

No. 08-100604-A

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**IN THE  
COURT OF APPEALS OF THE  
STATE OF KANSAS**

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**FILED**

**JUL 21 2009**

**CAROL G. GREEN  
CLERK OF APPELLATE COURTS**

**STATE OF KANSAS**  
Plaintiff-Appellee

vs.

**CLIFFORD BAUGHMAN**  
Defendant-Appellant

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**REPLY BRIEF**

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Appeal from the District Court of Pottawatomie County, Kansas  
Honorable Michael Ireland, Judge  
District Court Case No. 07 CR 511

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### Nature of the Case

Clifford Baughman was charged with two counts of aggravated indecent liberties with a child and one count of sexual exploitation of a child in Pottawatomie County, Kansas. On March 20, 2008, a jury found the defendant not guilty of one count of aggravated indecent liberties with a child and guilty of the second count of aggravated indecent liberties with a child. The court granted the defendant's motion for a directed verdict and dismissed the count of sexual exploitation of a child. On May 15, 2008, the district court sentenced the defendant to a term of 68 months incarceration and 36 months post-release supervision.

The Brief of the Appellant, Mr. Baughman, was filed on March 10, 2009. Brief of the Appellee, the State of Kansas, was filed on July 15, 2009.

This is Mr. Baughman's Reply Brief.

### Statement of Issues

- Issue I: Reversible error was committed when the state produced evidence of multiple acts regarding the July incident, but the state failed to elect the act upon which it was relying and the court failed to give a unanimity instruction**
- Issue II: The trial court committed reversible error when it gave the deadlocked jury instruction, PIK Crim.3d 68.12, over defense counsel's objection.**
- Issue III: The District Court committed reversible error when it refused to allow the defense to impeach D.K. with evidence of a prior inconsistent statement.**
- Issue IV: The trial court did not adequately investigate Clifford's request to remove his trial counsel based on his claims that he had a conflict with Mr. Roe.**

### **Statement of Facts**

For the purposes of this reply brief, Mr. Baughman relies upon the Statement of Facts contained in his Brief of Appellant, filed in this court on March 10, 2009.

### **Arguments and Authorities**

In this Reply Brief, Mr. Baughman responds to the State's argument related to Issue II concerning the deadlocked jury instruction given by the court below. Mr. Baughman continues to advance all issues and arguments made in his Brief of Appellant filed on March 10, 2009.

In the instant case, the instruction PIK Crim. 3d 68.12, the deadlocked jury instruction, was given to the jury as Jury Instruction 14. It read in pertinent part:

This is an important case. If you should fail to reach a decision, the case is left open and undecided. Like all cases, it must be decided sometime. Another trial would be a heavy burden on both sides. (R. I, 50).

The language “[a]nother trial would be a heavy burden on both sides” is problematic. In *State v. Salts*, 288 Kan. 263, 200 P.3d 464 (2009), the Kansas Supreme Court held “[i]nclusion of the language ‘[a]nother trial would be a heavy burden on both sides’ in PIK Crim.3d 68.12 is error.” The Supreme Court found the language was misleading and inaccurate because a second trial is not necessarily burdensome on one or both parties. It also noted that “the language is confusing” because “[i]t sends conflicting signals when read alongside Instruction 11 or a similar instruction that tells jurors not to concern themselves with what happens after they arrive at a verdict.” It was error for the

court in the instant case to give the deadlocked jury instruction over defense counsel's objection.

The State in its brief has acknowledged that defense counsel objected to this instruction (Brief of Appellee, 20), and that because there was an objection to the instruction, the appellate court must determine, under the applicable standard of review, if the instructions properly and fairly stated the law as applied to the facts of the case, and if the jury could have reasonably been misled by them. (Brief of Appellee, 19-20, citing *State v. Page*, 41 Kan. App. 2d 584, 585).

The State argues in its brief that it has not been shown that the deadlocked jury instruction given in the instant case could have reasonably misled the jury. (Brief of Appellee, 20). In support of this claim the State points to *Page*. In *Page*, at one point during jury deliberation, the jury informed the judge that there was a possibility of a hung jury. Then, after recessing at the end of the day, the jury returned to deliberate the following day and returned a verdict of guilty. The State argues that, because the jury in the instant case made no announcement of a possible hung jury and because there was a split verdict – guilty on one count of aggravated indecent liberties and not guilty on the other – there has been no showing that the jury could have been reasonably misled by the instructions. (Brief of Appellee, 20-21).

Mr. Baughman responds to these arguments of the State as follows. The same defects that were present in the deadlocked jury instruction in *Salts* and *Page* were present in the instruction given in the instant case. Our Supreme Court has clearly stated that the instruction as it was given here is erroneous. It is erroneous for multiple reasons:

1. It is incorrect when it tells the jury that the defendant's constitutional right to a trial is a burden to the defendant.
2. The deadlocked jury instruction, which invites the jury to consider what might happen in the case in the event of a hung jury, is directly at odds with another instruction, which was given to the jury in the instant case, which tells it that it is not to consider the disposition of the case after trial.
3. The deadlocked jury instruction improperly allows the jury to consider the "burden" of another trial to the State and its taxpayers, including the jurors themselves, in terms of time, money and inconvenience.
4. It is erroneous because it allows the jury to consider matters outside the evidence presented at trial in reaching a verdict.

The Supreme Court in *State v. Salts* called the deadlocked jury instruction, as it was given in the instant case, "misleading and inaccurate" and "confusing." 288 Kan. at 266. Under the circumstances, where the deadlocked jury instruction is erroneous on so many levels, and where the Supreme Court has clearly recognized that the instruction is "misleading and inaccurate" and "confusing," it surely has been shown that the instruction could have reasonably misled the jury.

Moreover, the deadlocked jury instruction given to the jury in the instant case contains problematic language that was not at issue in *Salts* or *Page*. The instruction contained the language "[l]ike all cases, it must be decided sometime" which was disapproved by this Court in *State v. Turner*, 34 Kan. App. 2d 131, Syl. ¶3, 115 P.3d 776 (2005). The court found that this language was an inaccurate statement of law. Following *Turner*, this language was removed from the PIK instruction. PIK Crim. 3d

68.12. This Court did not find the erroneous language in the deadlocked jury instruction to be reversible error in *Turner*, concluding that there was no coercive effect because the deadlocked jury instruction had been given to the jury with the rest of the instructions prior to deliberations. As we know now, after *Salts* and *Page*, the timing of the deadlocked jury instruction, (i.e., giving it with all other instructions prior to deliberation) no longer prevents it from creating reversible error. Even though *Turner* was decided in 2005, the erroneous language was still present in the deadlocked jury instruction given at Mr. Baughman's 2008 trial. In *State v. Scott-Herring*, 284 Kan. 172, 180-81, 159 P.3d 1028 (2007), the Kansas Supreme Court directed courts to cease using the version of PIK Crim. 3d 68.12, which contains the language "[I]ike all cases, it must be decided sometime." The presence of the language in the deadlocked jury instruction in this case was in direct violation of *Scott-Herring* and *Turner*. Accordingly, the instruction was erroneous, and this is another reason why the deadlocked jury instruction could have reasonably misled the jury.

Finally, the State in its brief failed to mention the most recent case on this issue, *State v. Pruitt*, \_\_\_ Kan. App. 2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 1705747, Slip Opinion No. 100,039 (June 19, 2009). In *Pruitt* the jury was given the same deadlocked jury instruction that was at issue in *Salts* and *Page*, over defense counsel's objection. In *Pruitt* the jury did not make any announcement during deliberation that there was a possibility that it might not be able to reach a verdict. It simply deliberated and returned a split verdict of guilty on attempted burglary and not guilty on battery. The *Pruitt* Court, noting that there had been an objection to the instruction, applied the standard of review set forth

in *Page* and acknowledged as correct by both parties in the instant case. The *Pruitt* Court held:

“Because the [deadlocked jury] instruction was misleading and it contradicted another jury instruction, Pruitt's conviction must be reversed. See *State v. Page*, 41 Kan.App.2d \_\_\_, 203 P.3d 1277, 1279 (2009). (“Given the fact our Supreme Court has held the deadlocked jury instruction misleading and the real possibility the jury in this case was at least influenced by the erroneous language in the jury instruction, this defendant's convictions must be reversed.”).”

*State v. Pruitt*, Slip Opinion at 14.

Procedurally, the instant case is identical to *Pruitt*. The matters cited in the State's brief as a lack of proof that Mr. Baughman's jury could have been reasonably misled by the deadlocked jury instruction – the absence of an announcement by the jury during deliberation and a split verdict – were both present in *Pruitt*, and yet this Court found reversible error.

Given the language of *Salts*, *Page*, and *Pruitt* there can be no doubt that the jury instruction at issue in the instant case was erroneous, misleading, inaccurate, and confusing. The jury could have reasonably been misled by this erroneous, misleading, inaccurate, and confusing instruction. As in *Page* and *Pruitt*, the deadlocked jury instruction directly contradicted another instruction. As in *Page* and *Pruitt*, the error must result in reversal of conviction.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing reply brief was made by mailing two copies, postage prepaid, to Sherri Schuck, P O Box 219, Westmoreland, KS, 66549-0219; and by hand delivering one copy to Stephen N. Six, Attorney General, Kansas Judicial Center, Topeka, KS 66612 on the 21 day of July, 2009.



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