IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GERALD LAMONT WELLS, Appellant.	No. 39369-7-II UNPUBLISHED OPINION

Johanson, J. — Gerald Lamont Wells appeals his six convictions for second degree child rape. He argues that substantial evidence does not support four of the convictions and that the prosecutor committed misconduct in closing argument by misstating the reasonable doubt standard. He also raises several issues in a Statement of Additional Grounds for Review (SAG).[1] We affirm the convictions.

FACTS

I. Background

In March 2007, six-year-old T.R.[2] told a friend that she had seen her stepfather, Wells, come into the bedroom she shared with her thirteen-year-old half-sister K.R.[3] and engage in

[1] RAP 10.10.

[2] The nature of this case requires some confidentiality to protect the minor victim. Accordingly, we use initials to identify the minor victim and her family members.

[3] Although K.R. identified herself as K.W. when she testified at trial, we refer to her as K.R. throughout this opinion because most of the record refers to her as K.R.

unusual behavior with K.R. When T.R.'s friend told her mother what T.R. had said, the mother contacted T.R.'s elementary school counselor Jennifer LaShells. On March 27, LaShells, a mandatory reporter, talked to T.R. and contacted Child Protective Services (CPS). CPS workers then spoke to K.R. at her school, but she denied any abuse.

On March 30, CPS workers and a detective left a telephone message for K.R.'s and T.R.'s mother, J.W., asking her to contact them. J.W. questioned T.R. and K.R. about the telephone message and, after first denying that anything had happened, K.R. eventually admitted that Wells had had inappropriate sexual contact with her. After confronting Wells, who denied any inappropriate contact, J.W. removed her children from the home and took K.R. to a hospital to be examined.

Joanne Mettler, an advanced registered nurse practitioner specializing in child sexual abuse, examined K.R. on April 3. Mettler had received reports indicating that K.R. disclosed that Wells had engaged in sexual intercourse with her 10 or more times. K.R.'s physical exam was consistent with these reports, revealing "two notches on her hymen that could be consistent with her history of penetration, or consistent with a history of penetration." 6 Verbatim Report of Proceedings (VRP) at 102. The State subsequently charged Wells with six counts of second degree child rape.

II. Procedure

A. Trial Testimony

At trial, the State's witnesses testified as set out above. Additionally, K.R., who was then 15, testified that between Thanksgiving 2006 and March 2007, Wells entered the bedroom she

shared with T.R. when they were sleeping and engaged in sexual intercourse with her "about six times." VRP (Apr. 6, 2009, A.M. Session) at 28. K.R. also testified about four specific incidents: (1) the first one, which occurred between Thanksgiving and Christmas in 2006; (2) another incident that occurred when T.R., who usually slept in the upper bunk of the bunk bed the girls shared, was sleeping on the bedroom floor; (3) a third incident when Wells had to reposition her (K.R.'s) body; and (4) the last incident, about a month before her birthday in March 2007. T.R. testified that she had twice seen Wells come into their bedroom at night, get on top of K.R., and "shak[e]" K.R. by moving back and forth while on top of her. 6 VRP at 138-39.

B. Closing Argument and Verdict

In its closing argument, the State reminded the jury that "the instructions that [the jury had] are the law," and that the trial court, not counsel, instructs the jury on the law. 7 VRP at 187. After discussing the charges, the "to convict" instructions, and credibility issues, 7 VRP at 187, the State argued:

> Now, we talked early on in this case, we talked in voir dire about the concept of reasonable doubt, and it's a concept that a lot of people don't quite understand because it's not something that we use in day-to-day life. You don't think to yourself when you're going about your day-to-day business that I believe this beyond a reasonable doubt. It's a legal term that we just don't use.
>
> *Each of you, when you drove to court today, drove on roads, you probably drove on a two-lane road, you passed hundreds of cars, and you didn't pull over every time you saw a car because you believed beyond a reasonable doubt that that car wasn't going to hit you, that it wasn't going to slam into you head-on. We use the concept of reasonable doubt every day in our life, we just don't know it. It's not that difficult of a concept to understand when you really think about it, so don't let it trip you up in this case.*
>
> *Essentially, what you have to do is say to yourself I find the defendant not guilty and my reason is blank. And if you're able to fill in that blank, if you have—that means you have a reasonable doubt.*
>
> *Now, in this case, you can't fill in that blank because there is no*

> *reasonable doubt here.* Your instructions tell you that when you have an abiding belief in the truth of the charge, that it's proven to you beyond a reasonable doubt. Now, let's talk about some of the things that were brought up that could potentially be argued are reasonable doubt.

7 VRP at 197-98 (emphasis added). Defense counsel did not object to this argument.

During its argument, the State also displayed a slide reminding the jury of its duty to follow the law as set out by the trial court. The State also displayed several slides consistent with its reasonable doubt argument. Defense counsel did not object to these slides.

The jury found Wells guilty on all six counts. Wells appeals.

ANALYSIS

I. Sufficiency

Wells first challenges the sufficiency of the evidence as to four of the six counts. He argues that the State proved only two distinct incidents and that it failed to prove any other counts because K.R. "had no memory of the alleged incidents that could distinguish between counts." Br. of Appellant at 16. We disagree.

We review a claim of insufficient evidence to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). We defer to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75 (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

Although K.R. specifically identified only four separate rapes (the first and last rapes, the rape that occurred when T.R. was sleeping on the bedroom floor, and the rape during which Wells repositioned K.R.'s body), she also testified that Wells raped her "about six times." VRP (Apr. 6, 2009, A.M. Session) at 28. And Joanne Mettler, the nurse who examined K.R., testified that K.R. had reported that Wells had raped her at least 10 times. Taking this evidence in the light most favorable to the State, this evidence was sufficient to establish all six counts, and Wells's sufficiency argument fails.

II. Prosecutorial Misconduct

Wells next argues that the prosecutor committed misconduct in closing argument by misstating the reasonable doubt standard and by analogizing the reasonable doubt standard to everyday decision making. Although the prosecutor's arguments were inappropriate, Wells has waived these errors.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists when there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). In determining whether the prosecutor's comments during closing argument were improper, we review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the

argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998)). But defense counsel's failure to object to such comments at trial constitutes waiver on appeal unless the misconduct is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury," and "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987), *review denied*, 110 Wn.2d 1009 (1988)), *cert. denied*, 514 U.S. 1129 (1995).

Our recent decisions in *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010); *State v. Venegas*, 155 Wn. App. 507, 523-24, 228 P.3d 813, *review denied*, 170 Wn.2d 1003 (2010); and *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936, 939-40, *review denied*, 171 Wn.2d 1013 (2011), establish that the State's "fill-in-the-blank" reasonable doubt argument and its comparison of reasonable doubt to everyday decision-making processes were improper arguments.[4] But because defense counsel did not object to these arguments the more difficult question is whether Wells's failure to object to these arguments

[4] The State argues that its fill-in-the-blank argument here is different from the arguments at issue in *Anderson* and *Venegas* because the prosecutor here said, "Essentially, what you have to do is say to yourself *I find the defendant not guilty* and my reason is blank," 7 VRP at 197-98 (emphasis added), rather than using the phrase, "in order to find the defendant not guilty," which was the phrase used in *Anderson*, 153 Wn. App. at 424, and *Venegas*, 155 Wn. App. at 519. Br. of Resp't at 9. Although the language here differs from that in *Anderson* and *Venegas*, we hold that, taken in context, it is sufficiently similar to the language in those cases that it creates the same risk of confusion about the reasonable doubt standard and the State's burden at trial.

waived these errors. As noted above, to overcome waiver Wells must show that these errors were "so flagrant and ill intentioned that it causes an enduring and resulting prejudice *that could not have been neutralized by an admonition to the jury*." *Russell*, 125 Wn.2d at 86 (emphasis added).

In *State v. Warren*, the prosecutor repeatedly argued that the defendant was not entitled to "the benefit of the doubt," defense counsel objected, and the trial court gave the jury a lengthy curative instruction and directed it to review the written instructions. 165 Wn.2d 17, 24-25, 27, 195 P.3d 940 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 2007 (2009). The *Warren* court held that although "the prosecutor's argument was improper because it undermined the presumption of innocence," the trial court's "appropriate and effective curative instruction" cured any error. *Warren*, 165 Wn.2d at 26, 28.

Wells made no objection to the prosecutor's remarks, and did not ask for a curative instruction. *Warren* establishes that a trial court's timely, appropriate curative instruction can cure prejudice caused by improper argument misstating the reasonable doubt standard, even when such argument is arguably more egregious than the argument at issue here.

The jury was properly instructed as to the burden of proof and the definition of reasonable doubt. Although the prosecutor's remarks were inappropriate, under these facts his argument was not so flagrant and ill intentioned that prejudice could not have been neutralized by a curative instruction. Defendant has waived his challenge to the prosecutor's closing arguments by failing to object at trial and failing to request a curative instruction.

III. SAG Issues

In his pro se SAG, Wells appears to argue that evidence presented at trial showing that the girls' bunk bed was broken and could not have supported his weight demonstrated that he was not guilty. The jury heard evidence from J.W. and Wells's sole witness Curtis Barnes, suggesting that the bunk bed had been assembled without some screws, that some of the upper bed's slats were insecure, and that the bed might not support an adult's weight. But the jury also heard evidence from a police detective that the police had found no evidence that the bed had been repaired or rigged in any way. The detective testified that the bed could support an adult's weight. T.R. and K.R. both testified that the rapes occurred in the bunk bed's lower bunk. Thus, it appears that Wells is asserting that the jury should have believed J.W.'s and Barnes's testimonies over the detective's and the girls' testimonies. This is a credibility issue that we cannot review on appeal. *Thomas*, 150 Wn.2d at 874-75 (citing *Camarillo*, 115 Wn.2d at 71; *Cord*, 103 Wn.2d at 367).

Wells also seems to assert that J.W. would have provided additional testimony that would have been helpful to him if the prosecutor had not threatened to take her children away if she testified in more depth. What J.W. might have testified to and whether the prosecutor had threatened J.W. are matters outside the record that we cannot address on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 338 n.5, 899 P.2d 1251 (1995).

Wells next asserts that his appointed counsel and the prosecutor met in private and appeared to be on friendly terms—perhaps implying that his appointed counsel had a conflict of interest or that his counsel improperly addressed matters off the record. Because any information regarding these possible arguments is outside the record, we cannot address these arguments on

direct appeal. *McFarland*, 127 Wn.2d at 333, 338 n.5.

Finally, Wells argues that his appointed counsel failed to call his formerly retained counsel, Jessica R. Giles, as a witness. Although the record shows that the trial court removed Giles from the case when she became "a potential witness in the case," Clerk's Papers at 49, there is nothing in the record regarding what information Giles could have testified to. Accordingly, based on this record, we cannot evaluate whether Wells's appointed trial counsel was ineffective for failing to call Giles as a witness. *McFarland*, 127 Wn.2d at 333, 338 n.5.

We affirm the convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, J.

Penoyar, C.J.