IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT E. ANDERSON, Appellant.	No. 40770-1-II UNPUBLISHED OPINION

Johanson, J. — Robert Anderson appeals his jury convictions for second degree child rape and third degree child rape. Anderson argues that the trial court (1) violated his right to a unanimous jury instruction, (2) failed to exercise its discretion regarding the scope of closing argument, and (3) abused its discretion by denying his motion for a new trial. Anderson also argues that the prosecutor engaged in multiple acts of misconduct throughout the trial. In his statement of additional grounds for review (SAG),[1] Anderson alleges that the trial court erred by allowing the prosecutor to say that Anderson committed other offenses against someone other than the alleged victim. We affirm.

FACTS

I. Second and Third Degree Child Rape

Robert and Diane[2] Anderson are C.A.'s[3] paternal grandparents. C.A. regularly visited his

[1] RAP 10.10(a).

[2] We refer to Diane Anderson by her first name in order to avoid confusion with appellant, Robert Anderson, and intend no disrespect.

[3] We use initials to protect the privacy of juveniles and victims.

grandparents at their Gig Harbor home. When C.A. was about 10, his grandfather showed him photographs of naked adult females on the computer. His grandfather explained the female body parts and "what you do to them." 2 Report of Proceedings (RP) at 112. C.A. did not tell anyone because he was afraid. In the next "[c]ouple [of] months," his grandfather showed him similar photos on the computer between 5 and 10 more times. 2 RP at 114. When C.A. was 11, his grandfather showed him sexually explicit photos that he kept in his toolbox in the garage. His grandfather explained to C.A. what was happening in the photos.

During the summer when C.A. was 13 years old, he went camping and fishing with his grandfather. While on the fishing boat, C.A.'s grandfather touched his genitalia and performed fellatio on him. After they returned to the campground, they showered and spent the day shooting. That night in the tent trailer, C.A.'s grandfather took photographs of C.A. in naked poses. In the trailer that evening, his grandfather touched C.A.'s genitalia and performed fellatio on him again. C.A.'s grandfather told C.A. that if he told anybody about what happened, he (Anderson) would kill C.A. and then kill himself. C.A. was concerned because his grandfather "seemed serious" and "he owns a lot of guns." 2 RP at 141.

During the fall of that year, when C.A. was still 13, he and his grandfather watched television together in the garage while C.A. sat on a black stool. His grandfather touched his genitalia and performed fellatio on him again. Near the holidays that year, C.A., his sisters, and their grandfather slept in the tent trailer parked in the front yard. His sisters slept on one side of the trailer and C.A. and his grandfather slept on the other side. During the night, his grandfather penetrated C.A.'s anus.

When C.A. was 14, he and his grandfather went on a fishing trip on the ocean in a large motor boat. His grandfather performed fellatio on him. When C.A. was 15, he went on a camping trip to Canada with his grandfather because they were attending a dog show. While C.A. slept on the couch that night, his grandfather touched C.A.'s genitalia and performed fellatio on him.

When C.A. was 16, his mother caught him looking at pornography on the computer. After she alerted C.A.'s father about the issue, C.A. told his father and stepmother that his grandfather had introduced him to pornography and C.A.'s father immediately called his parents. The next day, C.A.'s stepmother asked him if his grandfather had ever touched him, and C.A. disclosed that he had. C.A.'s stepmother immediately phoned C.A.'s father at work, who immediately phoned police.

The State charged Anderson with two counts of second degree child rape contrary to RCW 9A.44.076, and four counts of third degree child rape contrary to RCW 9A.44.079. As part of Anderson's release provisions, the trial court ordered Anderson to restrict his travel to Pierce, King, Thurston, and Kitsap counties. A jury found Anderson guilty of one count of second degree child rape and one count of third degree child rape, and not guilty of three counts of third degree child rape, and it was unable to reach a decision on the remaining charge of second degree child rape. Anderson moved for a new trial on numerous grounds. After hearing argument, the trial court denied Anderson's motion.

The trial court sentenced Anderson to 120 months to life for second degree child rape and 34 months on third degree child rape. Anderson appeals.

ANALYSIS

I. Unanimous Jury Verdict

Anderson argues that the trial court violated his right to a unanimous jury verdict on all counts. Specifically, Anderson argues that the *Petrich* instruction was inadequate because the acts on the camping trip were a continuous course of conduct and thus a single offense.[4] *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *overruled on other grounds*, *State v. Kitchen*, 110 Wn.2d 403 (1988). We disagree.

A. Standard of Review

We review the adequacy of jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). A conviction requires that a unanimous jury conclude that the defendant committed the criminal act charged in the information. *Petrich*, 101 Wn.2d at 569. When the prosecutor presents evidence of several acts that could form the basis of one count charged, either the State must elect a specific act, telling the jury on which act to rely in its deliberations, or the court must instruct the jury to agree on a specified criminal act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). But where the criminal acts constitute a continuing course of conduct, an exception exists and neither an election nor a unanimity instruction is required. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1966).

We determine whether criminal acts consist of a continuing course of conduct by evaluating the facts in a common sense manner. *Love*, 80 Wn. App. at 361. Evidence that the

[4] Anderson also makes these arguments in his SAG (#1, 2, 3); we address them here.

charged conduct "occurred at different times and places tends to show that several distinct acts occurred" while "evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct." *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

Here, the abuse that occurred on the camping trip when C.A. was 13 did not constitute a "continuous course of conduct" because the abuse occurred at different times and places. The testimony established that the rapes occurred once during the day, in a boat, and again in the trailer at night. Additionally, C.A. testified that when he was 13, his grandfather abused him when they watched television together in the garage. The trial court instructed the jury with two *Petrich* instructions, one instruction for the two counts of second degree child rape and one instruction for the four counts of third degree child rape. During closing argument, the State alleged that three specific acts occurred when C.A. was 13, constituting second degree child rape. The State told the jury that it should consider each act separately and that to find Anderson guilty for a specific count of second degree child rape, it had to be unanimous that a particular act occurred. The jury's verdict demonstrates that the jury considered the evidence and the charges separately because the jury found Anderson guilty of one count of second degree child rape and unable to reach a decision on the remaining charge of second degree child rape.

Similarly, the State alleged multiple acts occurred when C.A. was 14 or 15, constituting third degree child rape. The State again told the jury that it should consider each act separately and that to find Anderson guilty for a specific count, it had to be unanimous that a particular act occurred. Under these circumstances, the trial court properly instructed the jury with two *Petrich*

instructions, one for the two counts of second degree child rape and one for the four counts of third degree child rape. The jury found Anderson guilty of one count third degree child rape but not guilty as to counts II, IV, V, and VI. We reject Anderson's argument and hold that the trial court adequately instructed the jury.

II. Prosecutorial Misconduct

Anderson next argues that the prosecutor committed misconduct throughout trial and during closing by (1) offering photos of Anderson's firearms found in the house; (2) using the term "pornography"; (3) asking Anderson and his wife about their sexual relations; (4) asking Anderson about his post-charging residences; (5) misstating the burden by comparing the standard of "beyond a reasonable doubt" to everyday decision making; (6) arguing that the victim was a party to the case; and (7) informing the jury to disregard Anderson's right to confront witnesses. The State responds that the prosecutor's statements were not reversible misconduct. We agree with the State.

A. Standard of Review

Anderson bears the burden of showing that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "Prejudice occurs where there is 'a substantial likelihood that the misconduct affected the jury's verdict.'" *In re Det. of Sease*, 149 Wn. App. 66, 81, 201 P.3d 1078 (quoting *State v. Thomas*, 142 Wn. App. 589, 593, 174 P.3d 1264, *review denied*, 164 Wn.2d 1026 (2008)), *review denied*, 166 Wn.2d 1029 (2009). In analyzing prejudice, we do not look at the comments in isolation but, rather, in the context of the

total argument, the issues in the case, the evidence, and the court's instructions to the jury. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Anderson's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct is "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

B. Prosecutor Offered Photos of Firearms

Anderson argues that the prosecutor committed misconduct by offering irrelevant photographic evidence that Anderson owned guns, thereby using a constitutionally-protected right as a smear campaign.

At trial, the State explained that it intended to offer photographs of Anderson's firearms to corroborate C.A.'s testimony that he was concerned about his grandfather's threat to him (C.A.) and to kill himself because his grandfather "seemed serious" and "owns a lot of guns." 2 RP at 141; 5 RP at 589-90. Anderson did not object to this evidence; instead, he requested that the trial court read a limiting instruction before admitting the photos so that the jury would not make the inference that Anderson's legal possession of firearms was evidence of any crime. Detective Michael Ames, who was the lead detective, testified that based on his interview with C.A., he searched Anderson's house with a warrant, looking for computers, digital cameras, photographs, documents, file-type folders, and firearms.

As Anderson requested, when Detective Ames began to testify about his warrant to search for evidence, the trial court stopped him and read Anderson's limiting instruction to the jury:

> With regard to the issue of the firearms, I will just instruct the jury that a citizen of the United States has the constitutional right to own and possess firearms.

5 RP at 634. Then, without objection, the trial court admitted photo evidence of several guns that police found in the main residence of Anderson's house.

The record does not support Anderson's argument that the prosecutor engaged in misconduct by presenting, without objection, this corroborating photographic evidence.

C. Use of the Term "Pornography"

Anderson next argues that the prosecutor improperly referred to "legal Playboy-type materials" as "pornography" in order to inflame the jury to render verdicts on passion and prejudice rather than evidence.

The term "pornography" is a legal term:

> Material (such as writings, photographs, or movies) depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement. Pornography is protected speech under the First Amendment unless it is determined to be legally obscene.

Black's Law Dictionary at 1199 (8th ed. 2004). Anderson supplies no legal authority for his argument that the term "pornography" is inflammatory and we reject it. RAP 10.3(6).

D. Questions About Andersons' Sex Life

Anderson further argues that the prosecutor repeatedly asked questions about the Andersons' sex life in order to humiliate and embarrass the Andersons.[5] The record shows that Anderson introduced three areas of testimony on the topic of the Andersons' sex life and that the State explored them appropriately.

First, Anderson introduced Diane's testimony that when wearing his catheter, Anderson is

[5] Anderson also makes this argument in his SAG (#7); we address it here.

incapable of engaging in sexual relations. Evidence about Anderson's ability to have sex is directly relevant to his rape charges. Thus, it was logical that on cross-examination, the State inquired into why Diane believed that Anderson was incapable of having an erection. By questioning Diane about her knowledge, the State established that the catheter was not the determinative factor regarding the Andersons' lack of sexual intimacy and therefore the mere fact that Anderson used a catheter did not supply a sure defense to his rape charges. Anderson did not object to this questioning and nothing in the record supports Anderson's argument that the State acted with flagrance or ill intent. Instead, the State appropriately explored an issue the defense raised.

Next, Anderson introduced the idea that if sexual contact had occurred, their dogs would have barked and jumped around. Anderson asked Diane whether the dogs always slept in the bed and whether they barked at noise or movement. In response, the State explored Diane's testimony in the context of her marital relationship by asking whether, during the relevant time, she and her husband ever engaged in sexual relations. Diane replied they did not. The State followed up by asking, "Not at all for that three-year period?" 6 RP at 880. Anderson did not object; Diane affirmed that she and Anderson did not have sex at all during that period. At this point, the State discontinued its inquiry, which was brief and appropriate. This was appropriate cross-examination to explore the basis of her knowledge, or lack of knowledge, of how the dogs would have acted if sexual contact had occurred.

Lastly, Anderson introduced a line of questioning about whether Diane's inability to engage in sexual intercourse caused Anderson to view his grandson as a sexual object. The State

had not previously asked questions of this nature, did not ask follow-up questions on the topic, and did not seek to show that Anderson had a lustful disposition toward C.A. Rather, the State objected to this questioning.

We hold that the prosecutor appropriately explored the topic of the Andersons' sex life and did not commit misconduct or seek to humiliate the Andersons.

E. Questions About The Andersons' Separate Residences

Anderson also argues that the prosecutor committed misconduct by asking completely irrelevant questions about Anderson's and Diane's separate residences.[6] For example, the prosecutor asked Anderson why his family moved to Spokane, and why Diane stays in a hotel rather than stay at his trailer when she comes to testify. The State explains that it briefly touched on this issue for two reasons. First, Anderson presented Diane as a witness who had a "close relationship" with him; thus, the prosecutor properly explored whether they were actually close. Br. of Resp't at 25. Next, evidence showing that Diane refused to cooperate with the State and that she would not testify for the State showed that she was a biased witness, thus the prosecutor properly explored her claim that she needed reimbursement for lodging.

Here, Anderson does not meet his burden of showing that the prosecutor's questions about the Andersons' living arrangements were irrelevant or improper in the context of the entire record and circumstances at trial. Additionally, he supplies no authority to support the assertion that a prosecutor commits misconduct by asking irrelevant questions.

F. Burden of Proof

[6] Anderson also makes this argument in his SAG (#6, 8); we address it here.

Anderson also argues that during closing, the prosecutor misstated and trivialized the State's burden of proof by comparing it to the level of reasonable doubt that parents have when they choose a good babysitter for their kids. Although Anderson is correct that the prosecutor's comparison was improper, we hold that the improper comparison was not prejudicial.

If the defendant objected to the misconduct, we determine whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *State v. Sakellis*, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011) A prosecutor improperly compares the reasonable doubt standard to everyday decision making because it minimizes and trivializes the gravity of the standard and the jury's role. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). Once the defendant demonstrates improper prosecutorial conduct, we evaluate the defendant's claim of prejudice. *Sakellis*, 164 Wn. App. at 183.

Here, the prosecutor compared the reasonable doubt standard to the level of reasonable doubt that parents have when they choose a good babysitter for their kids. Because the prosecutor's comparison involved "everyday decisions," it is improper. *Anderson*, 153 Wn. App. at 431. Anderson timely objected to this comparison. He now argues that because we have given prosecutors notice of the impropriety of comparisons to everyday decisions, the prosecutor intentionally and flagrantly urged the jury to convict based on an improper standard of proof. But the proper test to apply is whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Sakellis*, 164 Wn. App. at 184 (citing *Anderson*, 153 Wn. App. at 427, 429).

In this case,[7] prejudice is unlikely because the prosecutor's comparison to choosing a babysitter was brief, and the trial court instructed the jury on the definition of "beyond a reasonable doubt" and that "the lawyers' statements are not evidence" and "[y]ou must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." Clerk's Papers at 177-79. We presume the jury was able to follow the court's instruction. *Warren*, 165 Wn.2d at 28. Anderson does not meet his burden to show that the prosecuting attorney's improper conduct was prejudicial in the context of the entire record and circumstances at trial. *Fisher*, 165 Wn.2d at 747.

G. Prosecutor Spoke of Rights of Accuser

Anderson further argues that the prosecutor committed misconduct during closing argument when he quoted Justice Cardozo's sentiment that "[j]ustice, though due the accused, is due the accuser, also" and told the jury that "[C.A.], the accuser, has a right . . . to a fair trial" and stated that the jury should not discount C.A. based on his young age. 9 RP at 1382-83. Specifically, Anderson argues that the State is the accuser; therefore, C.A. was not a party to this case who was also entitled to justice. Anderson neither cites to legal authority nor provides legal argument explaining his assertion that the prosecutor's quotation of Justice Cardozo and identification of C.A. as the accuser constitutes an egregious misstatement of criminal law. It is undisputed that the State filed charges based on its investigation of C.A.'s accusations. We reject Anderson's unsupported argument. RAP 10.3(6).

[7] We note that in *State v. Walker*, the prosecutor made four separate types of improper arguments, which had a cumulative prejudicial effect. 164 Wn. App. 724, 729, 265 P.3d 191 (2011).

H. Prosecutor's Closing Rebuttal

Anderson next argues that the prosecutor committed misconduct in his closing argument by chastising his attorney for cross-examining C.A. Specifically, Anderson argues that the prosecutor thereby urged the jury to disregard his confrontation rights. Under the Sixth Amendment's confrontation clause, an accused has a right to confront witnesses against him. U.S. Const. amend. VI; *see also Crawford v. Washington*, 541 U.S. 36, 42, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But, the State is entitled to comment on the quality and quantity of the defense's evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). The State has wide latitude in arguing to the jury, and prosecutors may draw reasonable inferences from the evidence. *Gregory*, 158 Wn.2d at 860. Additionally, the prosecutor is "'entitled to make a fair response to the arguments of defense counsel.'" *Gregory*, 158 Wn.2d at 863 (quoting *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)).

In his closing argument, Anderson argued to the jury that the prosecutor had offensively discussed the Andersons' sex life, which is "one of the most difficult subjects for adults to discuss." 9 RP at 1411. In its rebuttal, the State responded that C.A. had to testify about oral sex with his grandfather but Anderson's counsel "had no similar compassion for [C.A.]" when asking for more detail about the allegations. 9 RP at 1470. Anderson objected, arguing that the State was urging the jury to convict based on their possible dislike of Anderson's counsel and that the State's words shifted the burden. The trial court immediately reminded the jury that it should consider only the evidence and that "the State has the burden of proof in a case with proof beyond a reasonable doubt as to each element of each crime charged." 9 RP at 1470-71.

Because the State is entitled to comment on the quality and quantity of Anderson's evidence and is entitled to respond to defense counsel's arguments, we hold that Anderson does not meet his burden to show the comment was improper. *Gregory*, 158 Wn.2d at 860, 863. In addition, Anderson cross-examined C.A. extensively; we do not see that the prosecutor's closing argument comment violated Anderson's confrontation rights. *State v. Price*, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006).

V. Trial Court's Rulings regarding scope of closing arguments

Anderson argues that the trial court erred by refusing to exercise its discretion in limiting the scope of closing argument. Specifically, Anderson challenges the trial court's frequent response to his objections during the State's closing argument that "this is closing argument." Br. of Appellant at 53. We review the trial court's rulings regarding the scope of closing argument for abuse of discretion. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). The trial court possesses broad discretionary powers over the scope of closing argument. *State v. Frost*, 160 Wn.2d 765, 771-72, 161 P.3d 361 (2007). Counsel may argue the evidence and can draw reasonable inferences from it. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

Anderson relies on *State v. Elliott*, 121 Wn. App. 404, 88 P.3d 435 (2004), for the proposition that the trial court's failure to exercise discretion is an abuse of discretion. He highlights four occasions during closing argument when, after he objected, the trial court responded, "[T]his is [closing] argument." 9 RP at 1348, 1376-77, 1380. But the record does not support Anderson's claim that the trial court failed to exercise discretion. Rather, the record shows that, although the trial court gave both parties wide latitude to make closing argument, the trial court responded to objections during closing argument by reminding the jury of its instructions and the duty to follow those instructions. Specifically, the trial court reminded the jury (1) of the instruction on the proper burden, (2) of the instruction on the law, and (3) to use its collective memory in recalling the evidence presented at trial. Thus, we hold that the record shows that the trial court exercised its proper discretion when ruling on these objections.

VI. Motion for New Trial

Anderson argues that the trial court erred by denying his motion for a new trial.[8] Anderson highlights three issues that he claims justify a new trial: (1) Detective Ames testified about Detective Dawson's examination of Anderson's computer, (2) Anderson learned in the presentence report that C.A. had marijuana and alcohol use issues during the time of the charged crimes, and (3) cumulative error warranted a new trial.

A. Standard of Review

In a criminal proceeding, the trial court should grant a motion for a new trial only when the defendant "'has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be treated fairly.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Russell*, 125 Wn.2d at 85. This standard requires "[s]omething more than a possibility of prejudice" to warrant a new trial. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The granting or denial of a new trial is a matter primarily within the trial court's discretion, and we will not disturb the decision without a clear abuse of discretion. *Bourgeois*, 133 Wn.2d at 406. An abuse of discretion occurs only "'when no reasonable judge would have reached the same conclusion.'" *Bourgeois*, 133 Wn.2d at 406 (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)).

B. Detective Ames' Testimony About Detective Dawson's Report

Anderson argues that the trial court should not have allowed Detective Ames to testify to the content of Detective Dawson's examination of Anderson's computer because *Melendez-Diaz*

[8] Anderson also makes this argument in his SAG (#4, 5).

v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314 (2009), held that such evidence violated the defendant's confrontation rights. At trial, Detective Ames testified that he acted as the scene manager as police collected evidence including two computers. Detective Ames testified that Detective Dawson examined the computers and found sexually explicit images of adults on Anderson's hard drive and nothing of evidentiary value on Diane's laptop computer or the digital camera. On cross-examination, Detective Ames stated that the sexually explicit images that Detective Dawson found were not illegal. Anderson did not object to Detective Ames's testimony about Detective Dawson's report.

During the hearing on Anderson's new trial motion, the trial court found that Detective Dawson's report examined only whether Anderson's computer had illegal pornography stored on it and that the report concluded it did not. The trial court noted Diane had testified she found non-illegal pornography on Anderson's computer and that this was an undisputed fact. The trial court also noted that Anderson asked the court to admit evidence showing that Detective Dawson examined both Diane's computer and a digital camera and that his examination revealed no inappropriate images on either. Under these facts, Anderson does not show that the trial court abused its discretion when it determined that Detective Ames's testimony did not prejudice Anderson to the point where he is entitled to a new trial.

C. New Information About Victim

Anderson next argues that he is entitled to a new trial because he belatedly learned in the presentence report that, according to C.A.'s mother, C.A. used alcohol and marijuana. Anderson

does not supply any further details about this information nor explain why the jury would have found it believable or persuasive.

To obtain a new trial based on newly discovered evidence, Anderson must prove that the evidence (1) will probably change the trial result; (2) was discovered after the trial; (3) could not have been discovered before trial by exercising due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Macon*, 128 Wn.2d 784, 803-04, 911 P.2d 1004 (1996). The trial court may deny a new trial when any one of these factors is absent. *Macon*, 128 Wn.2d at 804.

The trial court rejected Anderson's argument that his new information would have affected the jury. The trial court noted that (1) the information did not come from C.A. but is attributed to his mother; (2) there was no collaborating testimony from Anderson or his friend that C.A. appeared intoxicated during any of the relevant periods; and (3) although it is not unlikely that a molested person would turn to drugs and alcohol, this circumstance is relevant to the defense only if the defense can demonstrate that it actually diminished the victim's perception or recall.

Nothing in the record contradicts the trial court's reasoning or indicates that "no reasonable judge would have reached the same conclusion." *Bourgeois*, 133 Wn.2d at 406 (citation omitted). Therefore, we do not disturb the trial court's decision.

D. Cumulative Error

Anderson argues that he is entitled to a new trial under the doctrine of cumulative error

because he has established "several trial errors" including that the prosecutor committed grave misconduct and the trial court refused to exercise its discretion. Br. of Appellant at 55-56.

We may reverse based on the cumulative effects of the trial court's errors, even if considered separately we would conclude that each error was harmless. *Russell*, 125 Wn.2d at 93. After carefully reviewing the entire record, we are confident that Anderson received a fair trial and that any error was slight and not so prejudicial that he is entitled to a new trial. The trial court properly exercised its discretion in denying Anderson's motion for a new trial. *Bourgeois*, 133 Wn.2d at 406. Thus, he is not entitled to relief under the cumulative error doctrine.

VII. Statement of Additional Grounds

A. Prosecutor's Statement at Sentencing

In his SAG, Anderson states that the trial court should not have allowed the prosecutor, at sentencing, to say that Anderson sexually assaulted his daughter. But at sentencing, the prosecutor did not say anything about Anderson's daughter or any other person other than C.A. The record does indicate, however, that the presentencing report included information that Anderson's daughter told someone that he molested her when she was a young girl until she was about 13. But the State said that it was not prepared to have an evidentiary hearing on the issue and it had no objection should the trial court want to strike that portion. The trial court refers to the material using abbreviations and initials; thus, its verbal ruling would be difficult for Anderson to follow, but the trial court did strike those portions from the presentencing report. It appears that the possibility of his daughter's allegations alarmed Anderson; however, the trial court did not include or consider these allegations in Anderson's sentencing.

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Armstrong, P.J.

Hunt, J.