89971-1

No. 43218-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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**STATE OF WASHINGTON**,

Respondent,

vs.

**CHADWICK KALEBUAGH,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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# Respondent's Brief

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## I. ISSUES

A. Did the trial court's preliminary instruction to the jury improperly shift the burden of proof and undermine the presumption of innocence?

B. Did the State not present sufficient evidence to prove beyond a reasonable doubt that Kalebaugh had sexual contact with H.S.?

C. Did the trial court err when it gave the State's proposed jury instruction defining sexual contact over Kalebaugh's objection?

D. Did the deputy prosecutor commit misconduct during his closing argument that deprived Kalebaugh of his right to a fair trial?

E. Did the cumulative errors deprive Kalebaugh of his right to a fair trial?

## 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. 1RP 23, 47-48. Brianna Sausey lived at the house with her mother, Jacqueline Shore. 1RP 23. Ms. Shore's grandson, Wesley, and his dad Matthew also lived at the house. 1RP 23. Chadwick Kalebaugh also lived at the Napavine house. 1RP 23. William Sheldon Joyce

[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.

moved into the Napavine house on October 12, 2011. 1RP 47-48. T.S.[2] started staying at the Napavine house for about a week prior to October 28, 2011. 2RP 17. T.S.'s two sons were staying with her at Ms. Strong's house. 1RP 51. T.S. had a daughter, HS, who first came to spend the night at Ms. Strong's house on October 28, 2011.

On October 28, 2011 Ms. Strong threw a birthday party for her oldest son who was turning five. 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 in the living room. 2RP 20.[3] After the kids were put to sleep, 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, Randy Grantham, Private Jacob Murphy, Leland Thompson and Matthew Medina arrived at the Napavine house. 1RP 91-92; 2RP 68-69, 128. The five had been at a Halloween party. 1RP 91. Mr. Grantham was the

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

[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.

designated driver and they stopped in at the Napavine house because Mr. Grantham wanted to clean up before driving home to Tenino because he was covered in blood from breaking up a fight. 1RP 89, 92. Mr. Grantham had broken up a fight at the Halloween party and was covered in blood. 1RP 92. 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. Medina and Mr. Thompson were intoxicated and went to sleep in the garage. 1RP 26, 50, 92.

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

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 he "[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 Chad 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 of the couch. 2RP 109.

[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.

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 police arrived and Pvt. Murphy told Kalebaugh he needed to go outside. 2RP 145. Pvt. Murphy stated that Kalebaugh said, "I didn't do anything wrong. I don't need to go outside." 2RP 145, 148. Kalebaugh said he did not want to go outside because he thought Pvt. Murphy wanted to fight him. 2RP 134. Pvt. Murphy next told Kalebaugh "You need the get the fuck outside." 2RP 145, 148. Napavine Police Officer Noel Shields came inside the house and told Kalebaugh, who was lying on the couch, that he needed to come outside. 2RP 54.

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. There was a child hearsay hearing. CP 15. H.S.'s statements were suppressed by the trial court. CP 17. Kalebaugh elected to have his case tried to a jury. *See* 1RP; 2RP; 3RP. 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 judgement 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 appeals his conviction. CP 80-94.

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

## III. ARGUMENT

### A. KALEBAUGH CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE TRIAL COURT'S ALLEGED IMPERMISSIBLE STATEMENT IN ITS PRELIMINARY INSTRUCTION REGARDING REASONABLE DOUBT BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.

Kalebaugh claims the trial court shifted the burden of proof in its preliminary oral instruction to the entire panel of prospective jurors prior to voir dire. Brief of Appellant 17-26. The trial court advised the prospective jurors 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. Kalebaugh did not object to the trial court's preliminary instruction. 1RP 8-11. Kalebaugh is now attempting to assert to this Court that the last two paragraphs above, the "if after your deliberations you do not have a doubt for which a reason can be given as to the defendant's guilt…", is a manifest constitutional error that he can now raise for the first time on appeal. Brief of Appellant 17-22. The alleged error is not a manifest constitutional error. The error, if one exists, would be constitutional but Kalebaugh does not demonstrate to this Court how the error is manifest. Therefore, Kalebaugh cannot raise this issue for the first time on appeal.

### 1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, __ Wn. App. __, 280 P.3d 1152, 1155 (2012). Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, __ Wn. App. __, 284 P.3d 793, 802 (2012).

### 2. Kalebaugh Did Not Object To The Allegedly Erroneous Preliminary Instruction And Fails To Show This Court That The Alleged Error Is A Manifest Constitutional Error.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted).*

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted).* No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

**a. The preliminary oral instruction to prospective jurors was not erroneous.**

The State is not agreeing that the preliminary instruction to the prospective jurors was in error. Kalebaugh cites to the "fill-in-the-blank" cases to exemplify how the trial court's preliminary instruction was error and shifts the burden which is an error of

constitutional dimensions. Brief of Appellant 18-21.[6] In all of those cases, the deputy prosecutor during closing argument would make an argument similar to the following:

> A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say "I don't' believe the defendant is guilty because," and then you have to fill in the blank. It is not something made up. It is something real, with a reason to it.

*State v. Anderson,* 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The Court held that the deputy prosecutor's argument was improper because it implied that the jury had to be able to find a reason to acquit the defendant which in turn "made it seem as though the jury had to find Anderson guilty *unless* it could come up with a reason not to". *Anderson*, 153 Wn. App. at 431 (emphasis original). The Court held this was an improper implication that the jury initially had an affirmative duty to convict the defendant. *Id.* The Court also held that the argument implied the defendant had the burden of supplying the reason why he or she is not guilty, which is impermissible because the defendant has no affirmative duty. *Id.*

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[6] *Citing State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012); *State v. Emery*, 161 Wn. App. 172, 253 P.3d 413 (2011); *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010); *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010); *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009).

The trial court here did not require prospective jurors to fill in the blank. It did not demand the prospective jurors be able to articulate the reason why the defendant was not guilty. The trial court, in an oral statement to the entire venire stated:

> 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 9. This oral instruction is not the same as stating in order to find the defendant not guilty you must state, "I don't believe the defendant is guilty and fill-in-the-blank." The fill-in-the-blank argument demands the jurors articulate why the defendant is not guilty. It does not allow for the defendant to be presumed innocent because a juror is being commanded to find the defendant guilty unless the juror can state the reason for which he or she does not believe the defendant is guilty. In the oral preliminary instruction given by the trial court here, the trial court is simply conveying, albeit in more detail, the definition of reasonable doubt, which is, "a reasonable doubt is one for which a reason exits…" WPIC

4.01. The prospective jurors are not being told that they must convict unless they can state what their doubt is, the prospective jurors are told that if they have no doubt for which a reason can be given then they are satisfied beyond a reasonable doubt. It is a subtle but important distinction. Therefore, the preliminary oral instruction to prospective jurors was not in error.

**b. If the preliminary oral instruction was erroneous it was not a manifest error.**

While the State maintains throughout its argument that the instruction was not erroneous, arguendo, the error alleged by Kalebaugh, that the preliminary instruction to prospective jurors shifted the burden of proof, is an error of constitutional dimension as it violates the due process clause. *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552 (1994) (citations omitted). Therefore, the analysis in this case must be focused on whether the alleged error is manifest.

An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a "plausible showing… that the asserted error had practical and identifiable consequences in the trial of the case." *O'Hara*,167 Wn.2d at 99

(internal citations and quotations omitted). Kalebaugh has not satisfied this requirement. First Kalebaugh argues that because *Anderson* was decided in 2009 and the cases subsequent to *Anderson* all held that the fill-in-the-blank argument was improper, the error was obvious at the time it was committed. Brief of Appellant 21. As argued above, the trial court's preliminary instruction is not identical to the fill-in-the-blank argument made by deputy prosecutors during their closing arguments. The difference between the two statements is sufficient that the trial court would not have foreseen the error. *See O'Hara*, 167 Wn.2d at 100.

Second, Kalebaugh makes a circular argument that the error had a practical and identifiable consequence on his trial because it undermined his presumption of innocence due to the shifted burden. Brief of Appellant 22. This is not an identifiable consequence. It does not acknowledge that the proper jury instruction defining reasonable doubt was given at the end of day two of the jury trial. 2RP 168; CP 22. The pattern jury instruction for reasonable doubt was included in the Court's Instructions to the Jury and three complete sets of instructions were provided to the jury to use during their deliberations. WPIC 4.01; 3RP 41-42; CP 22. Kalebaugh does not articulate how this alleged erroneous

preliminary oral instruction to the venire had a practical and identifiable consequence to his trial. Therefore, Kalebaugh has not satisfied the requirements to show this Court that the error is manifest and the alleged error is not properly before this Court.

### 3. If The Preliminary Instruction Was Erroneous It Does Not Constitute A Structural Error.

If the preliminary instruction regarding reasonable doubt given to the venire was erroneous, the error did not render the trial unreliable or fundamentally unfair and the error is therefore not a structural error. *See State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009). A structural error requires automatic reversal and is not subject to a harmless error analysis. *State v. Mosteller*, 162 Wn. App. 418, 429-30, 254 P.3d 201 (2011), *review denied* 172 Wn.2d 1025 (2011). Structural errors only occur in a limited number of cases and most constitutional errors can be subject to a harmless error analysis. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "Constitutional violations that defy harmless-error review "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Mosteller*, 162 Wn. App at 430, *citing Neder*, 527 U.S. at 8. A defective reasonable doubt jury instruction, which used a definition of reasonable doubt that had

been previously ruled unconstitutional, has been held to be structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

In the present case the erroneous[7] preliminary oral instruction to prospective jurors, given prior to voir dire, does not render the trial fundamentally unfair or unreliable. *Mosteller*, 162 Wn. App. at 430. This instruction was not given to the jury at the close of evidence and was not provided to the jury during its deliberations. Further, right before the trial judge said the erroneous instruction he spoke of the presumption of innocence and also 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.

1RP 8. The jury instructions are to be considered in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). In regards to the preliminary instruction to the prospective jurors this would mean the entire instruction as

[7] The State is making this argument in the alternative and continues to maintain that the instruction is not erroneous.

given, which included the correct statement that Kalebaugh is not required to produce or prove anything and that it is the State's burden to prove every element of the crime charged beyond a reasonable doubt. 1RP 8. The erroneous instruction in this case is not structural is therefore subject to the harmless error test.

**4. If The Preliminary Instruction Was Erroneous The Error Was Harmless.**

Not every misstatement in a jury instruction will relieve the State of its burden. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). However, "a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden." *Brown*, 147 Wn.2d at 339 (citations and internal quotations omitted). A jury instruction that misstates the law is subject to a harmless error analysis. *State v. Hayward*, 152 Wn. App. 632, 646, 217 P.3d 354 (2009) (citations and internal quotations omitted). "In order to hold the error harmless, we [,the reviewing court,] must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Brown*, 147 Wn.2d at 341 (citations and internal quotations omitted).

In the present case the preliminary instruction given to prospective jurors prior to voir dire did not affect the jury verdict. The jurors that were chosen to sit on the jury heard two days of

testimony and then were given the jury instructions at the close of the case. 2RP 163-74. Included in those instructions was the standard pattern jury instruction for reasonable doubt. 2RP 168 (reading CP 22); 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. Further, the copies of the instructions the jury was given to use during their deliberations contained the correct statement of reasonable doubt and did not shift the State's burden of proof. 3RP 42; CP 18-32.

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). Kalebaugh may argue to this Court that the trial court provided an erroneous instruction which would necessarily mean the jury followed that erroneous instruction. The State argues to this Court that it is the instructions given to the jury at the close of the case that they follow when they decide the case. These are the instructions that the jury has heard right before they enter into their deliberations, these jury instructions, which are titled, "Courts Instructions to the Jury", are the ones which they have copies of and can reference during their deliberations. 3RP 42; CP 18-32.

In this case the jury heard from Kalebaugh who denied anything ever happened. *See* 2RP 119-144. The jury also heard the testimony of Pvt. Murphy, a man who had never met anyone in the house besides Mr. Grantham and had no problems with any person in the house. 2RP 69-70, 93. Kalebaugh's description of what happened after T.S., Ms. Strong and Mr. Joyce went upstairs was different than the testimony of Mr. Joyce, Mr. Grantham and Pvt. Murphy. Pvt. Murphy saw Kalebaugh with his arm under the covers of and over the groin area of H.S. 2RP 74-75. Kalebaugh's arm was making a back and forth motion. 2RP 74. When Pvt. Murphy confronted Kalebaugh he stopped, looked surprised and then rolled over with an unlit cigarette in his mouth and pretended to be asleep. 2RP 77-78, 92-93.

The jury's verdict was not tainted by the erroneous preliminary instruction regarding reasonable doubt given to the venire. Absent the erroneous instruction the jury would have reached the same verdict. The correct jury instructions and the testimony elicited during the trial make the error harmless beyond a reasonable doubt.

## B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE KALEBAUGH HAD SEXUAL CONTACT WITH H.S.

The State presented sufficient evidence to sustain the trial court's conviction for Child Molestation in the First Degree. The evidence introduced proved that Kalebaugh had sexual contact with H.S.

### 1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

### 2. There Was Sufficient Evidence Presented To Prove Kalebaugh Had Sexual Contact With H.S.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150

Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Kalebaugh of Child Molestation in the First Degree the State was required to prove, beyond a reasonable doubt, that Kalebaugh had sexual contact with H.S. [8] RCW 9A.44.086; CP 4-6; 26. Sexual contact is defined as "touching of the sexual or other intimate parts of a person done for the purpose

[8] Kalebaugh is not challenging the other elements of Child Molestation in the First Degree.

of gratifying the sexual desires of either party." RCW 9A.44.010(2); CP 25. Kalebaugh agrues to this Court that the State has failed to sufficiently prove both elements of sexual contact. Brief of Appellant 27-28. Kalebaugh asserts the evidence presented was insufficient to prove he touched an intimate area of H.S. Brief of Appellant 28. Kalebaugh also claims the State failed to prove he touched H.S. for sexual gratification. Brief of Appellant 31. Kalebaugh's assertions are incorrect. The State presented sufficient evidence for both elements of sexual contact and his conviction should be affirmed.

**a. The State presented sufficient evidence that Kalebaugh touched H.S. in an intimate area.**

An intimate area of the body is not defined by statute. It is possible to touch an intimate area through clothing. *In re Welfare of Adams*, 24 Wn. App. 517, 519, 601 P.2d 995 (1979). The term, intimate area, when defining a part of the body is "somewhat broader than the term 'sexual.'" *In re Adams*, 24 Wn. App at 519. It has long been held that what areas on the body, apart from a person's breasts and genitalia, are intimate is to be determined by the trier of fact. *Id.* at 520. "Contact is 'intimate' within the meaning of the statute 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." *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008).

Kalebaugh argues to this court that the State only proved that H.S. was touched between her waist and her knees and "for the State to prevail, this Court would have to find that *any* place in the knee to waist region is an intimate body part." Brief of Appellant, 30. This is generalization of the evidence and an oversimplification of the law. The State proved that Kalebaugh touched an intimate area of H.S.

In the broadest terms, Kalebaugh touched H.S. in the area from below her belly button to somewhere above her knees. 2RP 74-75. When examining the testimony of Pvt. Murphy it becomes clearer where Kalebaugh was touching H.S. although due to the blanket covering H.S. there is no direct evidence. 2RP 74-75. H.S. was sleeping on her back on the couch with her left side facing out towards the living room. 2RP 27, 75. H. S. had one of her knees visible, propped up against the backrest of the couch. 2RP 109. Pvt. Murphy saw Kalebaugh's hand underneath the blanket towards H.S.'s groin area. 2RP 74. Pvt. Murphy stated he was sure Kalebaugh's hand was below H.S.'s waist and above her knees. 2RP 75, 109. Pvt. Murphy stated he could not be certain if

Kalebaugh's hand was over H.S.'s vagina but based on the direction of Kalebaugh's arm it looked like his hand was over H.S.'s vagina. 2RP 75. The deputy prosecutor asked Pvt. Murphy, "Now, in that area of the belly button and knees, did the touching seem to be in the middle or closer to the top or the bottom of that area?" 2RP 109. Pvt. Murphy responded, "It was more towards the middle." 2RP 109.

In the light most favorable to the State, with all reasonable inferences being drawn in favor of the State, Pvt. Murphy's testimony is sufficient to prove that the area Kalebaugh touched, around H.S.'s groin area, under the circumstances that the touching occurred, is an area that a person of common intelligence would know was an intimate area. In addition to Pvt. Murphy's testimony, the jury heard about the strange positioning of the shorts H.S. was wearing after Kalebaugh touched her. 2RP 27-28. The shorts on H.S.'s left side were pushed up all the way to H.S.'s waistband and her underwear was visible. 2RP 28. The shorts being in this condition is just further evidence that Kalebaugh was touching H.S. right next to, if not directly on her vagina. Any rational jury would have found beyond a reasonable doubt that Kalebaugh touched an intimate area of H.S.

**b. The State presented sufficient evidence that Kalebaugh touched H.S. for the purpose of sexual gratification.**

Kalebaugh cites to *State v. Powell*, arguing that when touching occurs through the child's clothing, there must be additional extrinsic evidence of sexual gratification. Brief of Appellant 31-32, *citing State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). The State acknowledges that *Powell* requires extrinsic evidence in a case where the touching was outside the child's clothing. In Kalebaugh's case there was such extrinsic evidence presented to the jury.

The night of the birthday party, October 28, 2011 to October 29, 2011, was the first time H.S. had spent the night at the Napavine house. 2RP 18. T.S. had only known Kalebaugh for approximately two weeks prior to October 28, 2011. 2RP 18. The touching occurred after T.S., Ms. Strong and Mr. Joyce joined Mr. Grantham and Ms. Sausey upstairs. 2RP 23-24; 2RP 74. The children in the living room were all asleep prior to Pvt. Murphy taking a seat in the recliner to sleep. 2RP 72-73. Prior to going upstairs T.S. could see Pvt. Murphy was closing his eyes. 2RP 23. Pvt. Murphy testified that when he first was in the living room the lights and the television were on. 2RP 73. The lights were later shut

off but the television stayed on. 2RP 73. Then the television was shut off, which was what startled Pvt. Murphy awake. 2RP 73. Kalebaugh waited until after all the adults were either upstairs or asleep, the two other children in the room downstairs were asleep and the lights were off before he touched H.S.

H.S. was sleeping and therefore did not need an adult to be caring for her. 2RP 72-73. Further, T.S. did not testify that Kalebaugh was a caregiver for her daughter. *See* 2RP. Pvt. Murphy described Kalebaugh's arm as making a back and forth movement with his hand under the blankets, below H.S.'s waist in the direction of her vagina. 2RP 74-75. When confronted, Kalebaugh rolled over with an unlit cigarette in his mouth and pretended to be asleep. 2RP 77. Kalebaugh stated that he did not touch anybody. 2RP 56. Kalebaugh denied that he was even in the room with H.S. when the molestation occurred. 2RP 56, 132-134.

There is also the disarray of H.S.'s shorts that she was sleeping in. H.S. regularly slept in shorts. 2RP 28. The condition of the shorts, as found by her mother immediately after the incident, was different than T.S. had ever seen H.S.'s sleeping shorts before. 2RP 28. The bottom of the shorts were pushed up towards H.S.'s hip on the left side, which was the side closer to the outside of the

couch. 2RP 27. The shorts were wrinkled around where they had been pushed up. 2R 27-28. The shorts were pulled up all the way to H.S.'s waistline and her underwear was visible. 2RP 28.

In *Powell*, the allegation was that the victim had been sitting on Powell's lap when he gave her a hug around her chest and then helped her off his lap. *Powell* , 62 Wn. App. at 916. According to the victim, when Powell lifted her off his lap he placed his hand on the front and the bottom of her underpants, under her skirt. *Id.* The victim also alleged that Powell had touched her on both of her thighs, outside of her clothing, while sitting in a truck. *Id.* The Court of Appeals noted that any touching was fleeting and susceptible to innocent explanation. *Id.* at 917-18. Powell testified that he was affectionate with children and did not deny hugging the victim. *Id.* at 918. Powell did deny touching the victim under her skirt or touching the victim for sexual gratification. *Id.* The Court of Appeals reversed Powell's conviction because it found that there was insufficient evidence to support that Powell touched the victim for sexual gratification. *Id.*

In the present case there is no innocent explanation. Either the jury believed Pvt. Murphy's version of events, which they did because they convicted Kalebaugh, or the jury believed

Kalebaugh's version of the events. Kalebaugh did not give an innocent explanation as to why he was touching H.S., he not only denied touching her, he denied being in the room at the time the incident occurred. The lights are out and everyone is either asleep or upstairs. There is the movement of Kalebaughs hand in a back and forth motion around the lower waist, groin or upper thigh area of H.S. The little girl's shorts had the bottom of the shorts on the left side pulled all the way up to her waist with her panties showing. There is also Kalebaugh's reaction when he was confronted, he did not get angry or yell, he rolled over and acted as if he was asleep.

The jurors are the determiners of the credibility of witnesses and the reviewing court does not reweigh the importance of evidence or the credibility of the witnesses. *Green*, 94 Wn.2d at 221. Jurors are in the best position to evaluate the conflicting evidence that was elicited in this case. *See Olinger*, 130 Wn. App. at 26. In the light most favorable to the State, with all reasonable inferences drawn in favor of the State and understanding that circumstantial evidence is just as reliable as direct evidence, there is sufficient evidence that any jury could have found beyond a reasonable doubt that Kalebaugh touched H.S. for the purpose of sexual gratification. The jury "can infer sexual gratification from the

nature and circumstances of the act itself." *State v. Tilton*, 111 Wn. App. 423, 430, 445 P.3d 200 (2002), *reversed on other grounds*, *State v. Tilton* 149 Wn.2d 775 (2003). There is no other explanation for Kalebaugh's actions.

Therefore, when this Court views the evidence in the light most favorable to the State, any rational jury could find beyond a reasonable doubt that Kalebaugh had sexual contact with H.S. on or about or between October 28, 2011 and October 29, 2011. This Court should affirm the conviction.

### C. THE TRIAL COURT DID NOT ERROR WHEN IT GAVE THE STATE'S PROPOSED JURY INSTRUCTION DEFINING SEXUAL CONTACT.

A jury instruction must accurately state the law but is not required to be a pattern jury instruction. *Stevens v. Gordon*, 118 Wn. App. 43, 53, 74 P.3d 653 (2003). In the present case the trial court gave a jury instruction defining sexual contact that had additional language above and beyond the standard pattern jury instruction. WPIC 45.07; CP 25. Kalebaugh argues to this Court that the trial court erred in giving the State's proposed jury instruction for sexual contact because it improperly instructs the jury on what the law is. Brief of Appellant, 34-38. Kalebaugh asserts that the jury instruction given prejudiced him because it allowed the

jury to convict Kalebaugh under an incorrect definition of intimate contact that was less vigorous than required by law. Brief of Appellant. 37.

Kalebaugh's assertion that jury instruction number five, defining sexual contact, was an inaccurate statement of the law is incorrect. *See* CP 25. The explanation of intimate area was an accurate statement of the case law on the matter. *See Jackson*, 145 Wn. App. at 819. The jury instruction was proper and did not prejudice Kalebaugh.

**1. Standard of Review.**

Jury instructions are reviewed de novo. *Bennett*, 161 Wn.2d at 307. A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.*

**2. The Definition Of Intimate Contact Was An Accurate Statement of Law.**

A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond,* 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable

inferences in the light most favorable to the requesting party." *Webb*, 162 Wn. App. at 208, *citing State v. Hanson,* 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990). Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin,* 100 Wn.2d 417, 420, 670 P.2d 265 (1983). Juries are presumed to follow the jury instructions provided to them by the trial court. *Ervin*, 158 Wn.2d at 756.

In the present case the State proposed and the trial court instructed the jury that sexual contact was:

> Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.
>
> Contact 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 considering whether a particular touching is done for the purpose of gratifying a sexual desire, you may consider among other things the nature and the circumstances of the touching itself.

Sexual contact may occur through a person's clothing CP 25. Kalebaugh objected to this instruction being given. 2RP 159. Kalebaugh did not however propose any jury instructions of his own. 2RP 95, 159. Kalebaugh in this appeal is only objecting to the trial court's use of the second paragraph regarding intimate contact. Brief of Appellant. Brief of Appellant 34.[9]

The statement in paragraph two of instruction five is an accurate statement of the law. An intimate area is not defined by statute and the courts have repeatedly held that the determination if an area of the body is an "intimate area" is a question that is to be resolved by the trier of fact. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009); *Jackson*, 145 Wn. App at 819; *In re Adams*, 24 Wn. App. at 520. The courts have held that,

> [c]ontact is 'intimate' within the meaning of the statute 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.

*Jackson*, 145 Wn. App. at 819. So with the exception of "within the meaning of the statute" the definition of intimate given in jury

[9] Kalebaugh also argues that the trial court prejudiced him by misreading the jury instruction and using the word "contact" instead of "conduct". This error is at most negligible because the jury had correct copies of the jury instructions, if there is a question regarding the law the jury is always to refer back to the jury instructions and the jury is also told that if the judge appears to comment on the evidence they are to disregard it.

instruction five is word for word the statement of the law in *Jackson.* CP 25. Kalebaugh insists that without adding that the intimate parts of the body must be in close proximity of the primary erogenous area the instruction is misleading and allows an impermissibly overbroad definition of intimate area. Brief of Appellant, 36. Kalebaugh's argument comes from the statement in *In re Adams* that "the statute [,prohibiting touching of sexual or other intimate parts of another,] is directed to protecting the parts of the body in close proximity to the primary erogenous area which a reasonable person could deem private with respect to salacious touching by another." *In re Adams*, 24 Wn. App. at 521. Yet, the pattern jury instruction only states, "[s]exual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." WPIC 45.07. The pattern instruction gives even less parameters for the jury to consider when deciding what is an intimate area and does not include a statement about close proximity to primary erogenous areas.

There is no definition found in the pattern jury instructions for intimate area and, as stated earlier, it is for the jury to determine what constitutes an intimate area. *In re Adams*, 24 Wn. App. at 520. The jury instruction given by the trial court clarified that for an area

to be considered intimate, a person, under the circumstances that the conduct was occurring, of ordinary intelligence could fairly be expected to know that the parts touched were intimate and the touching was therefore improper. CP 25. Without the second paragraph of instruction five the jury would not have had any frame of reference for what an intimate area would be beyond common knowledge and personal definitions. The instruction given was not an erroneous statement of the law.

Even if the instruction is somehow erroneous, Kalebaugh was not prejudiced by the trial court's definition of intimate contact. The jury is not only charged with deciding if Kalebaugh touched an intimate area of H.S.'s body, as Kalebaugh argues. The jury must also decide what area of a body is intimate. The State respectfully disagrees with Kalebaugh's assertion that there was such a lack of evidence as to where H.S. was touched that this instruction impermissibly allowed the jury to convict Kalebaugh of Child Molestation in the First Degree without him touching an intimate are on H.S. The State has argued at length above how the evidence supports the finding that Kalebaugh touched H.S. in an intimate area. Kalebaugh touched H.S. under a blanket in the central region between her belly button and her knees. 2RP 109. Kalebaugh's

hand appeared to be over H.S.'s vagina and her shorts were in such disorder that the bottom left of one leg was pulled up to the waistband and her underwear was visible. 2RP 28, 75. This Court should affirm Kalebaugh's conviction.

### D. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HIS CLOSING ARGUMENT.

During closing argument the deputy prosecutor made two arguments that Kalebaugh objected to at the time and is now claiming constitutes prosecutorial misconduct. 3RP 11-12; Brief of Appellant 38-43. The deputy prosecutor stated, "Now you as a jury get to decide what counts as an intimate part of the person's body." 3RP 11. Kalebaugh objected and the trial court overruled the objection. Next, the deputy prosecutor told the jury:

> It says, "Contact is intimate within the meaning of the statute 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." So just because it's not right in the vagina doesn't mean that it's not necessarily sexual contact.
>
> Think about it. The whole reason the region is kind of intimate, especially if you don't know this person, let alone that they are five and you are 32, but even though the touching was above the knees and below the belly button, and when asked Private Murphy said it was towards the middle of that zone, that's right over the vagina, and even if it was closer to the knees or closer to the belly button, rubbing on her, that's an intimate area. Anywhere in that zone is intimate. You

> wouldn't feel comfortable with a stranger touching you anywhere near, probably nowhere on your body, but especially between that zone. That's an intimate part of the body.

3RP 11-12. Kalebaugh objected and the trial court overruled the objection. 3RP 12.

Kalebaugh argues to this Court that both of the above statements misstate the law of the definition of sexual contact. Brief of Appellant 40. Kalebaugh asserts he was prejudiced by these misstatements of the law and because his case was a credibility contest between himself and Pvt. Murphy the deputy prosecutor's misstatement of the law makes the prejudice particularly evident. Brief of Appellant 42.

The deputy prosecutor did not commit misconduct because his statements regarding the law in this case were correct. Further, if the deputy prosecutor misstated the law Kalebaugh has not sufficiently established that the remarks prejudiced his case.

**1. Standard Of Review.**

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v.* Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

### 2. The Deputy Prosecutor Did Not Improperly Instruct The Jury Or Misstate Law.

To prove prosecutorial misconduct, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn. 2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing State v. Gregory*,

158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

Jurors are instructed that they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 163, 168 P.3d 359 (2007) (citations omitted). A lawyer's statements to the jury regarding the law "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 2113 (1984) (citation omitted).

The deputy prosecutor's first statement, that the jury gets "to decide what counts as an intimate part of the person's body" is an accurate statement of the law. 3RP 11; *In re Adams*, 24 Wn. App. at 520. Contrary to Kalebaugh's argument that the jury only gets to determine whether an intimate part has been touched, the law

actually states, "[t]he determination of which anatomical areas apart from genitalia and breasts are intimate is a question to be resolved by the trier of fact." *In re Adams,* 24 Wn. App. at 520. The deputy prosecutor did not commit misconduct because he did not misstate the law.

The deputy prosecutor's second statement at issue, abbreviated down to the essence of what Kalebaugh asserts is a misstatement of the law, that the whole area between the knees and the belly button are an intimate area, must be taken in the full context of what the deputy prosecutor is saying. The deputy prosecutor did argue that touching, in the manner that occurred in this case, rubbing on H.S., somewhere above the knees and below her belly button in and intimate part of the body. 3RP 12. The deputy prosecutor also stated that Pvt. Murphy stated that the touching was in the middle of the zone between the belly button and knees. 3RP 36. The deputy prosecutor also spoke about under these circumstances this conduct, the touching of this area would be considered improper because it was an intimate area. 3RP 11. This is not a misstatement of the law. The law does not define intimate areas. The deputy prosecutor was arguing that under these facts anywhere in the zone would be considered an intimate

area. 3RP 11-12. But the deputy prosecutor also told the jury, right before he made the zone argument, that the jury is the one who get to decide what an intimate area is. The deputy prosecutor did not commit misconduct.

### 3. If This Court Were To Find That The Deputy Prosecutor Committed Misconduct, Kalebaugh Was Not Prejudiced And The Misconduct Was Therefore Harmless Error.

The State does not concede that any of the statements the deputy prosecutor made were improper. Arguendo, if this court finds any or all of the statements improper and misconduct, any such misconduct was harmless error. Kalebaugh has the burden of showing the misconduct was prejudicial considering the context of the entire record. *Gregory*, 158 Wn.2d at 809. The context of the record includes the instructions that are given to the jury and evidence addressed in the argument. *State v. Monday*, 171 Wn. 2d at 675.

Kalebaugh argues to this Court that because this case is a "credibility contest" the deputy prosecutor's statements are particularly damaging, prejudicial and warrant reversal of the conviction. Brief of Appellant 42. While this case is about credibility, the jury, as evidence by its verdict, believed Pvt. Murphy's version

of events, the alleged improper statements do not bolster Pvt. Murphy's credibility.

Kalebaugh was not prejudiced by the deputy prosecutor's statements. The law given was clear; the State had to prove there was sexual contact between Kalebaugh and H.S. CP 24-26. Pvt. Murphy's testimony established that Kalebaugh had sexual contact with H.S. The manner in which Kalebaugh was touching H.S., rubbing her under a blanket, the area in which he was touching her, in the middle of the area between her below her belly button and above her knees, his response to being confronted and the condition of H.S.'s shorts prove Kalebaugh was molesting H.S. This Court should affirm Kalebaugh's conviction.

### E. THERE IS NO CUMALITVE ERROR WHICH WOULD WARRANT DISMISSAL OF KALEBAUGH'S CASE.

The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). The doctrine does not apply in Kalebaugh's case. The preliminary instruction regarding reasonable doubt that was given to the venire was not erroneous. If the instruction was given in error

it was not a structural error and was harmless beyond a reasonable doubt.

The State presented sufficient evidence to prove beyond a reasonable doubt that Kalebaugh had sexual contact with H.S. The jury instruction given defining sexual contact was correct in its entirety. Lastly, the deputy prosecutor did not commit misconduct.

## IV. CONCLUSION

For the foregoing reasons, this court should affirm Kalebaugh's conviction.

RESPECTFULLY submitted this 14th day of October, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

# LEWIS COUNTY PROSECUTOR

# October 12, 2012 - 2:42 PM

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**Is this a Personal Restraint Petition?** ○ Yes ◉ No

**The document being Filed is:**

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

**Comments:**

No Comments were entered.

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A copy of this document has been emailed to the following addresses:

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