topic. Defense counsel initially provided notice that they intended to present a defense of diminished capacity and/or not guilty by reason of insanity, although those defenses were later withdrawn in favor of general denial. 21RP 53; 22RP 33; 27RP 65-66; CP 119; Supp. CP ____ (sub no. 177, Order On Omnibus Hearing).

¹ This brief refers to the vrp as follows: 1RP – 8/26/09; 2RP – 9/3/09; 3RP – 10/8/09; 4RP – 1/22/10; 5RP – 2/12/10; 6RP – 2/24/10; 7RP – 4/29/10; 8RP – 5/12/10; 9RP – 6/9/10; 10RP – 6/11/10; 11RP – 7/8/10; 12RP – 8/31/10; 13RP – 10/18/10; 14RP – 11/15/10; 15RP – 12/7/10; 16RP – 12/8/10; 17RP – 1/10/11; 18RP – 2/4/11; 19RP – 2/9/11; 20RP – 3/11/11; 21RP – 3/25/11; 22RP – 4/25/11 (a.m.); 23RP – 4/25/11 (p.m.); 24RP – 4/27/11; 25RP – 5/12/11; 26RP – 5/13/11; 27RP – 5/16/11; 28RP – 5/17/11; 29RP – 5/19/11; 30RP – 5/23/11; 31RP – 5/24/11; 32RP – 5/25/11; 33RP – 5/31/11; 34RP – 6/1/11; 35RP – 6/6/11; 36RP – 6/7/11; 37RP – 6/8/11; 38RP – 6/9/11; 39RP – 6/10/11; 40RP – 6/13/11; 41RP – 6/14/11; 42RP – 6/15/11; 43RP – 6/21/11; 44RP – 6/22/11; 45RP – 6/23/11; 46RP – 6/27/11; 47RP – 6/28/11; 48RP – 6/29/11; 49RP – 7/1/11; 50RP – 8/12/11; 51RP – 8/16/11.

Moreover, on several occasions defense counsel questioned Kalebu's competence to stand trial. He had been found incompetent in prior, unrelated proceedings and diagnosed as suffering from bipolar disorder. 8RP 3-4. While waiting for trial in this case, he once again began showing signs of serious mental disturbance, including aggression, withdrawal, poor grooming, and grandiosity (referring to himself as "emperor"). 8RP 4-7. Kalebu was not eating well and claiming that his food was poisoned. 8RP 8-9. Western State Hospital evaluated Kalebu and deemed him competent for trial, a finding Judge Hayden adopted. 10RP 2-4; competency hearing exh. 1.

In a subsequent hearing, however, Kalebu proclaimed himself "King of America" and asserted he was a political prisoner held against his will. 11RP 6. The defense retained Clinical and Forensic Psychologist David Dixon, who evaluated Kalebu and concluded he was not competent, prompting the court to send Kalebu to Western State Hospital again. 12RP 4-6; competency hearing exh. 8. As before, doctors at Western found Kalebu competent. Competency hearing exh. 2. Judge Hayden held a contested competency hearing. See generally 15RP-17RP. Ultimately, he agreed that Kalebu suffers from bipolar disorder, but

concluded he was competent to proceed. 17RP 156-158; CP 54-55.

Thereafter, Kalebu continued to claim his food was being poisoned and that he was an emperor. 18RP 6; 19RP 10-12. Judge Hayden found that Kalebu “clearly has issues,” but abided by his competency finding. 19RP 3-4. A second defense-retained doctor evaluated Kalebu and concluded he was incompetent to stand trial, but Judge Hayden declined to order another evaluation at Western State Hospital. 28RP 65-67; 32RP 6-36; pretrial exh. 6.

After several outbursts in court, Judge Hayden ordered that Kalebu watch the remainder of trial from a remote location until he agreed to control himself. 18RP 3-24; 19RP 8-12, 27-29, 32-33; 21RP 25-28; 22RP 10-13; 24RP 2-8, 33-35, 40. On those days where Kalebu would not commit to proper behavior, he could watch the proceedings on a monitor from the jury room associated with a different courtroom and could send messages to his attorneys. 25RP 8-17, 68-77; CP 101-103. Jurors were instructed to disregard Kalebu’s absence. 35RP 3.

2. Jury Selection

Judge Hayden proposed that 3,000 special summons be sent to prospective jurors to ensure a sufficient

number of individuals to seat a jury. 20RP 4. Although Kalebu's case was designated a "Seattle" case, thereby requiring that all prospective jurors be drawn from the designated Seattle jury assignment area, court administration summoned approximately 1,000 of the jurors from the Kent assignment area. CP 65-68; 23RP 2-11. Kalebu moved to strike the entire panel and begin anew in compliance with Washington law. CP 69; 22RP 27-33. The motion was denied. Instead, Judge Hayden ordered that all Kent area jurors be informed they need not appear. 23RP 14.

3. The State's Evidence At Trial

Around midnight on the evening of Saturday, July 18, 2009, Theresa Butz and her partner, Jennifer Hopper, went to bed in Butz's Seattle home at 727 S. Rose Street. 37RP 74-75, 84-85, 136-137. The home has three bedrooms – a front bedroom (referred to as the "northwest bedroom"), a middle bedroom (the "central bedroom"), and a back bedroom (the "southwest bedroom"). Exhibit 2; 37RP 113, 115-116. The couple slept in the northwest bedroom, Hopper kept her things in the central bedroom, and the southwest bedroom was for guests. 37RP 116.

Sometime after midnight, Butz and Hopper awoke to find a shirtless man standing over Butz and holding a knife. The man

immediately reached over Butz and held the knife to Hopper's throat, telling her to be quiet and "I don't want to hurt you, I just want pussy." 37RP 138-139. He ordered Butz to remove her clothes and she told him that she was having her period. He responded that he did not care and she did as she was told. 37RP 140. The man then got on top of Butz and raped her. 37RP 140.

Hopper could see that the rapist was a slim, but muscular, black man with short hair. 37RP 142-143. She estimated the blade on the knife to be six inches long and believed the intruder had taken it from a set in the kitchen. 37RP 144-145; 38RP 72.

The man got off of Butz and told Hopper to remove her clothes, which she did. He told Butz to perform oral sex on Hopper, but she only pretended to do so. 37RP 141. The man walked to Hopper's side of the bed, closing the bedroom windows on the way. Still holding the knife, he raped her vaginally and anally. 37RP 141-144, 147-148. He then had Butz perform oral sex on him. 37RP 149. The rapist kept saying that he was just there for sex, he did not want to hurt them, and they should do as he said. 37RP 150.

After both women were back on the bed, the rapist paused while leaning against a dresser. 37RP 153-154. He asked if they

had any money, and they told him that, although they did not have any cash, he could take whatever he wanted. 37RP 154-155. When the women expressed fear that he might hurt them, he continued to reassure them they would not be injured. 37RP 155. He also said, "Don't get too excited. That was just round one." 37RP 155.

The rapist then alternated between the women, raping both vaginally and anally. 38RP 12-14. At one point, when Butz was not fully cooperating, he said, "Stop it or I'll cut you." 38RP 13. Hopper believed the rapist ejaculated inside of her. He wiped himself off using a pair of khaki shorts belonging to Butz. 38RP 15-16. Hoping to encourage the rapist's departure, Hopper lied and said the two were being picked up at 5:00 a.m. for a wedding in Portland that day. 38RP 18-19. The rapist responded that they did not have to worry because he would be long gone by then. 38RP 20.

The intruder then raped both women again. With knife still in hand, he had both women perform oral sex on him before raping Hopper vaginally. 38RP 23-26, 31. As he was doing so, the tip of the knife touched her arm. Although it did not hurt, she said "ouch," to which the rapist responded, "Oh, I'm sorry." 38RP 32. This

reassured Hopper that he was not a killer. 38RP 32. At one point, Butz did something – perhaps having to do with the knife – and the rapist responded by saying, “Don’t do that, don’t do that, don’t do that.” 38RP 33. Worried that Butz had angered him, Hopper also told her to stop. 38RP 33.

The rapist indicated he knew the women were going to call the police, but said he’d be long gone by then. 38RP 33-34.

Eventually, the intruder told the women to lie down next to each other on the bed. 38RP 36. He then got on top of Hopper and raped her vaginally. At the same time, he had his right arm over Butz – as if to hold her down – and the knife in his right hand. According to Hopper, it felt as though he was ejaculating inside her and, about that same time, she heard Butz ask, “Why are you cutting me? Why are you cutting me?” 38RP 37. Butz resisted and the rapist told her to stop or he would kill Hopper. She did stop, but then Hopper began resisting. In response, according to Hopper, the rapist jumped up from the bed and told both women to follow him. 38RP 37-38.

Hopper testified that she and Butz followed the man into the central bedroom, where he turned on the light. 38RP 39. On the bed was a pair of jeans, which Hopper assumed belonged to him.

The rapist reached into a pocket and removed a small item concealed in hand. 38RP 40. It looked like a small knife.² 38RP 41. As both women pleaded for the rapist not to hurt them, he forced them back into the northwest bedroom and on the bed. 38RP 41.

The rapist now had a knife in each hand. As he pinned Hopper and Butz on the bed using his knees, both women physically resisted his efforts. 38RP 42. Hopper then heard Butz say, "You got me, you got me, you got me." 38RP 42. The intruder began cutting Hopper's throat and switched from a cutting motion to a stabbing motion while both women continued to resist. 38RP 43. Hopper decided to stop fighting and played dead just as she felt a powerful surge of energy from Butz. 38RP 44.

Butz was able to push and kick the rapist off the bed. 38RP 44. The two struggled and it appeared that the intruder punched Butz. But Butz was able to grab a small metal table next to the bed and use it to push him away. She then used the table to push through a front window in the bedroom. She fell to the ground just

² Crime scene investigators believed this smaller knife, like the larger one the rapist initially used to threaten the women (both of which were recovered in the home) came from the set in the kitchen. 40RP 130-131.

outside the window, but was able to get up and run to the curb before collapsing on the ground. 38RP 45.

Back in the bedroom, the intruder and Hopper looked at one another. Rather than attack Hopper further, the intruder ran out of the room and disappeared. 38RP 45-46. Hopper then also left the room, heading out the front door of the home, and seeking the assistance of neighbors. 38RP 46. The sound of breaking glass and Hopper's pleas for help alerted others, who called 911. 35RP 50-51; 36RP 16-17, 53; 38RP 48-50.

Police and other emergency responders arrived at the scene. 35RP 58-59. Hopper was transported to Harborview Medical Center. 38RP 54. Her condition was not immediately life threatening. 38RP 28. She had sustained multiple lacerations on the left side of her neck and left arm. 42RP 15-17, 19-22. Although one cut transected her external jugular vein, which can cause significant bleeding, the injury was not life threatening because this is a low pressure vein and tends to clot before one loses sufficient blood to cause death. 42RP 17-18. Swabs were used to collect evidence samples from Hopper's body. 40RP 59-63.

Butz died where she collapsed by the curb. 36RP 99; 37RP 38. She had sustained sharp and blunt force injuries during her struggle with the intruder. 42RP 39. These included several cuts across her neck, wounds to her left arm, head, and mouth (including three fractured teeth), and a stab wound to her left chest, which penetrated the left ventricle of her heart and proved fatal. 42RP 39, 48-69, 74-83. Swabs also were used to collect evidence from Butz's body. 42RP 42, 70-73.

DNA testing of sperm collected from Hopper's body produced a profile that matched a profile in the CODIS database. That profile was from a blood sample of an unknown male from an unsolved 2008 break in at Auburn City Hall. 43RP 122-136; 45RP 107-114. Auburn Police had a DVD recording of a suspect – with his dog – at the time of the break in. 45RP 113-117, 126-128. That recording was released to other law enforcement and broadcast by local media, resulting in identification of the suspect as Isaiah Kalebu by Kalebu's mother and a King County Assistant Prosecuting Attorney who had prosecuted Kalebu in a prior case. 42RP 119-129; 45RP 127-128; 46RP 5-8.

Kalebu was located and arrested on July 24, 2009. 46RP 40. Police took buccal (cheek) swabs to serve as a DNA reference

sample. 43RP 83-85. The bloodstain from the Auburn break-in was retested and compared to that reference sample. 45RP 143-149. They were declared a match at all 13 DNA sites tested. 45RP 150. The estimated probability of randomly selecting an unrelated individual with that same profile is 1 in 13 quintillion. 45RP 151.

A comparison of Kalebu's profile to DNA evidence collected at the scene and from the victims revealed that Kalebu was a possible source. The probability he was a source varied depending on the evidence sample. According to the Washington State Patrol Crime Lab, the statistical calculations ranged from 1 in 2 people in the United States population as possible contributors (a mixed sample from Hopper's breast swabs) to a 1 in 62 quadrillion probability of randomly selecting an unrelated individual with the same profile (isolated sperm on several evidence samples).³ 43RP 163-176; 44RP 47-60; 45RP 151-155.

³ WSPCL analyst Tara Roy testified that the 1 in 62 quadrillion number may be conservative. Although the test kits examine 13 DNA sites (and statistical calculations are based on those 13 sites), the rapist's semen has a genetic mutation at one of these sites. The statistical software is unable to account for such a mutation, leaving 12 sites for comparison and calculation. 43RP 118, 123, 185-190; 44RP 59-60. This mutation was not found in the DNA samples from Kalebu's buccal swabs. It was, however, found in

DNA from a stain on the khaki shorts the rapist used to wipe himself was sent to Sorenson, a private lab, for comparison with Kalebu's reference sample. 44RP 36-39; 46RP 9-12. Sorenson uses a more sensitive testing kit that examines 16 chromosomal sites. 46RP 12-13. The lab declared a match and calculated the frequency of this profile as 1 in 5.2 sextillion for Caucasians, 1 in 131 centillion for African-Americans, and 1 in 9.25 sextillion for Hispanics.⁴ 46RP 14-15.

On the jeans Kalebu wore when arrested, in addition to finding Kalebu's DNA in several locations, one stain contained a mixture of DNA, for which Kalebu, Butz, and Hopper were all possible contributors, as were 1 in 410 individuals in the general U.S. population. 44RP 54-56.

Police believed that Kalebu entered and exited through a bathroom window on the back of the home. The screen had been removed and blood was found on the window ledge. 40RP 100-103; exhibit 2. Immediately below the window was a bathtub. 40RP 102. Kalebu's palm and fingerprints were found on the tub.

semen on jeans Kalebu was wearing when arrested. 43RP 185-186; 44RP 79-81.

⁴ Kalebu's father is Ugandan. 46RP 8-9.

45RP 19-35, 60-63. His palm print was found in the northwest bedroom. 45RP 35-39, 63. And his footprint also was found inside the home. 45RP 54, 85-90.

Hopper was given an opportunity to see video footage of Kalebu and hear his voice. She identified him as the assailant. 38RP 62-71.

4. Kalebu's Absence From A Critical Hearing

After the State had called its last witness, defense counsel Michael Schwartz informed the court that Mr. Kalebu wished to take the stand in his own defense. 46RP 86. Schwartz suggested, however, that before Kalebu testified, "the court should undertake a colloquy with him so that the court understands the full picture of what he wants to do outside the presence of the jury." 46RP 86. Schwartz added, "I will tell the court that if he chooses to [testify], we will have no questions for him. If he does so, he will be testifying in a narrative style."⁵ 46RP 86.

Judge Hayden indicated he had never before encountered a similar situation. 46RP 86-87. Prosecutor Brian McDonald

⁵ As Schwartz would later reveal, Kalebu had informed his attorneys that he wished to testify how poorly he had been treated, that he has significant mental health issues, and that he needs to be in a hospital. 47RP 8.

indicated he had never heard of counsel refusing to examine his client, either. 46RP 87. McDonald suggested Judge Hayden bring Kalebu into the courtroom, ensure he was willing to conduct himself in an appropriate fashion while testifying, and then address the issue of counsel's refusal to question his client. 46RP 87-88.

Jurors were brought into the courtroom, the State formally rested, and Judge Hayden then ordered a recess to address Kalebu's testimony. 46RP 88. Kalebu was brought into court, where Judge Hayden confirmed that he wished to testify. 46RP 89-90. Kalebu committed to dressing for trial and acting appropriately in front of jurors. 46RP 90-92. Judge Hayden indicated that defense counsel did not intend to ask Kalebu any questions, to which Kalebu responded, "Yeah, well, you know, they ain't been intending on doing a whole lot of question asking, I've noticed." 46RP 92.

The court and counsel briefly discussed the restraints that would be used on Kalebu for his court appearance. 46RP 92-94. The conversation then returned to Schwartz's indication he would not pose any questions to Kalebu. Judge Hayden asked Schwartz if he wanted to have a conversation with Kalebu regarding the manner of Kalebu's testimony. 46RP 95. Schwartz replied:

Your Honor, I can tell the court that I've already spoken to Mr. Kalebu about the subject matter of his testimony. Based on that conversation, I have nothing to ask him. I understand what the court wants is whether that should be in a narrative form or by question and answer, him posing the questions to himself and then answering.

46RP 95. Judge Hayden ordered Schwartz to assist Kalebu in preparing questions, which Kalebu would ask himself while on the stand. 46RP 95-96. Court was then recessed for the day. 46RP 97.

The following morning, Kalebu watched the proceedings by video feed and was not brought down to the courtroom. 47RP 2. Returning to the subject of Kalebu's possible testimony, Judge Hayden asked Schwartz on what authority he could simply decline to ask his client questions. 47RP 2. Schwartz responded:

The court rules provide that a party or representative of the party cannot put forth or present evidence that is not material or relevant to the matter that is at trial.

As I indicated yesterday, based on my discussions with Mr. Kalebu, I do not believe that -- in one part what he wants to testify about is material or relevant to this matter.

The second part, I can't tell the court. If the court wants to hear that in chambers, I'd be happy to tell the court what that is.

47RP 3.

Judge Hayden asked if an in chambers hearing would violate Bone-Club⁶ and Schwartz said it would not. 47RP 3. Prosecutor McDonald indicated it might be appropriate to have the in chambers hearing because, as the record currently stood, there did not appear to be valid grounds supporting Schwartz's decision not to question Kalebu. 47RP 3-5. McDonald walked Judge Hayden through the Bone-Club analysis, and Judge Hayden determined a closed hearing was necessary. 47RP 6-7. Judge Hayden, both defense counsel, and a court reporter then retreated to the privacy of Judge Hayden's chambers. 47RP 8.

Schwartz informed Judge Hayden of Kalebu's initial indication that he wanted to testify to how poorly he has been treated, his significant mental health issues, and his need for hospitalization. 47RP 8. The more difficult aspect of his testimony, however, was that he now also wanted to confess but claim that God told him to commit the crimes and made him do it. 47RP 8-10. Kalebu had not informed his attorneys of his intent to testify that he committed the crimes at God's direction until that very morning. 47RP 10.

⁶ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Schwartz explained that, although the defense had originally provided notice of a mental health defense, that defense had been withdrawn. 47RP 8. His concern was that if Kalebu admitted the crimes but testified that God told him to commit them, the defense would then move for a recess to have him examined concerning mental illness at the time of the crime, and the court would refuse that request. 47RP 11. On appeal, he and Ms. Brandes could be found ineffective for allowing Kalebu to take the stand and confess knowing his testimony would not lead to the jury's consideration of a mental defense. 47RP 11.

Judge Hayden indicated that, regardless of counsel's concerns, Kalebu had the right to take the stand and testify that God made him do it and "[w]e'll just deal with the appeal when it comes." 47RP 12. The court and defense counsel then discussed the mechanics of posing questions to Kalebu. 47RP 12-16. During this discussion, Schwartz indicated his reluctance to ask Kalebu questions stemmed solely from the consequences of Kalebu confessing in front of the jury:

Schwartz: The issue for me is as I indicated to you. I understand he has a constitutional right to testify. He also has a constitutional right to effective assistance of counsel.

Court: He does.

Schwartz: If he gets up there and asks questions so he confesses, he's giving up one of them.

Court: He is, but then he gives up his right to counsel when he takes a plea too.

Schwartz: At trial, that's true.

Court: I think he – if somebody wants to get up in trial and say, "I did it," I don't know that we can stop them. As a practical matter that doesn't – if he gets up at trial and says, "I did it," that doesn't necessarily thwart where I perceive it to be going anyway. But he certainly puts himself at risk of putting real jeopardy to your theory of the case.

47RP 16.

Ms. Brandes indicated she would be contacting Dr. Dixon again to determine whether he could evaluate Kalebu for a mental defense. 47RP 17. The court and counsel agreed that Kalebu would be told to draft the questions he wanted to answer on the stand and counsel would ask them. 47RP 17. Schwartz then suggested that Kalebu be brought down to the courtroom and told about the court's decision. 47RP 17-18.

At the conclusion of the in-chambers hearing, Judge Hayden summarized for the prosecution what had occurred. He explained

the agreed-upon process and noted that defense counsel had the option of telling jurors Kalebu had drafted the questions.⁷ 47RP 18.

Prosecutor McDonald belatedly noted concern that Kalebu had not been present for a discussion that involved his right to testify and the manner of his testimony. 47RP 18. Judge Hayden responded that Kalebu would receive a transcript of the hearing and he was unaware of any requirement that a defendant attend a conference in chambers.⁸ 47RP 18. Judge Hayden also assured McDonald that his only rulings were that Kalebu had to draft the questions and that the examination would be in a question and answer format. 47RP 18-19.

McDonald believed that revealing to jurors that Kalebu had authored the questions might impinge on his right to testify and right to effective representation. Schwartz responded that he did not anticipate that revelation. 47RP 19. McDonald also wanted to clarify that Judge Hayden had not made any ruling concerning the

⁷ The transcript indicates that Judge Hayden summarized the hearing for prosecutors *before* the chambers conference had concluded. See 47RP 18 (summary followed by notation that “Chambers conference concluded.”) This is obviously incorrect. The summary was offered after the private conference.

⁸ There is no indication a transcript was ever prepared until this appeal.

scope of Kalebu's testimony, and Judge Hayden indicated he had not. 47RP 20.

Kalebu was brought down to the courtroom. 47RP 20. Judge Hayden did not share with Kalebu all that occurred in the in-chambers hearing. Rather, he simply told Kalebu that he – with Schwartz's assistance – could draft the questions he wished to answer on the stand, Schwartz would ask those questions, and Kalebu would testify in response. 47RP 21. Kalebu indicated he understood and that he did not plan on acting up in front of jurors. 47RP 21-22. The discussion then turned to Kalebu's request for a Bible to be used when affirming that he would testify truthfully, what he would wear to court, and the use of restraints during his testimony. 47RP 22-45.

At Kalebu's request, he was taken back upstairs for the remainder of the hearing. 47RP 45-46. The court and counsel focused on jury instructions, photographs, and a stipulation regarding an officer's testimony. 47RP 46-65. At the conclusion of those discussions, McDonald once again raised the issue of Kalebu's absence from chambers. 47RP 66. He obviously was not fully aware of what occurred in chambers, but wanted the court to consider an opinion – State v. Berrysmith, 87 Wn. App. 268, 944

P.2d 397 (1997), review denied, 134 Wn.2d 1008 (1998) – in deciding whether Kalebu's absence created an issue. 47RP 67. Judge Hayden responded, "I'm satisfied that the only thing we discussed in chambers were legal issues pertaining to the matter in which the testimony would be elicited." 47RP 67. Defense counsel concurred. 47RP 67.

5. Kalebu's Testimony, Proposed Instructions, and Closing Arguments

The following day, just prior to Kalebu taking the stand, defense counsel requested that Kalebu be evaluated again for competency to stand trial and evaluated for the first time to determine his state of mind at the time of the offenses. Counsel indicated the motion was based on the information disclosed in chambers the prior day and their interactions with Kalebu since. Funding had already been approved and the evaluation could occur that Friday (this request was made Wednesday). 48RP 8-9. The motion was denied. 48RP 9-10.

Kalebu's then took the stand and provided very brief testimony in response to defense counsel's questions. As counsel predicted, he confessed:

Q: Mr. Kalebu, do you know anything about the events that occurred in the early morning hours of July 19th, 2009, at 727 South Rose Street?

A: I was there, and I was told by my God and God of Abraham, Isaac, and Jacob, to attack my enemies. I did so. I followed the -- I followed the instructions by God.

48RP 11.

After the court indicated it was having a hard time hearing, Kalebu was asked to repeat his testimony. 48RP 12.

Q: Would you answer the question again?

A: I was instructed by my God, the God of Abraham, Isaac, and Jacob, to attack my enemies. I did so.

Q: Mr. Kalebu, have you ever been diagnosed as having a mental illness?

PROSECUTOR: Objection, calls for hearsay.

DEFENDANT: Yeah, I have been diagnosed several times.

48RP 12.

The attorneys argued the admissibility of Kalebu's last answer, and the court excused the jury. 48RP 12-13. Ultimately, the court ruled the answer inadmissible hearsay and struck it from the jury's consideration. 48RP 15-16. The prosecution did not cross-examine Kalebu, and the defense rested. 48RP 26.

Defense counsel proposed supplemental instructions on the affirmative defense of not guilty by reason of insanity. 48RP 38-40, 50-53; CP 166-178, 294-295. The prosecution objected on two grounds – lack of timely notice and absence of sufficient supporting evidence. 48RP 40-41, 49-50, 53. Defense counsel noted their request for a recess to have Kalebu evaluated for the mental defense had been denied despite the fact Judge Hayden already knew in advance – from the prior day’s in-chambers hearing – the nature of Kalebu’s testimony. 48RP 52, 57.

Judge Hayden denied the defense instructions, citing the absence of timely notice of the defense and the absence of substantial evidence demonstrating that Kalebu suffered from a mental disease or defect. 48RP 53-59.

Despite Kalebu’s testimony that he was in the victims’ home and followed God’s instruction to attack the women, during closing argument, defense counsel argued that the State had failed to establish that Kalebu was present or that the attack with the knives was premeditated. 48RP 117-135 (identity), 135-144 (premeditation).

The jury convicted Kalebu on all counts and answered “yes” to each question on the deadly weapon and aggravating factor

special verdict forms. CP 233-235, 237-249. Judge Hayden imposed a mandatory sentence of life in prison without the possibility of parole on count 1,⁹ an exceptional 540-month term on count 3, an exceptional minimum 540-month term on count 4, and a standard range minimum 89-month term on count 5. CP 283-284, 286, 288. The sentences on counts 1, 3, and 4 were run consecutively to one another and concurrently with count 5. With the deadly weapon enhancements, the total sentence imposed was life plus 1,176 months. CP 288.

Kalebu timely filed his Notice of Appeal. CP 272-281.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO STRIKE THE ENTIRE JURY PANEL.

Washington law is clear on the method to be used for selecting members of the public to serve as jurors at King County trials. King County has two superior court facilities – the King County Courthouse in Seattle and the Norm Maleng Regional

⁹ In light of the conviction on count 1, Judge Hayden dismissed the conviction on count 2 on double jeopardy grounds. CP 274.

Justice Center in Kent. State v. Lanciloti, 165 Wn.2d 661, 664, 201

P.3d 323 (2009). By statute,

The superior court at least annually shall cause a jury source list to be compiled from a list of all registered voters and a list of licensed drivers and identicaid holders residing in the county.

In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licensed drivers and identicaid holders residing in each jury assignment area. . . .

RCW 2.36.055.

King County implemented RCW 2.36.055 by promulgating

Local Superior Court General Rule 18, which provides:

(e) Location for Jury Assignment Areas for Civil and Criminal Cases Filed in King County.

- (1) *Designation of Jury Assignment Areas.* The jury source list shall be divided into a Seattle jury assignment area and a Kent jury assignment area that consists of registered voters and licensed drivers and identicaid holders residing in each jury assignment area. The area within each jury assignment area shall be identified by zip code and documented on a list maintained by the chief administrative officer for the court.
- (2) *Where Jurors Report.* Individuals receiving a jury summons shall report for service to the Court facility in the jury assignment area identified on the face of the summons.

- (3) *Adjustment of Jury Assignment Area Boundaries.* The jury assignment areas contained in this rule may be adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.

LGR 18(e); see also GR 18 (regarding jury source lists generally).

“Roughly speaking, the ‘Seattle Case Assignment Area’ includes all of the city of Seattle and everything north of Interstate 90 and the ‘Kent Assignment Area’ includes everything else.” Lanciloti, 165 Wn.2d 665. The purpose of dividing King County into two jury assignment areas is to create a broader and more representative jury pool. Prior to the statute and related rules, data showed that “lower income and racial minority citizens were less likely than higher income and non-minority citizens to report to a court house more distant from their home.” Id. at 664.

As previously noted, King County administration failed to comply with the statute and local rule when it summoned jurors from both the Seattle and Kent assignment areas. CP 65-68. When defense counsel learned of this violation of Washington law, they moved to strike the entire panel under CrR 6.4, which provides:

(a) Challenges to the Entire Panel. Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection.

CP 69.

Following the defense motion, court administration informed Judge Hayden that jurors from the Kent assignment area could be identified and told not to appear for Kalebu's trial. 23RP 2. The State argued that there had been "substantial compliance" with the law and, therefore, the defense had to demonstrate prejudice, which it could not because all jurors from the Kent assignment area would now be excluded. 23RP 7-8.

The defense disagreed, arguing that the local rule was mandatory, there had been a material departure from its requirements, and the only remedy was to strike the entire panel under CrR 6.4(a) regardless whether the defense could prove prejudice. 23RP 9-11, 13. Moreover, there was prejudice because approximately 1,000 jurors from the Seattle assignment area were improperly denied the opportunity to serve when replaced by that number of individuals erroneously summoned from the Kent assignment area. 23RP 2-5, 10-11.

The defense motion to strike the entire panel should have been granted. “Where the selection process is in substantial compliance with the statutes, the defendant must show prejudice.” State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991) (citing Roche Fruit Co. v. Northern Pac. Ry., 18 Wn.2d 484, 139 P.2d 714 (1943)). However, “If there has been a material departure from the statutes, prejudice will be presumed” Id. This issue is reviewed for an abuse of discretion. Id.

In Kalebu’s case, there was not substantial compliance with Washington law. Although RCW 2.36.055 and LGR 18(e) require that potential jurors be summoned entirely from the Seattle assignment area, many of the jurors summoned for Kalebu’s case were from the Kent assignment area. And while court administration later identified the Kent jurors and informed them they need not attend, the violation had already occurred. Because there was a material departure from the required procedures, the only available course of action was to strike the entire panel. Prejudice is presumed. Tingdale, 117 Wn.2d at 600; CrR 6.4(a).

Not only did the procedures used in Kalebu’s case violate the controlling statutes and rules, they also violated Kalebu’s due process rights. State statutes and regulations can create due

process liberty interests. “By enacting a law that places substantive limits on official decisionmaking, the State can create an expectation that the law will be followed, and this expectation can rise to the level of a protected liberty interest.” In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994).

Specifically,

For a state law to create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.” Kentucky Dep’t of Corrections v. Thompson, 490 U.S. 454, 463, 109 S. Ct. 1904, 1910, 104 L. Ed. 2d 506 (1989); Swenson v. Trickey, 995 F.2d 132, 134 (8th Cir.), *cert. denied*, 510 U.S. 999, 114 S. Ct. 568, 126 L. Ed. 2d 468 (1993). Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.

Cashaw, 123 Wn.2d at 144.

The substantive predicate for RCW 2.36.055 and LGR 18(e) is a jury trial in either the Seattle facility or the Kent facility of the King County Court. If in the former, there is a specific directive to draw jurors from the Seattle jury assignment area. If in the latter, there is a specific directive to draw jurors from the Kent jury assignment error. Washington law dictates the particular decision

by court administration; there is not “a significant degree of discretion.” Therefore, Kalebu’s due process rights were violated.

Where there has been a constitutional violation, prejudice is presumed and the State bears the burden to prove it was harmless beyond a reasonable doubt. State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986)).

As counsel pointed out below, approximately 1,000 jurors from the Seattle jury assignment area were erroneously prevented from appearing for Kalebu’s case. One or several of these individuals may have deliberated in the case and reached a different result than the 12 jurors ultimately chosen. “It is no answer to say that the 12 jurors who ultimately comprised [the] jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result.” Irby, 170 Wn.2d at 886-887. The State cannot show the erroneous exclusion of these jurors had no impact on the verdicts.

2. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.

The federal and state constitutions guarantee criminal defendants the right to be present at trial. Irby, 170 Wn.2d at 880-881.

The federal Constitution does not explicitly guarantee the right to be present. Rather, the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. Irby, 170 Wn.2d at 880-881. Under the federal Constitution, a defendant has the right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Id. at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Stated another way, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." Id. (quoting Snyder, 291 U.S. at 107-108).

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the

right to be present,¹⁰ and arguably provides even greater rights. Under our state provision, the defendant must be present to participate “at every stage of the trial when his substantial rights may be affected.” *Id.* at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). This right does not turn “on what the defendant might do or gain by attending . . . or the extent to which the defendant’s presence may have aided his defense[.]” *Id.* at 885 n.6.

Whether there has been a violation of the constitutional right to be present at trial is a question of law this Court reviews de novo. Irby, 170 Wn.2d at 880. There was a violation in Kalebu’s case when he was excluded from the in-chambers hearing regarding his decision to testify.

As an initial matter, there is no doubt that Kalebu was absent for the private hearing. He could see and hear what was happening in open court through the video feed. 47RP 2. But Kalebu had no way of knowing what was occurring in Judge Hayden’s chambers. 47RP 2.

¹⁰ Article 1, section 22 provides, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

There also can be no doubt that Kalebu's absence was entirely unnecessary. Judge Hayden conducted a Bone-Club analysis and properly concluded that the hearing concerning Kalebu's testimony should not be open to the public or prosecutors. 47RP 6-7. The proper course at that point was to clear the courtroom and either have Kalebu continue to watch the proceedings remotely or bring him down to the courtroom for the closed hearing. Indeed, at this point in the trial there was no reason not to simply bring Kalebu down. He had behaved in court the prior day. 46RP 89-97. And he behaved in court when brought down just after the private hearing. 47RP 20-46.

Prosecutor McDonald's concern over Kalebu's exclusion from the hearing was warranted. Judge Hayden's brief summary of the hearing – that he and defense counsel merely discussed legal issues pertaining to the manner in which Kalebu's testimony would be elicited [47RP 18-19, 67] – failed to acknowledge the importance of what actually happened at the hearing. In addition to discussing the mechanics of who would draft the questions and the format to be used while Kalebu was on the stand, there were critical discussions concerning the impact of Kalebu's testimony on his defense of general denial and the fact his confession would not

ultimately lead to presentation of a mental defense for the jury's consideration, leaving defense counsel vulnerable to a post-conviction claim they had been ineffective for actively assisting Kalebu in undermining his trial defenses.

In Kalebu's absence, defense counsel articulated the very scenario that eventually played itself out – Kalebu would confess that he was the attacker, he would claim that he was following God's command, the court would not permit the defense to argue an insanity defense to the jury, and Kalebu would be convicted as charged, having sealed his fate by choosing to testify. 47RP 8-11.

Indeed, Kalebu's proposed testimony could not possibly establish an insanity defense. Washington follows the M'Naghten¹¹ test, which has been codified at RCW 9A.12.010. To establish the defense, a defendant must demonstrate by a preponderance of the evidence that:

- (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
 - (a) He was unable to perceive the nature and quality of the act with which he is charged; or

¹¹ M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

(b) He was unable to tell right from wrong with reference to the particular act charged.¹²

Former RCW 9A.12.010 (1)-(2); State v. Wheaton, 121 Wn.2d 347, 353 n.2, 850 P.2d 507 (1993). It is error to give an insanity instruction unless there is substantial evidence supporting it. State v. Wicks, 98 Wn.2d 620, 621-622, 657 P.2d 781 (1983).

Moreover, where a defendant claims that he acted in response to a deific decree, the defendant must establish:

- (1) At the time of the acts charged, the defendant had a mental disease or defect;
- (2) As a result of the mental disease or defect, the defendant had a delusion that he had received a direct command from God to do the acts;
- (3) The defendant did the acts because of that direct command; and
- (4) The direct command destroyed the defendant's free will and his ability to distinguish right from wrong.

State v. Applin, 116 Wn. App. 818, 826, 67 P.3d 1152 (2003), review denied, 150 Wn.2d 1026 (2004); CP 295.

In the absence of evidence that Kalebu suffered from a mental disease or defect at the time of the crimes, and a causal

¹² Shortly after Kalebu's trial, the statute was amended to make it gender neutral. Its substantive content, however, remains the same. See 2011 ch. 336, sec. 353.

connection with his delusions, his admissions did not establish insanity. Moreover, even if they had, Kalebu had not given timely notice of the defense under RCW 10.77.030, which makes insanity evidence inadmissible “unless the defendant, at the time of arraignment or within ten days thereafter or at such later time as the court may for good cause permit, files a written notice of his or her intent to rely on such a defense.” RCW 10.77.030(1); see also CrR 4.2(c) (same notice requirements). Kalebu’s attorneys had affirmatively *withdrawn* any insanity defense. 22RP 33.

Judge Hayden did not disagree with defense counsel regarding the chain of events that would follow Kalebu taking the stand. To the contrary, his responses at the private hearing seemed to confirm the scenario, telling counsel that Kalebu had the right to testify that God made him do it and “[w]e’ll just deal with the appeal when it comes.”¹³ 47RP 12. When Schwartz indicated that by confessing on the stand, Kalebu may be giving up his right to effective representation, Judge Hayden agreed. 47RP 16. Moreover, Judge Hayden stated that if Kalebu confessed on the

¹³ Since there would be no appeal, of course, unless Kalebu were convicted, this remark implies the court’s belief that Kalebu’s testimony would lead to findings of guilt.

stand, “he certainly puts himself at risk of putting real jeopardy to your theory of the case.” 47RP 16. Kalebu heard none of this before choosing to take the stand and admitting he was the attacker.

Criminal defendants have a constitutional right to testify or stay silent at trial. State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999); In re Detention of Post, 145 Wn. App. 728, 758, 187 P.3d 803 (2008), aff’d, 170 Wn.2d 302, 241 P.3d 1234 (2010). Under the United States Constitution, this right is grounded in the Fifth, Sixth, and Fourteenth Amendments. It also is a fundamental right under article 1, sections 9 and 22 of the Washington Constitution.¹⁴ Robinson, 138 Wn.2d at 758 (citing Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) and State v. Thomas, 128 Wn.2d 553, 910 P.2d 475 (1996)).

Critically, only the defendant possesses the authority to decide whether to take the stand and, like the waiver of other constitutional rights, this decision must be made knowingly, intelligently, and voluntarily. Robinson, 138 Wn.2d at 758. This

¹⁴ Article I, section 9 provides, “No person shall be compelled in any criminal case to give evidence against himself” Article I, section 22 provides, “In criminal prosecutions the accused shall

includes “sufficient awareness of the relevant circumstances and likely consequences.” Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

Here, Kalebu was denied critical information necessary to make a knowing, intelligent, and voluntary decision on whether to waive his right to silence (thereby admitting key elements of the State’s case) or, alternatively, waive his right to testify and simply permit his attorneys to argue his innocence based on deficiencies in the evidence already presented.

Below, the prosecution offered State v. Berrysmith for Judge Hayden’s consideration on whether Kalebu should have been included in the in-chambers hearing. 47RP 66-67. In Berrysmith, decided solely under federal Constitutional principles, the defendant was excluded from a hearing on defense counsel’s motion to withdraw, which was based on Berrysmith’s intention to perjure himself on the stand. Berrysmith, 87 Wn. App. at 270.

In deciding whether the hearing was a critical stage of trial, the Berrysmith court examined:

- (1) whether the subject of the hearing related purely to a legal matter;
- (2) and if so, whether absence of

have the right to appear and defend in person . . . [and] to testify in his own behalf”

the defendant nevertheless bore a reasonably substantial relation to the fullness of his or her opportunity to defend against the charge, or whether a fair and just hearing was thwarted by his absence.

Berrysmith, 87 Wn. App. at 273-274. The court found that withdrawal of counsel was purely a legal question. Id. at 275. Therefore, his absence was not necessary for a fair and just hearing. Moreover, resolution of that legal question bore no relation to Berrysmith's opportunity to defend against the crime charged. Id. at 276.

In contrast, applying the federal standard, the issues discussed and decided in Kalebu's absence had a reasonably substantial relation to the fullness of his opportunity to defend against the charges and a fair hearing was impossible without his participation. The issues pertained to whether he would be permitted to take the stand, the manner in which he would be permitted to testify, and whether he could present an insanity defense at that late stage of trial.

Moreover, applying the even greater protections of article 1, section 22 of the Washington Constitution (not addressed in Berrysmith), Kalebu had the right to be present in chambers because, given the topics of conversation, there was a possibility

his “substantial rights may be affected.” Irby, 170 Wn.2d at 885. As already discussed, at the conclusion of the private hearing, it would have been apparent to Kalebu that taking the stand involved great risk (undermining his trial defenses) and little chance of any reward (the jury’s consideration of insanity as an affirmative defense).

Reversal is required unless the State can demonstrate harmlessness beyond a reasonable doubt. Irby, 170 Wn.2d at 885-886. The State cannot do so here.

Had Kalebu been present for the private hearing, he would have heard his attorneys’ concerns and, more importantly, heard Judge Hayden’s responses. Counsel had tried to dissuade Kalebu from testifying. 47RP 11. But hearing the discussion with Judge Hayden – who ultimately would decide whether to give an insanity instruction – was critical in deciding which right to waive and which to exercise, particularly where, as counsel stated on the record, Kalebu was prone to changing his mind and still might do so on this very topic. 47RP 11.

Kalebu’s uninformed decision to testify and confess that he was the attacker rendered an acquittal or conviction on a lesser charge impossible. Based on the State’s evidence, defense

counsel had attempted a two-pronged defense: (1) the State's evidence identifying Kalebu as the attacker was unreliable and (2) even if Kalebu was the attacker, neither Butz's murder nor Hopper's attempted murder was premeditated. 48RP 117-135 (identity), 135-144 (premeditation).

Kalebu's admission on the stand that he was at Butz's home the morning of the crimes left no doubt in jurors' minds that he was the attacker, a point prosecutors made repeatedly during closing argument. 48RP 112-113, 154, 159.

Moreover, his confession on the stand also established premeditation beyond any reasonable doubt. This was an element of the charge in count 1 (Murder in the First Degree) and count 2 (Attempted Murder in the First Degree). CP 190-191, 213-214.

For these charges, jurors were instructed:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 192. Jurors also were instructed on the non-premeditated lesser offenses of Murder in the Second Degree and Attempted Murder in the Second Degree. CP 194-196, 216-218.

Well before the close of evidence, Judge Hayden had recognized correctly that the defense strategy was to challenge the evidence of premeditation by arguing the stabbing only occurred as an impulsive reaction to the women's resistance. 39RP 5-7. Indeed, during closing arguments, defense counsel argued vigorously that, based on the State's evidence, jurors should find Kalebu guilty of the lesser offenses because neither the murder nor the attempted murder had been premeditated. 48RP 135-144.

In this regard, counsel challenged Hopper's assertion that, shortly before the final assaults in the northwest bedroom, Kalebu took both women to the central bedroom and obtained the second, smaller knife from his pants pocket before returning to the northwest bedroom. According to Hopper, Butz had already been cut at this point, yet there was a total absence of any blood inside that central bedroom. 38RP 37; 43RP 26-28, 90-96. Counsel argued it was therefore unlikely Hopper's testimony on this particular point was credible. 48RP 136-138.

Moreover, Kalebu had repeatedly reassured the women he was not there to hurt them. 37RP 138-139, 150, 155. And prior to the women resisting, Kalebu did not act like an individual with murder on his mind. He apologized to Hopper when he accidentally touched the knife tip to her arm. 38RP 32. And he told them he would be gone before they were picked up for the fictitious wedding Hopper had mentioned and before they called police. 38RP 20, 33-34. Counsel focused on this evidence in arguing there was no stabbing (or intent to harm) until the women began to resist. 48RP 143.

Moreover, all of Butz's wounds were to her front, meaning that Kalebu did not pursue her or cut her further as she got out of bed, picked up the small table, and escaped through the window. 48RP 140-143. Similarly, Kalebu stopped cutting Hopper when Butz ran from the home. He allowed her to simply leave the home through the front door. 48RP 142, 144.

Surprisingly, even after Kalebu's testimony, at least one juror still questioned proof of premeditation. See CP 250. But in light of Kalebu's admission that he was told to "attack my enemies" and chose to follow that instruction, there no longer was any realistic chance jurors would find the crimes committed without

premeditation. His testimony revealed a conscious, deliberate, and planned decision to attack both women. It ensured convictions on the most serious charges.


D. CONCLUSION

The trial court erred when it denied appellant's motion to strike the entire jury venire under CrR 6.4(a). Moreover, Kalebu was denied his federal and state constitutional right to be present for all critical stages of trial and his right to make a knowing, intelligent, and voluntary decision on whether to waive his right to silence. These errors require a new trial.

DATED this 28th day of February, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67560-5-I
)	
ISAIAH KALEBU,)	
)	
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 28TH DAY OF FEBRUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ISAIAH KALEBU
 DOC NO. 350965
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2013.

x *Patrick Mayovsky*