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No. 89971-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Chadwick Kalebaugh,**

Petitioner/Appellant.

---

Lewis County Superior Court

Cause No. 11-1-00772-8

The Honorable Judge Richard Brosey

## **Petitioner's Supplemental Brief**

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ORIGINAL

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## STATEMENT OF FACTS

Chadwick Kalebaugh was charged with child molestation. CP 4-6. At his jury trial, the only direct evidence of molestation came from a witness named Murphy. Murphy testified that he awakened from a nap and saw Mr. Kalebaugh reaching under a blanket that covered a sleeping five-year-old, and making a back and forth movement somewhere between her bellybutton and her knees. RP (1/4/12) 74-75, 109. The only circumstantial evidence of guilt came from the girl's mother, who testified that she woke her daughter up and found her sleeping shorts pushed up so her underwear was visible. RP (1/4/12) 27-28.

Mr. Kalebaugh denied the offense, first to his housemates and Murphy, and then to a police officer. RP (1/3/12) 56, 58-59; 76-77, 88; RP (1/4/12) 55-56, 133. At trial, he testified and denied the charge. RP (1/4/12) 140-141.

Prior to jury selection, the court instructed jurors on the meaning of reasonable doubt. The judge included the following language in the instruction:

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

On the other hand, if after your deliberations you do have a doubt for which a reason can be given as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt. RP (1/3/12) 9.

At the conclusion of the evidence, the court instructed jurors using the pattern instruction on reasonable doubt. CP 22; RP (1/4/12) 167-68.

At no time during the trial did the court tell jurors they could acquit even if they could not give a reason for any doubt. *See* RP *generally*; CP 18-32.

The jury convicted Mr. Kalebaugh. CP 64. He appealed, arguing that the trial court's preliminary instruction misstated the burden of proof by requiring jurors to articulate a reason for their doubt. *See* Appellant's Opening Brief, pp. 17-26.<sup>1</sup> The Court of Appeals declined to reach the merits of the argument, and affirmed his conviction. Opinion, pp. 1, 8-9.

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<sup>1</sup> Mr. Kalebaugh raised other issues in the Court of Appeals as well.

## ARGUMENT

**I. THE TRIAL COURT’S INSTRUCTIONS IMPROPERLY DIVERTED THE JURY’S ATTENTION AWAY FROM THE REASONABLENESS OF ANY DOUBT, AND ERRONEOUSLY FOCUSED IT ON WHETHER JURORS COULD PROVIDE REASONS FOR THEIR DOUBTS.**

A. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)). Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends. VI; XIV; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is “inappropriate”

because it “subtly shifts the burden to the defense.” *Emery*, 174 Wn.2d at 759-60.<sup>2</sup>

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit...” *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc*, 138 F.3d 552 (5th Cir. 1998).<sup>3</sup>

An instruction imposing an articulation requirement

creates a lower standard of proof than due process requires...  
[I]nability to articulate a good reason for doubt does not make the doubt unreasonable.

*Humphrey*, 120 F.3d at 534.<sup>4</sup>

B. The trial court erroneously told jurors to convict unless they could articulate a reason for their doubt.

The trial court’s advance oral instruction included the following language: “If after your deliberations you do not have a doubt for which a

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<sup>2</sup> See also *State v. Walker*, 164 Wn. App. 724, 731-32, 265 P.3d 191 (2011); *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

<sup>3</sup> The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases reached the opposite result under the AEDPA’s strict procedural limitations. See, e.g., *Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

<sup>4</sup> In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

reason can be given as to the defendant's guilt, *then, you are satisfied beyond a reasonable doubt.*" RP (1/3/12) 9 (emphasis added). This language differed from that in the pattern instruction (WPIC 4.01), and from that approved by the Supreme Court in *Bennett. Bennett*, 161 Wn.2d at 317-318.

The erroneous instruction did more than provide an incorrect definition. Instead, the instruction told the jury what its decision must be. According to the instruction, if a juror could not articulate a reason to doubt, then the juror must conclude that s/he was "satisfied beyond a reasonable doubt," and thus must vote to convict. RP (1/3/12) 9.<sup>5</sup>

The error was especially egregious because it came at the very beginning of the case. Because it preceded the testimony, the erroneous instruction served as a lens through which jurors viewed each piece of evidence as it was admitted. For example, a juror with amorphous concerns about Murphy's credibility might immediately dismiss those

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<sup>5</sup> The erroneous directive was confirmed by another part of the court's preliminary instruction, which indicated that the state had not met its burden if jurors *did* have a doubt for which a reason could be given. RP (1/3/12) 9. Although legally correct, this statement had the unfortunate effect of compounding the error. If "a doubt for which a reason can be given" requires acquittal, it seems logical that inability to give a reason leads to conviction. As a whole, the instructions erroneously focused jurors on whether or not they could articulate a reason for their doubts, not on the *reasonableness* of their doubts.

concerns, no matter how reasonable. This could occur even before Murphy left the witness stand.<sup>6</sup>

As a matter of law, the jury is “firmly presumed” to have followed the court’s erroneous instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). Jurors must have had the erroneous instruction in mind while listening to the evidence. *Id.* They had no reason to disregard it when it came time to deliberate. CP 18-32. Having viewed the evidence through the distorting lens of the preliminary instruction, they had no choice but to deliberate with the understanding that acquittal required articulation of a reason for their doubts. Indeed, jurors might well have already forgotten any reasonable but inchoate doubts when it came time to begin deliberation.

The erroneous instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759-60. It also “create[d] a lower standard of proof than due process requires...” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Mr. Kalebaugh’s right to due process and his right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his conviction must be reversed and the case

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<sup>6</sup> Furthermore, the decision to disregard inchoate but reasonable doubts could unconsciously impact the juror’s view of every subsequent witness.

remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

C. Although legally correct, the court's other instructions did not cure, and may have exacerbated, the error in the preliminary instruction.

When taken as a whole, the court's instructions improperly diverted the jury's attention away from the reasonableness of their doubts. Neither the preliminary instruction nor the court's instructions at the end of the case corrected the problem caused by the court's erroneous statement on reasonable doubt.

Both the preliminary instruction and the closing instructions correctly defined reasonable doubt as "a doubt for which a reason can be given." RP (1/3/12) 9; CP 22. But this correct statement of the law did not cure the error created by the court's misstatement. Neither set of instructions told jurors they could acquit even if they could not articulate a reason for their doubt. RP (1/3/12) 8-11; CP 18-32.

Both sets of instructions also outlined the presumption of innocence. RP (1/3/12) 9; CP 22. This, too, did nothing to cure the problem. Jurors who presumed Mr. Kalebaugh innocent and had reasonable doubts would nonetheless feel obligated to vote 'guilty' if they could not articulate their reasons for each doubt. According to the court's

erroneous instruction, if they could not articulate their reasons, they were “satisfied beyond a reasonable doubt.” RP (1/3/12) 9.

The court’s instructions at the end of the case were consistent with the court’s erroneous preliminary instruction. CP 18-32. Even though the closing instruction set omitted the offending language, it did nothing to solve the problem created by the court’s initial misstatement of the law. The court never told jurors they could acquit even if they could not articulate a reason for their doubt. CP 18-32.

Indeed, the court’s instructions on reasonable doubt, although legally correct, may well have exacerbated the problem. To the average juror, the legal definition of reasonable doubt—“a doubt for which a reason can be given”—would seem to support the court’s incorrect statement that “If... 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.” RP (1/3/12) 9 (emphasis added). Taken as a whole, the instructions diverted jurors’ attention from the reasonableness of their doubts, and erroneously focused them on whether or not they could give a reason for any doubts.

The court’s preliminary instruction required jurors to articulate a reason for any doubts they had. RP (1/3/12) 9. The error was not cured by other language in the preliminary instruction or by the closing

instruction set. Furthermore, the error may well have been exacerbated by language defining reasonable doubt, because that language might appear to support the court's misstatement of law. RP (1/3/12) 9; CP 22.

Because of this, Mr. Kalebaugh's conviction must be reversed, and the case remanded for a new trial. *Sullivan*, 508 U.S. at 278-82.

**II. MR. KALEBAUGH'S CONVICTION MUST BE REVERSED BECAUSE THE ERRONEOUS INSTRUCTION CREATED STRUCTURAL ERROR THAT PREJUDICED HIM.**

A. The court's misstatement created structural error requiring automatic reversal.

The reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). It "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.*, (citing *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895)).

A faulty instruction on reasonable doubt "unquestionably qualifies as 'structural error.'" *Sullivan*, 508 U.S. at 282. The consequences of such errors "are necessarily unquantifiable and indeterminate." *Id.* Because of this, structural errors require automatic reversal. *In re Stockwell*, 179 Wn.2d 588, 608, 316 P.3d 1007 (2014).

Here, the court committed structural error by telling jurors “If... you do not have a doubt for which a reason can be given...then, you are satisfied beyond a reasonable doubt.” RP (1/3/12) 9. The court’s instructions diverted jurors from reasonable doubt, and focused them instead on whether or not they could give a reason for any doubt.

Our system of justice relies on juries to decide the facts in criminal trials. *Alleyne v. United States*, -- U.S. ---, \_\_\_, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). A trial judge “may not direct a verdict for the State, no matter how overwhelming the evidence.” *Sullivan*, 508 U.S. at 277. Nor may a court review any matter that inheres in the jury’s verdict. *State v. Linton*, 156 Wn.2d 777, 788, 132 P.3d 127 (2006).

This faith in the jury rests on the assumption that juries will receive proper instruction, especially with respect to the “bedrock” principles underlying the entire system. *Winship*, 397 U.S. at 363. Instructions that misstate the reasonable doubt standard remove the premise upon which the jury system is based. No one can have faith in a verdict delivered by a jury that received misleading instructions on reasonable doubt.

The error here “unquestionably qualifies as ‘structural error.’” *Sullivan*, 508 U.S. at 282. Because of this, the court must reverse Mr. Kalebaugh’s conviction. *Id.*; *Stockwell*, 179 Wn.2d at 608.

B. Even if the error is not structural, the state can't prove it harmless beyond a reasonable doubt.

The Supreme Court has described the reasonable doubt standard as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363. In this case, the trial court's error increased the risk of conviction resting on factual error.

The state produced only weak evidence of Mr. Kalebaugh's guilt. Murphy, the main prosecution witness, testified that he saw Mr. Kalebaugh making a back and forth movement somewhere between the girl's bellybutton and her knees though under a blanket. (1/4/12) 74-75, 109. His testimony provided, at best, ambiguous evidence of sexual contact. The child did not testify or provide any statements admitted at trial. *See RP generally*. Although the girl's mother found her daughter's shorts pushed up and her underwear visible, this may have resulted from restlessness rather than criminal activity. RP (1/4/12) 27-28.

Furthermore, Mr. Kalebaugh consistently denied wrongdoing. He did not make any statements that undermined the presumption of his innocence. RP (1/3/12) 56, 58-59; 76-77, 88; RP (1/4/12) 55-56, 133, 140-141.

Under these circumstances, the erroneous instructions posed a significant risk of error. A juror who reasonably doubted Murphy's

testimony but could not articulate the reason may well have voted to convict. Such a juror would “not have a doubt for which a reason can be given as to the defendant’s guilt,” and thus, under the court’s instruction, was unequivocally “satisfied beyond a reasonable doubt.” RP (1/3/12) 9.

Similarly, a doubt could stem from Mr. Kalebaugh’s denial of guilt, or from the ambiguous nature of the prosecution’s evidence. Under the court’s instruction, a juror who could not articulate the reason for such a doubt would have no choice but to convict.

Mr. Kalebaugh’s consistent denials and the weaknesses in the prosecution’s case make it impossible for the state to prove the error harmless beyond a reasonable doubt. This is especially true given the court’s closing instructions, which did nothing to correct the problem, and likely exacerbated it by repeating the phrase “a doubt for which a reason can be given.” CP 21.

The error was not harmless beyond a reasonable doubt. The conviction must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

**III. THE COURT OF APPEALS SHOULD HAVE REVIEWED MR. KALEBAUGH’S ARGUMENT ON THE MERITS AND REVERSED HIS CONVICTION.**

- A. The flawed instruction created structural error, which may always be raised for the first time on review.

An instruction that relieves the state of its burden and infringes the jury trial right qualifies as structural error. *Sullivan*, 508 U.S. at 279-282. RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

Because structural error occurred here, the Court of Appeals should have reviewed the merits of the appeal. *Paumier*, 176 Wn.2d at 36. The Supreme Court should reach the merits of Mr. Kalebaugh’s argument, overturn the Court of Appeals decision, and reverse Mr. Kalebaugh’s conviction. *Id.*; *Sullivan*, 508 U.S. at 282; *Stockwell*, 179 Wn.2d at 608.

B. If the error is not structural, it should have been reviewed as a manifest error affecting Mr. Kalebaugh's rights to due process and to a jury trial.

A manifest error affecting a constitutional right may be raised for the first time on review.<sup>7</sup> RAP 2.5(a)(3). An error is manifest if it "actually affected [the defendant's] rights at trial." *State v. Lamar*, 89060-9, 2014 WL 2615399, 327 P.3d 46 (Wash. 2014). To secure review, an appellant need only make "a *plausible* showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *Id.* (emphasis added).

The manifest error analysis "is distinct from deciding whether the error was harmless." *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010). It does not require the appellant to show that the error caused the jury to vote guilty:

The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred.

*Id.* Instead, the appellant must show that the trial judge could have foreseen the potential error and that the record contains sufficient facts to review the claim. *Lamar*, 327 P.3d at 50. For this reason, an error that is

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<sup>7</sup> In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This

*manifest* may also be *harmless*.<sup>8</sup> See, e.g. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Here, the Court of Appeals misapplied the “manifest error” standard and refused to reach the merits. Opinion, pp. 6-9. Instead of determining the adequacy of the record or the foreseeability of the error, the Court of Appeals burdened Mr. Kalebaugh with the obligation to show that the error was not harmless. Opinion, pp. 6-9. This reflects a fundamental misunderstanding of RAP 2.5(a)(3)’s requirement that an error be “manifest.”

The Court of Appeals misinterpreted the rule because it relied on Connecticut decisions instead of the Washington Supreme Court’s decisions construing RAP 2.5(a)(3). Opinion, pp. 7-8.<sup>9</sup> This was error.

Connecticut law should not control the interpretation of Washington’s Rules of Appellate Procedure. Furthermore, these Connecticut cases do not address the scope of review, which is the subject of RAP 2.5. Instead, the *Golding* case and its progeny allow an appellant

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includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

<sup>8</sup> The burden of showing an error is harmless remains with the prosecution. *Gordon*, 172 Wn.2d at 676.

<sup>9</sup> Citing *State v. Figueroa*, 235 Conn. 145, 665 A.2d 63 (1995); *State v. Walton*, 227 Conn. 32, 630 A.2d 990 (1993); *State v. Lewis*, 220 Conn. 602, 600 A.2d 1330 (1991); *State v. Golding*, 213 Conn. 233, 567 A.2d 823 (1989); *State v. Woolcock*, 201 Conn. 605, 618, 518 A.2d 1377 (1986).

to prevail *on the merits* of certain constitutional claims, even absent objection in the trial court:

we hold that a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met...

*Golding*, 213 Conn. at 239 (emphasis in original).<sup>10</sup>

In each case cited by the Court of Appeals, the Connecticut appellate court denied the appellant's claim on its merits. In none of the cited cases did the Connecticut appellate court determine that "the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim." *Lamar*, 327 P.3d at 50. But these are the very questions that must be answered to determine the scope of review under RAP 2.5(a)(3). *Lamar*, 327 P.3d at 50. The Court of Appeals should not have relied on cases from Connecticut to interpret RAP 2.5(a)(3).

The *Golding* court *did* note that cases can be disposed of through harmless error analysis, without "delv[ing] deeply into the constitutional merits of a claim." *Golding*, 213 Conn. at 242. The same is true in

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<sup>10</sup> See also *Figueroa*, 235 Conn. at 183 ("A defendant may prevail under the third prong of *Golding*..."); *Walton*, 227 Conn. at 64 ("In order to prevail on a claim of constitutional error not preserved at trial, the defendants must meet all four of the conditions of [*Golding*]"); *Lewis*, 220 Conn. at 615-617; *Woolcock*, 201 Conn. at 618.

Washington,<sup>11</sup> and has no bearing on the scope of review under RAP 2.5(a)(3). A manifest error affecting a constitutional right can only be found harmless if the state proves the error harmless beyond a reasonable doubt. *Gordon*, 172 Wn.2d at 676. The question of harmlessness is separate and distinct from the determination of whether an error is “manifest.” *Schaler*, 169 Wn.2d 284.

The court’s improper instruction qualified as a manifest error affecting Mr. Kalebaugh’s right to due process and to a jury trial. *Lamar*, 327 P.3d at 50; *Sullivan*, 508 U.S. at 278-81. The Court of Appeals should have reviewed the error on its merits. RAP 2.5(a)(3); *Lamar*, 327 P.3d at 50. The Supreme Court should reverse Mr. Kalebaugh’s conviction. *Sullivan*, 508 U.S. at 282; *Stockwell*, 179 Wn.2d at 608.

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<sup>11</sup> See, e.g., *State v. Aamold*, 60 Wn. App. 175, 183, 803 P.2d 20 (1991) (“We need not decide this issue, however, because even if the trial court erred by receiving the jury verdict in defense counsel’s absence, the error was harmless beyond a reasonable doubt”).

**CONCLUSION**

For the foregoing reasons, the court should reverse Mr. Kalebaugh's conviction and remand his case for a new trial.

Respectfully submitted on July 31, 2014.

**BACKLUND AND MISTRY**



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CERTIFICATE OF MAILING

I certify that on today's date:

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I filed the Supplemental Brief electronically with the Supreme Court.

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

Signed at Olympia, Washington on July 31, 2014.



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**To:** OFFICE RECEPTIONIST, CLERK; appeals@lewiscountywa.gov; Sara Beigh  
**Subject:** 89971-1-State v. Chadwick Kalebaugh-Supplemental Brief

Attached is the petitioner's supplemental brief.

Thank you.

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