IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66766-1-I
Respondent,	)	DIVISION ONE
v.	)	
BRIAN T. STARK,	)	UNPUBLISHED
Appellant.	)	FILED: January 14, 2013

COX, J. — A jury found Brian Stark guilty of attempted first degree child molestation, first degree child molestation, first degree incest, and third degree child molestation. On appeal, he contends the evidence was insufficient to prove attempted first degree child molestation and that the jury instructions defining that charge were defective. We disagree. We also reject the claims that Stark raises in his statement of additional grounds for review. We therefore affirm.

The State charged Stark with one count of attempted first degree child molestation (domestic violence) (Count I), one count of first degree child molestation (domestic violence) (Count II), one count of first degree incest (Count III), and one count of third degree child molestation (domestic violence) (Count IV). At trial, Stark's stepdaughter C.W. described four separate incidents that formed the basis for the charged offenses.

C.W., who was 17 at the time of trial, testified that her mother introduced her to

Stark when she was about five. A short time later, C.W. and her mother moved in with Stark. C.W.'s mother and Stark eventually married.

At first, Stark would buy things for C.W. and go out with her and her mother, and C.W. thought he was very nice. But one day, when she was about six and living in an apartment on Benson Hill in Renton, C.W. pretended to be sick and stayed home from school. Because C.W.'s mother was at work, C.W. went into her parents' bedroom to ask Stark for breakfast. C.W. got into bed with Stark, who eventually removed her underwear and spread her legs open. C.W. could not remember what happened next or how the incident ended, but thought that Stark "just looked" at her vagina.

The family moved to Spanaway in Pierce County for three years when C.W. was seven. According to C.W., the frequency of the abuse increased substantially in Spanaway. She testified that Stark would regularly "dry hump" her, rub her bottom, remove her clothes, and touch her vagina. On at least one occasion, C.W. thought he had penetrated her vagina with his finger. Frequently, Stark would cover C.W.'s face with a blanket during the abuse.

When C.W. was ten, the family returned to King County and moved into a new house in Maple Valley. A short time later, Stark and C.W. went into a nearby home that was still under construction. Stark took C.W. upstairs, pinned her in a corner, pulled down her pants, and rubbed her vagina.

C.W. recalled another incident that occurred when she was eleven or twelve and lying on her bed and watching television. Stark came into the bedroom, removed her

pants and underwear, and licked her vagina. C.W. believed this was the only incident that involved oral sex.

C.W. testified that the last incident of abuse occurred when she was 14, shortly before the beginning of ninth grade. C.W. and Stark were sitting on the couch in the afternoon watching a movie. At some point, Stark pinned C.W. down on the couch and started to remove her clothing. C.W. struggled with Stark and attempted to resist, but he eventually succeeded in removing her pants and underwear and then attempted to put his penis in her vagina. But C.W. continued to resist, and Stark eventually gave up.

Initially, C.W. did not tell anyone about the abuse because she was scared, and Stark said her mother would be angry. C.W. later became concerned that Stark would harm her or her family because he had threatened to kill her when the family was living in Spanaway. On one occasion, Stark grabbed a knife and held it in her direction.

When she was seven or eight, C.W. told her mother that she thought Stark had been touching her. C.W. also mentioned that it might have been a dream. At trial, she explained she did not really believe it was a dream, but said it because she was afraid of her mother's reaction. C.W.'s mother responded that she did not know what she should do if C.W. was not sure about the abuse and took no further action.

When C.W. was in high school, she told several friends about the abuse, one of whom reported it to a high school counselor. The counselor then reported the matter to the police.

Stark denied ever touching C.W. in an inappropriate manner. The defense

argued that inconsistencies in C.W.'s various accounts undermined her credibility and suggested that she may have fabricated the allegations to obtain freedom from parental restrictions.

The jury found Stark guilty as charged, and the court imposed standard-range sentences.

SUFFICIENCY OF EVIDENCE

Stark first contends the evidence was insufficient to support his conviction for attempted first degree child molestation on Count I. He argues the evidence that he "just looked" at C.W.'s vagina does not support an inference that he intended to – or made any effort to -- have sexual contact with her.

We review Stark's challenge by determining whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt.[1] A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it.[2]

In order to convict Stark of attempted first degree child molestation, the State had to prove that he took a "substantial step" with the intent of having sexual contact with C.W.[3] The court instructed the jury that "[s]exual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual

[1] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[2] Id.
[3] RCW 9A.28.020(1); RCW 9A.44.083(1).

desires of either party or a third party."[4] A "substantial step" is conduct that strongly indicates a criminal purpose and that is more than mere preparation.[5]

On appeal, Stark's argument focuses on C.W.'s recollection that he "just looked" at her vagina, but fails to address her testimony in context. Viewed in the light most favorable to the State, the evidence established that Stark physically contacted C.W. while she was lying on her back on the bed, removed her underwear, spread her legs open, exposing her private areas, and then looked at her vagina. Stark's actions occurred at a time when no other adult was in the house. From that evidence, the jury could reasonably find that Stark undertook a substantial step with the intent to have sexual contact. The evidence was therefore sufficient to support his conviction for attempted first degree child molestation.[6]

JURY INSTRUCTIONS

Stark next contends the trial court failed to instruct the jury on the necessary elements of attempted first degree child molestation. He argues the instructions failed to set forth the elements of the underlying completed offense of first degree child molestation and therefore relieved the State of its burden of proving all of the elements of the crime.

Generally, "[i]f the basic charge is an attempt to commit a crime, a separate

[4] Clerk's Papers at 37; RCW 9A.44.010(2).
[5] State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995).
[6] See State v. Jackson, 62 Wn. App. 53, 58, 813 P.2d 156 (1991) (evidence that defendant followed 14-year-old girl into a bedroom, approached her and told her to remove her skirt, was sufficient to establish substantial step with intent to have sexual intercourse for purposes of attempted rape).

elements instruction must be given delineating the elements of that crime."[7] Here, Instruction 17 correctly informed the jury that the elements of attempted first degree molestation as charged in Count I were (1) intent to commit first degree child molestation and (2) a substantial step toward the commission of that crime.[8] Contrary to Stark's suggestion, Instruction 7 completely and accurately recited the elements of the completed crime of first degree child rape. Additional instructions defined "sexual contact," marriage, and "state registered domestic partner."

Although Stark's argument is not completely clear, he appears to suggest that Instruction 7 was defective because it did not specifically reference Count I. But he has not cited any authority supporting this proposition. Nor has he presented any argument indicating how the omission was misleading or confusing or relieved the State of its burden of proving all of the elements of the offense.

In sum, the court correctly instructed the jury on the elements of attempted first degree child molestation, including the requirement that the State prove Stark had the intent to commit the completed offense. The court also instructed the jury on the elements of the completed offense and the relevant definitions. Finally, the court directed the jury to consider all of the instructions "as a whole." Nothing in the record rebuts the presumption that the jury followed these instructions.[9] There was no error.

STATEMENT OF ADDITIONAL GROUNDS

[7] State v. DeRyke, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003) (quoting WPIC 100.02 Note on Use).

[8] See Id. at 910.

[9] See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

Stark has also filed a statement of additional grounds for review, in accordance with RAP 10.10.

Surprise Witnesses

Stark alleges the trial court violated his right to a fair trial when it permitted "surprise testimony" by State witnesses Robin and Kailei Jordan about a previously undisclosed "trauma narrative." Stark claims the court should not have permitted testimony about the "trauma narrative," a written account of the alleged abuse that C.W. prepared at the direction of her counselor and read to the Jordans, without also releasing C.W.'s counseling records and permitting the defense to interview the counselor and investigate the "whole concept of the 'trauma narrative.'"

But the record shows the deputy prosecutor learned about the trauma narrative just before the trial testimony was scheduled to begin and immediately informed the court and defense counsel. In response, the court arranged a room for both sides to interview the Jordans, and the deputy prosecutor eventually provided a copy of the document to the defense. Defense counsel ultimately had five days to investigate the new information and prepare any additional cross examination before the trial testimony began. And contrary to Stark's suggestion, defense counsel did not ask to interview C.W.'s counselor, request disclosure of C.W.'s counseling records, or seek any additional time to prepare or investigate the issue.

Under the circumstances, Stark has failed to demonstrate any error or prejudice resulting from the late disclosure of the trauma narrative.

In a related argument, Stark appears to contend the court violated his right to a public trial and his right to be present at critical stages of his trial when it permitted counsel to interview the Jordans about the newly disclosed information outside of the open courtroom. But Stark makes no showing that what was essentially an investigative witness interview for purposes of counsel's trial preparation -- even though it occurred after trial had begun – implicated his public trial rights.[10] Research has not disclosed any authority suggesting that such interviews have historically been open to the press or public or that public access would play any significant role in the witness interview process.[11]

Stark's claim that he had a right to be present at the interview is also meritless. A criminal defendant has a fundamental due process right to be present at all critical stages of a trial.[12] A critical stage is one where the defendant's presence has a reasonably substantial relationship to fulfilling his opportunity to defend himself.[13] Here, Stark makes no showing that his absence from the witness interview affected his opportunity to defend. The interview did not involve the presentation of evidence, the admissibility of evidence, or the availability of a defense or theory of the case.[14] The proceeding did not violate Stark's due process right to be present.

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[10] See State v. Sublett, No. 84856-4, Slip Op. at 13, 2012 WL 5870484 (2012) (adopting experience and logic test to determine whether public trial right attaches to a particular proceeding).

[11] See Sublett, Slip. Op. at 20-21 (consideration of jury question in chambers did not implicate public trial right).

[12] State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011)

[13] In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998).

[14] See Benn, 134 Wn.2d at 920.

Opinion on Guilt

Stark also contends the trial court erred in admitting evidence of C.W.'s trauma narrative. He claims the evidence was an impermissible opinion on guilt.

Generally, witnesses may not express an opinion as to the defendant's guilt.[15] Whether testimony constitutes an improper opinion on guilt depends on the specific circumstances of each case, including "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact."[16]

Without objection, C.W. testified that her counselor asked her to prepare the trauma narrative "for me to tell my story so that I could get it all out and heal." The narrative itself consisted of her factual account of what had happened. As such, the challenged evidence involved C.W.'s personal experiences and essentially the same allegations that she described at trial. Contrary to Stark's assertion, the testimony was not analogous to the expert opinion on "rape trauma syndrome" found inadmissible in State v. Black.[17] Stark has failed to establish that the unchallenged evidence about the trauma narrative constituted an impermissible opinion on guilt.

Child Hearsay

Stark contends the trial court erred by admitting C.W.'s child hearsay statements to her mother without holding a hearing in accordance with RCW 9A.44.120. Defense

[15] State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).
[16] State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009) (citing State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008)).
[17] 109 Wn.2d 336, 745 P.2d 12 (1987).

counsel failed to object to the absence of a hearing and failed to object to the testimony during trial. Because both C.W. and her mother testified and were available for cross examination, the absence of the hearing did not implicate any constitutional confrontation or due process concerns.[18] The absence of an objection therefore precludes appellate review.[19]

In Camera Review of Counseling Records

Stark contends the trial court erred in not conducting an in camera review of C.W.'s counseling records. But his arguments rest on a misunderstanding of defense counsel's reference to the trauma narrative. Defense counsel never requested disclosure of C.W.'s general counseling records, and no counseling records were available for the court's review.

Conviction Based on Out-of-County Acts

Stark contends the trial court improperly permitted the jury to convict him of Attempted First Degree Child Molestation on Count I based on acts occurring in Spanaway in Pierce County. But Instruction 17 expressly informed the jury that the State had to prove the act charged in Count I occurred in King County. In addition, Instruction 6 permitted the jury to consider allegations of misconduct occurring outside of King County "only for the purpose of determining whether the defendant demonstrated a lustful disposition towards C.W." We must presume the jury followed those instructions.[20] And finally, during closing argument, the State expressly relied on

[18] State v. Warren, 55 Wn. App. 645, 650, 779 P.2d 1159 (1989).
[19] State v. Leavitt, 111 Wn.2d 66, 71-72, 758 P.2d 982 (1988).

an act occurring at the Benson Hill apartment in Renton as the basis for Count I. The jury did not convict Stark of crimes occurring in Pierce County.

Unanimity Instruction

Stark contends the trial court violated his constitutional right to a unanimous jury. He acknowledges the court gave a unanimity instruction that applied to counts II and III, but maintains the court erred in not giving a unanimity instruction for counts I (attempted first degree child molestation) and IV (third degree child molestation).

When the State presents evidence of several acts that could constitute the crime charged, the jury must unanimously agree on which act constituted the crime.[21] To ensure jury unanimity, the State must either elect the act on which it relies, or the court must instruct the jury to unanimously agree that at least one particular act constituting the charged crime has been proved beyond a reasonable doubt.[22]

Counts I and IV involved completely different charging periods, and for each count, C.W. described only one specific event that could have constituted the charged offense. For Count I, C.W. testified that when she was six, Stark removed her underwear, spread her legs, and stared at her vagina. Count IV was based on evidence that two days before the start of ninth grade, when C.W. was 14, Stark removed her pants and tried to put his penis in her vagina. During closing argument, the State specifically identified each incident as the basis for the respective charged

[20] State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).
[21] State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).
[22] Kitchen, 110 Wn.2d at 411; see also State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

offense. Contrary to Stark's assertion, the mere fact that C.W. testified in general terms that abuse occurred on multiple occasions does not establish multiple acts requiring a unanimity instruction.[23]

Same Criminal Conduct

Stark contends that because Counts II (first degree child molestation) and III (first degree incest) involved overlapping charging periods, the offenses were the "same criminal conduct" for purposes of sentencing. But in order to constitute the same criminal conduct, two or more current crimes must have the same criminal intent, be committed at the same time and place, and involve the same victim.[24] Here, the evidence established that these offenses involved separate and distinct acts occurring at different times and locations. Consequently, the crimes did not involve the same criminal conduct.

Double Jeopardy Counts II and III

Stark contends the trial court failed to require that his convictions for count II (first degree child molestation) and III (first degree incest) be based on "a separate and distinct act," thereby violating his right to be free from double jeopardy. When multiple counts allegedly occur within the same charging period, the jury instructions must make it manifestly apparent that each count is based on proof of a separate and distinct underlying act.[25]

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[23] See State v. Bobenhouse, 166 Wn.2d 881, 895, 214 P.3d 907 (2009).
[24] RCW 9.94A.589(1)(a).
[25] See State v. Borsheim, 140 Wn. App. 357, 367–68, 165 P.3d 417 (2007).

But contrary to Stark's assertions, the "to convict" instructions for counts II and III expressly informed the jury that each offense had to involve "an occasion separate and distinct" from the other count. Because the instructions required proof of a separate and distinct underlying event for each conviction, they do not raise any double jeopardy concerns.

Witness Misconduct

Stark contends the trial court erred in not delaying sentencing to permit an investigation into allegations of witness misconduct. The record fails to support Stark's allegations.

At the beginning of the sentencing hearing, the parties discussed the trial court's receipt of a letter the previous day from Nancy W. Nancy W. was C.W.'s maternal grandmother and testified at trial. In the letter, she alleged her belief that "there was communication between spectators and courtroom and witnesses." She also attached telephone records to the letter and alleged that C.W. had spoken to witness Lori Nielson for about five minutes after C.W.'s testimony and that C.W. had received a text message about her mother's testimony for the defense and a text message about defense counsel's demeanor.

As the deputy prosecutor correctly noted, the court had instructed the witnesses that they could not discuss their testimony with others, but did not prohibit all contact among witnesses, several of whom were family members and friends. Nothing in Nancy W.'s vague allegations supported the slightest inference of improper contact or

witness misconduct. Although defense counsel eventually requested a two-week continuance to investigate the matter, he candidly acknowledged that "as an officer of the Court, I will tell you I don't have anything more than something might have happened . . . ."

Under the circumstances, Stark has not demonstrated any error or abuse of discretion in the trial court's denial of a continuance for sentencing and failure to order an investigation into the allegations. As the trial court noted, defense counsel was free to submit any additional information about the issue at a later date, but he never did.

Right to Confrontation

Stark contends the trial court violated his right to confrontation when it permitted a large board to block his view of C.W. while she was testifying. But Stark fails to identify any evidence in the record to support this conclusory allegation. At best, Stark's allegations rest on matters outside the record and therefore cannot be considered on direct appeal.[26]

Prosecutorial Misconduct

Stark contends the deputy prosecutor committed reversible misconduct during closing argument. He therefore bears the burden of establishing that the challenged conduct was both improper and prejudicial.[27] Where, as here, the defense fails to object to alleged misconduct, any claim of error is unreviewable unless the comments were so flagrant and ill-intentioned that no instruction could have cured the resulting

[26] See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).
[27] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

prejudice.[28] We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[29]

Stark first contends the deputy prosecutor misstated the reasonable doubt standard when he informed the jury that "reasonable doubt" was defined as "a doubt for which a reason exists that may arise from evidence or lack of evidence" and that "if you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." Stark argues the comments improperly reduced the State's burden of proof by suggesting the jury did not need to fully, fairly, and carefully consider the evidence.

In the challenged remarks, the deputy prosecutor accurately recited portions of Instruction 5, which set forth the definition of reasonable doubt in WPIC 4.01.[30] In connection with this definition, the deputy prosecutor urged the jury to consider the reasonable doubt instruction carefully and to consider all of the evidence when making its decision. When viewed in context, nothing in the challenged comments suggested the jury did not need to fully, fairly, and carefully consider the evidence or minimized the State's burden of proof in any manner. Stark fails to demonstrate any error.

Stark also contends the deputy prosecutor committed misconduct by invoking the missing witness doctrine. During closing argument, defense counsel reminded the jury about two potential witnesses who might have resolved a dispute in the accounts of Stark and C.W. During rebuttal, the deputy prosecutor, without objection, correctly

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[28] State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).
[29] State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).
[30] See State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) (approving WPIC 4.01).

noted that although the defense had no obligation to call any witnesses, the defense also had the opportunity to call the witnesses.

"Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective."[31] Here, defense counsel arguably invited or provoked the challenged comment by suggesting the State did not call the potential witnesses because they would have undermined C.W.'s testimony. But even if the comment was improper, a prompt objection and curative instruction would have negated any potential prejudice. Stark has failed to demonstrate reversible misconduct.

Sufficiency of the Evidence of Incest

Stark contends the evidence was insufficient to support his conviction for first degree incest. He argues the conviction must be reversed because the State failed to prove penetration. Stark's contention is frivolous and rests on an incomplete definition of "sexual intercourse."

At the time of the charged offense -- and as correctly set forth in Instruction 19 -- "sexual intercourse" included "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another."[32] To prove first degree incest, the State relied on C.W.'s testimony that Stark licked her vagina. That evidence

[31] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).
[32] See RCW 9A.64.020(1); former RCW 9A.44.010(c) (2002).

was sufficient to establish sexual intercourse.

We affirm the judgment and sentence.

/s/ Cox, J.

WE CONCUR:

/s/ Lau, J.

/s/ Dwyer, J.