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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CHADWICK LEONARD KALEBAUGH,

Petitioner.

Review from Court of Appeals, Division Two, Case No. 43218-8-II

Respondent's Supplemental Brief

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By:

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 ORIGINAL

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I. ISSUE

- A. Did the trial court's preliminary comments to the entire venire regarding the burden of proof undermine Kalebaugh's presumption of innocence and shift the burden of proof thereby violating the Fourteenth Amendment right to due process?

II. STATEMENT OF THE CASE

Kristal Strong lived at a house located at 611 Washington Court in Napavine, Washington. 1RP 21.¹ There were a number of people living with Ms. Strong at the Napavine house, including Kalebaugh. 1RP 23, 47-48. T.S.,² and her two sons, started staying at the Napavine house for approximately a week prior to October 28, 2011. 1 RP 51; 2RP 17. T.S. also had a daughter, H.S., who first came to spend the night at Ms. Strong's house on October 28, 2011. 2RP 17-18.

On October 28, 2011 Ms. Strong threw a birthday party for her oldest son. 1RP 24. After the party the kids were put to bed. 1RP 48-49; 2RP 20. T.S. put her kids to bed around 11:30 p.m., with H.S. on the love seat and her two boys on a couch and a chair

¹ The jury trial in this case is reported in three volumes of verbatim report of proceedings. Day one of the trial, 1-3-12, will be cited as 1RP. Day two of the trial, 1-4-12, will be cited as 2RP. Day three of the trial, 1-5-12, will be cited as 3RP.

² The victim's mother, T.S., will be referred to by her initials to help protect the victim's identity.

in the living room. 2RP 20.³ After the kids were put to bed, T.S., Ms. Strong, Kalebaugh and Mr. Joyce went out to the garage. 1RP 24, 49; 2RP 20. Mr. Joyce and Kalebaugh were playing beer pong and split an 18 pack of beer. 1RP 49; 2RP 20.

Around 1:30 a.m. Ms. Sausey, Mr. Grantham, Private Jacob Murphy, Mr. Thompson and Mr. Medina arrived at the Napavine house. 1RP 91-92; 2RP 68-69, 128. Pvt. Murphy, an active Army Infantry soldier, had never been to the Napavine house and had not previously met T.S., Ms. Strong, Mr. Joyce or Kalebaugh. 2RP 68, 70. Mr. Grantham went upstairs to take a shower and Ms. Sausey went with him. 2RP 71-72. Pvt. Murphy was tired and wanted to sleep until his friends woke up and they would all travel back up to Fort Lewis together. 2RP 71-72. Mr. Grantham had told Pvt. Murphy he could "crash" on the reclining couch, which was across from where H.S. was sleeping on the love seat. 2RP 72-73.

While T.S. was staying at the Napavine house she slept on the floor in the living room. 1RP 51, 94; 2RP 29. There were blankets spread out in the middle of the living room floor, with three pillows, where T.S. sleeps. 1 53, 94; 2RP 29, 73. Kalebaugh, who

³ Mr. Joyce's testimony put the boys together on a couch in the living room. 1RP 49. Ms. Strong's testimony has the party finishing around 8:00 to 8:30 p.m. and the kids going to bed. 1RP 24.

usually slept on the couch, slept in the garage when T.S. was staying at the house. 1RP 51.⁴

T.S., Ms. Strong and Mr. Joyce went upstairs leaving H.S., the two boys, Pvt. Murphy and Kalebaugh downstairs. 1RP 28; 2RP 23. Kalebaugh asked T.S. for a cigarette as she headed upstairs and she gave one to him. 2RP 130. When Pvt. Murphy was first in the living room the lights and television were on. 2RP 73. The lights were shut off but the television remained on. 2RP 73. Pvt. Murphy started to fall asleep and heard the television click off so he opened his eyes. 2RP 73. Pvt. Murphy had no trouble seeing in the living room because the shades of the windows were open and the outside porch light was illuminating the living room. 2RP 73-74, 144-45. Pvt. Murphy stated “[I] [c]losed my eyes, tried to fall back asleep, then, I heard rustling, like someone was moving a lot. I opened my eyes again and then I seen [sic] Chad [Kalebaugh] chest up against the love seat with his hand underneath the blankets towards the little girl’s groin area.” 2RP 74. Pvt. Murphy said Kalebaugh’s arm was “[m]aking a back and forth movement.” 2RP 74. Kalebaugh’s arm was right at H.S.’s waistline. 2RP 74-75. One of H.S.’s knees was bent and propped up against the backrest

⁴ Kalebaugh testified that he slept on either the big couch or in the garage when T.S. was staying at the house. 2RP 132.

of the couch. 2RP 109. Pvt. Murphy could not tell if Kalebaugh's hand was over H.S.'s vagina because of the blanket but the direction of his arm looked like it was. 2RP 74-75. Pvt. Murphy could tell that Kalebaugh's hand was below H.S.'s waist. 2RP 75. Pvt. Murphy confronted Kalebauh by saying, "You know what you are doing is way wrong." 2RP 77. Kalebaugh quickly removed his hand from under the blankets, acted surprised and rolled over. 2RP 77, 92-93. Kalebaugh had a cigarette in his mouth and pretended he was asleep. 2RP 78.⁵

Pvt. Murphy immediately went upstairs to inform the other adults in the house of what he had seen. 2RP 78. Pvt. Murphy was mad, angry and shaking when he told the people what had happened. 2RP 95. Mr. Grantham, who had spent a good deal of time with Pvt. Murphy, said he has seen Pvt. Murphy really mad before but never to the point where he was shaking. 2RP 95-96. Mr. Joyce went downstairs and found Kalebaugh in the garage with an unlit cigarette. 1RP 55-56. Mr. Joyce asked Kalebaugh if he had touched H.S. and Kalebaugh stated, "no." 1RP 56. Kalebaugh was not angry, he seemed confused. 1RP 56, 75. Mr. Joyce went back

⁵ Kalebaugh's version of the events are distinctly different than Pvt. Murphy's. According to Kalebaugh he was out in the garage smoking a cigarette when he was first confronted by Mr. Joyce. 2RP 132-134.

upstairs and asked what had happened and Pvt. Murphy told Mr. Joyce again what he witnessed. 1RP 57-58, 2RP 79.

Mr. Joyce went back downstairs and Pvt. Murphy heard Mr. Joyce ask Kalebaugh if Kalebaugh was sure he did not do anything. 2RP 79-80. Pvt. Murphy could see Kalebaugh, who paused and looked down and away before saying no. 2RP 79-80, 88. Pvt. Murphy came down the stairs and confronted Kalebaugh again by saying, "You are lying." 2RP 88. Kalebaugh looked shocked but did not say anything. 2RP 88. Ms. Strong took her phone outside to call the police. 1RP 29. The children that were downstairs were grabbed and taken upstairs. 1RP 96-97; 2RP 26.

T.S. collected her daughter from downstairs. 2RP 26. T.S. found H.S. lying on her back on the couch, groggy. 2RP 26-27. H.S. was still under the blanket. 2RP 27. H.S. was wearing her normal sleeping attire, shorts and a pajama top. 2RP 27-28. H.S.'s shorts were pushed up towards her hip on H.S.'s left side, which was the side that was facing the outside of the couch. 2RP 27. The shorts were wrinkled around where they were pushed up. 2RP 27-28. The shorts were also pulled up to H.S.'s waistline and her underwear was visible. 2RP 28. T.S. had never seen H.S.'s shorts in this condition when H.S. was sleeping. 2RP 28.

The State charged Kalebaugh by amended information with one count of Child Molestation in the First Degree. CP 4-6. The State alleged the aggravating circumstances of a particularly vulnerable victim. CP 5. Kalebaugh elected to have his case tried to a jury. See 1RP; 2RP; 3RP. Prior to voir dire the trial judge advised the prospective jurors, without an objection, the following:

...The defendant has entered a plea of not guilty to that charge. The plea of not guilty puts in issue each and every element of the crime charged. The State as the plaintiff has the burden of proving beyond a reasonable doubt each and every element of the crime charged. The defendant has no burden or duty to prove that a reasonable doubt exists nor does he have the obligation to call witnesses or produce evidence.

In a criminal case a defendant is presumed innocent. This presumption continues throughout this entire trial, unless or until during your deliberations you find it's been overcome by the evidence beyond a reasonable doubt.

A "reasonable doubt" is one for which a reason exists and may arise from evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person, after fully, fairly and carefully considering all of the evidence or lack of evidence. 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 deliberation 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...

1RP 8-9.

The jury found Kalebaugh guilty of Child Molestation in the First Degree. CP 36. The jury also found that Kalebaugh knew, or should have known, that H.S. was a particularly vulnerable or incapable of resistance. CP 35. Kalebaugh's trial counsel filed a motion for relief from judgment and a new trial. CP 37-40. The trial court denied Kalebaugh's motion. CP 55-56. The trial court sentenced Kalebaugh to a standard range sentence of a minimum term of 72 months with a maximum of life. CP 66-67. Kalebaugh timely appealed his conviction. CP 80-94.

The Court of Appeals in an opinion published in part affirmed Kalebaugh's conviction. *State v. Kalebaugh*, 179 Wn. App. 414, 318 P.3d 288 (2014). The opinion was not unanimous. Judge Bjorgen authored a dissent in part, finding that the issue raised regarding the alleged improper statement defining reasonable doubt in the preliminary jury instruction was a manifest constitutional error that could be raised on the first time on appeal. Judge Bjorgen also discussed that the State would not successfully overcome a harmless error argument because the State's evidence was not harmless beyond a reasonable doubt. Kalebaugh petitioned for review, which was granted.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE PRELIMINARY COMMENTS TO THE JURY WERE NOT IN ERROR, AS THEY WERE TO THE ENTIRE VENIRE PRIOR TO JURY SELECTION AND THE CORRECT INSTRUCTIONS WERE GIVEN TO THE IMPANNELED JURY AT THE CLOSE OF EVIDENCE.

Kalebaugh alleges that the preliminary comments, or as he terms them, instructions, by the trial judge to the entire venire violated his Fourteenth Amendment right to due process because the trial judge's explanation regarding the burden of proof required a juror to articulate a reason for acquittal which undermined Kalebaugh's presumption of innocence and lessened the State's burden of proof. Petition for Review 1, 6-10. The State will focus this supplemental brief on why this initial comment to the venire was not in error. The State is not conceding the alternative argument it made to the Court of Appeals and relies on its briefing below regarding manifest constitutional error, structural error and harmless error analysis.

1. Standard Of Review

Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012).

2. The Preliminary Comments By The Trial Judge Were Not In Error Because They Were Not Jury Instructions And The Proper Jury Instructions Were Given To The Impaneled Jury After The Close Of Evidence.

The preliminary comments made to the entire venire are different from the actual jury instructions given at the close of evidence, which becomes the law of the case. See *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The preliminary comments included a reading of the crime the State was alleging Kalebaugh committed, the aggravating factors alleged, that a plea of not guilty puts in issue every element of the crime charged, the defendant has no burden or duty to prove reasonable doubt, the jury's duty to determine the facts from the evidence, what evidence they will be able to consider, how exhibits are handled, the attorney's remarks are not evidence, attorneys will make objections and not to be influenced by the raising of objections, the judge has a duty to rule on admissible evidence, and the law does not permit the judge to comment on the evidence.

1RP 8-11. The State could not find a case in Washington that dealt with the preliminary comments, or if this Court prefers, the preliminary instructions, to the jury prior to voir dire. The State looked at a number of different jurisdictions to see how they handled this issue.

In Arizona a trial court gave a preliminary instruction that stated, “[w]here the crime charged is the sale of a substance, the necessary intent is established by the transfer of any amount of a substance when the accompanying circumstances indicate an intent to sell.” *State v. Sanchez*, 542 P.2d 421, 422, 25 Ariz. App. 228 (1975). The instruction was given after the jury was impanelled but prior to the introduction of testimony or evidence and there was no objection to the instruction. *Sanchez*, 542 P.2d at 422. The trial court gave the correct instruction at the conclusion of the evidence. *Id.* *Sanchez* argued in his appeal that the preliminary instruction reduced the State’s burden to prove intent because it conveyed a probable cause standard, not a proof beyond a reasonable doubt standard. *Id.* The court stated,

[I]t must be remembered when this particular instruction was given. This occurred immediately after the jury was impaneled and prior to the taking of any evidence. Moreover, it was given in the atmosphere of generally instructing the jury under RULE 18.6(c) Rules of Criminal Procedure, 17 A.R.S., of their

general duties, their conduct during the trial informing them of the order of proceedings and the governing elementary legal principles. Assuming under these circumstances that the jury even remembered the specific wording of this instruction at the time they began their deliberations, it is not an incorrect statement of the law.

Id. at 422-23.

In California a trial court judge gave a preliminary instruction that omitted the word evidence to one group of jurors during the jury selection process. *People v. Frye*, 959 P.2d 83, 214, 18 Cal. 4th 894 (1998). The jury was correctly instructed after the close of evidence and prior to deliberations. *Frye*, 959 P.2d at 215. The appellate court held, “[i]t is not reasonably likely the jury was confused by the trial court’s mistake during jury selection.” *Id.* at 215.

In Kansas a trial judge explained to the prospective jurors during voir dire that there was a difference in the burden of proof necessary for a civil matter versus a criminal matter. *State v. Cook*, 913 P.2d 97, 108, 259 Kan. 370 (1996). The trial judge explained that in a civil case the burden is more probably true than not, 51 percent. *Cook*, 913 P.2d at 108. The judge went on to explain in a criminal case, in comparison, the burden of proof is not a quantifying number but it is more than 51 percent. *Id.* The trial

judge reiterated the percentage statement while orienting the jury on important concepts of criminal law. *Id.* At the close of evidence the judge read the jury instructions, using the correct reasonable doubt language. *Id.* Cook argued on appeal that the preliminary instruction allowed the jury to convict him with the wrong burden of proof; he would be guilty if the jury was 52 percent certain he had committed the crime. *Id.* The State argued to the court that the comments to the judge were merely commentary and should not be analyzed as jury instructions. *Id.* The State also argued that the correct standard for the burden of proof was included in the jury instructions given to the jury at the close of evidence, several days after the trial commenced. *Id.*

The Supreme Court of Kansas agreed with the State's analysis of the trial court's preliminary comments. *Id.* at 109. The Court stated:

We hold the trial court's commentary did not qualify as a jury instruction. The comments were not made under the guise of an instruction but, instead, were simply made to inform a potential jury that the burden of proof on a criminal case was different (even greater) than the burden of proof in a civil case. Thus, the question is whether the actual jury instruction regarding reasonable doubt was appropriate. The defendant did not object to the instruction when it was read to the jury at trial. Absent an objection, this court may reverse only if the instruction was clearly erroneous.

Id. The Kansas Supreme Court went on to state that trial court gave the appropriate instruction and neither that instruction nor the judge's commentary to the jury during voir dire regarding reasonable doubt was clearly erroneous. *Id.*

Prior to voir dire beginning in Kalebaugh's case the trial judge made a number of comments to the entire venire. 1RP 8-11. The trial judge read the charging information, including the aggravating factors. 1RP 8. The trial judge then stated:

The defendant has entered a plea of not guilty to that charge. The plea of not guilty puts in issue each and every element of the crime charged. The State as the plaintiff has the burden of proving beyond a reasonable doubt each and every element of the crime charged. The defendant has no burden or duty to prove that a reasonable doubt exists nor does he have the obligation to call witnesses or produce evidence.

In a criminal case a defendant is presumed innocent. This presumption continues throughout this entire trial, unless or until during your deliberations you find it's been overcome by the evidence beyond a reasonable doubt.

A "reasonable doubt" is one for which a reason exists and may arise from evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person, after fully, fairly and carefully considering all of the evidence or lack of evidence. 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 deliberation you do have a doubt for which a reason can be given as to the defendant's guilt, then, [sic] you are not satisfied beyond a reasonable doubt.

A charge has been made by the prosecuting attorney by filing a document called an Information, which informs the defendant of the charge. You are not to consider the mere filing of the Information or its contents as proof of the matters charged.

It is going to be your duty to determine which facts have been proved in this case from the evidence produced here in Court. It is also your duty to accept the law from the Court, regardless of what you personally believe the law should be. You are to apply the law to the facts that you decide have been proved and in this way decide the case.

Now the evidence that you are going to consider will consist of the testimony of witnesses any physical exhibits, which are admitted in evidence. It is very important that you listen carefully to the witnesses' testimony during trial. You will not be provided with a written copy of the testimony during our deliberations. For this reason your ability to accurately recall the testimony will be particularly important.

On the other hand, any exhibits that are admitted in evidence will go with you to the jury room for your use and consideration during your deliberations.

1RP 8-10. The trial judge continues to comment to the venire about that part of an attorney's duty is to make objections, the judge's duty is to rule on admissibility of evidence, attorney's remarks are not evidence, and that the law does not permit the judge to

comment on the evidence. 1RP 10-11. There was no objection to any of the preliminary comments. 1RP 8-11.

Kalebaugh argues the preliminary comments were akin to the prosecutorial misconduct cases where prosecutors, during closing arguments, told the jury they could only acquit the defendant if they could articulate a specific reason. Petition for Review 7-8, Appellant's Brief 18-19. For example, the prosecutor would tell the jurors they must be able to state, I don't believe the defendant is guilty because..., and the juror must fill-in-the-blank. *State v. Anderson*, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). Kalebaugh also asserts that because the trial court's alleged erroneous comments regarding reasonable doubt were made at the beginning of the case it caused the selected jurors to view the case through a distorted lens, that "they had no choice but to deliberate with the understanding acquittal required them to articulate a reason for their doubts." Petition for Review 8.

This Court recognizes that misstatements by prosecutors can be neutralized by a curative instruction. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The same rational reasonably applies to possible misstatements by judges. While the State is not conceding that the preliminary comment was a

misstatement of the burden of proof, if this Court recognizes that a curative instruction can neutralize prosecutorial misstatements then the proper jury instructions given at the close of evidence neutralize any misstatement during the preliminary comments by the judge. By giving the proper jury instructions to the jury at the close of evidence and telling the jury that these are the instructions the jury is to use when considering the evidence neutralize any possible prejudice by the alleged improper statement. See *Belgrade*, 110 Wn.2d at 507; 1RP 8-11; 2RP 163-64.

Kalebaugh's argument also puts far too much emphasis on the potential impact the preliminary comments made by the trial judge had on the jury. His argument also does not acknowledge what environment these comments were made in. The trial judge made his preliminary comments to the entire venire, prior to voir dire beginning. 1RP 8-11. At no point does the trial judge tell the jurors that what they are listening to are jury instructions. 1RP 8-11. In contrast when the jury instructions were read to the jury after the end of evidence the second day of trial, the trial judge stated, "Ladies and gentlemen, I'm now going to instruct you as to the law in this case...You are going to have when you go back to deliberate

the instructions that I read to you, plus two additional copies...”
2RP 163-64.

The appellate court in Arizona understood the importance of the timing of a preliminary comment, or instruction, noting in *Sanchez* that it was important to remember when the particular instruction was given and even commenting, “Assuming under these circumstances that the jury even remembered the specific wording of this instruction by the time they began their deliberations...” *Sanchez*, 542 P.2d at 422-23. The Kansas Supreme Court stated that the comments made during voir dire regarding reasonable doubt were not jury instructions and that the jury instructions, given after the close of evidence, were a correct statement of the law. *Cook*, 913 P.2d at 109. In California a preliminary instruction to a portion of a venire that omitted a word was not reversible error because the jury had been properly instructed at the close of the presentation of evidence. *Frye*, 959 P.2d at 215. In *Frye* the court held it was not reasonable to believe the jury would have been confused by the omission of a word during jury selection. *Id.*

The three out-of-state cases all exemplify why the trial judge’s preliminary comments were not in error, and if improper in

any way, is not reversible error. A preliminary comment made to the entire venire prior to jury selection, where the judge did not use the term jury instructions, the proper WPICs were read prior to deliberations and the jury was told the jury instructions given to them at the close of evidence were the instructions for which they were to use is not reversible error. The jury instructions are read to the jury at the end of the case and the jury retains written copies of the jury instructions during deliberations. 2RP 163-74; 3RP 42; CP 18-32. The statements made by the trial judge prior to voir dire are preliminary comments and nothing more.

Washington case law has established that when a jury instruction is raised as error, the instructions must be read as a whole. *McCreven*, 170 Wn. App. at 461-62. Jury instructions are not to be read in artificial isolation. *State v. Davis*, 175 Wn.2d 287, 329, 290 P.3d 43 (2012) (internal quotations and citations omitted). These principles are particularly important because juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). The jury instructions, read as a whole, are an accurate statement of the law in regards to reasonable doubt. 2RP 168 (reading CP 22); CP 18-32; WPIC 4.01. Nowhere in the jury instructions given to the

jurors at the conclusion of Kalebaugh's case was an erroneous instruction or misstatement of the law regarding reasonable doubt. See 2RP 163-74; CP 18-32.

IV. CONCLUSION

This Court should affirm Kalebaugh's conviction and find that the preliminary comments are not jury instructions. If this Court were to find the preliminary comments were in fact preliminary instructions this Court should hold that the timing of these instructions make any possible misstatement inconsequential and do not prejudice Kalebaugh because the proper jury instructions regarding reasonable doubt were given to the jury at the close of evidence .

RESPECTFULLY submitted this 31st day of July, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



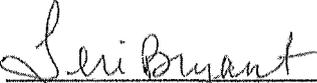
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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 89971-1
Respondent,)	
vs.)	DECLARATION OF
)	EMAILING
CHADWICK KALEGAUGH,)	
Petitioner.)	
)	
)	
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)	

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 31, 2014, the Petitioner was served with a copy of the **Respondent's Supplemental Brief** by emailing same to Backlund & Mistry, counsel for the Petitioner at: Backlundmistry@gmail.com.

DATED this 31st day of July, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
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Sent: Thursday, July 31, 2014 4:14 PM
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Subject: State v. Chadwick Kalebaugh, No. 89971-1

Attached is the Respondent's Supplemental Brief for filing in the above referenced case.

Thanks,

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