ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION I

CACR 06-54

OCTOBER 4, 2006

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| TYRONE RODDELL SMITH<br>APPELLANT | APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION, [NO. CR 04-2595] |
| V. | HONORABLE MARION ANDREW HUMPHREY, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | AFFIRMED |

Appellant Tyrone Roddell Smith was convicted by a Pulaski County Circuit Court jury of two counts of rape, committed against his eleven-year-old stepdaughter, S.S., and her twelve-year-old friend, C.L., during a sleep-over at appellant's house. Appellant argues on appeal that the trial court erred in overruling his objection to the prosecutor making improper comments during closing arguments regarding why appellant admitted to digitally penetrating C.L. We affirm.

We are cognizant that some leeway is given in opening statement and closing argument to permit counsel to argue every plausible inference that can be drawn from the evidence. *See*, *e.g.*, *Abraham v. State*, 274 Ark. 506, 625 S.W.2d 518 (1981). Both girls testified that on the night of May 1, 2004, appellant came into the bedroom where they were

sleeping and had sexual intercourse with each girl. S.S. testified that this was not the first time he had sexual intercourse with her because it had happened more than ten times over a long period of time. S.S. testified that appellant had told her that it was in preparation for adulthood, but she had not revealed what was going on because she was scared. S.S. considered appellant the only father she had known her whole life. Upon examination by a physician, S.S. showed evidence that was suspicious of past injury to her hymen consistent with sexual abuse. C.L. testified that appellant had sexual intercourse with her, and it was not the first time it had happened. C.L. said that her mother found out what happened when her mother washed her panties and found blood inside, which was prior to C.L. beginning her menstrual cycle.

Appellant was arrested later that month, and in an interview with a police detective, appellant admitted to having penetrated C.L.'s vagina with two of his fingers. Appellant stated that C.L. was flirtatious with him on many occasions, and she wanted to have sex with him that night. He stated that this was a consensual act, but that he accidentally cut the inside of her vagina with a torn fingernail. He expressed regret at having done what he did, but he denied having intercourse with her or his stepdaughter.

The trial court instructed the jury that counsel's argument was not to be considered evidence, and further that any remarks having no basis in the evidence should be disregarded. During the State's rebuttal closing argument, the prosecutor commented to the jury that the audiotape of the interview had nine instances where appellant admitted to placing his fingers

inside C.L.'s vagina. The prosecutor said that appellant was unaware that this act fit within the definition of rape. The prosecutor said that appellant sounded like a person building a story, given that he knew the girls had gone to the police, he knew C.L. had bled from her vagina, and he assumed that evidence of injury to C.L's vagina would be found. Defense counsel asked to approach the bench, whereupon the following exchange occurred:

> DEFENSE: She [the prosecutor]'s really going outside what the evidence was with speculating what the defendant might have –
>
> PROSECUTION: Your Honor, I just –
>
> DEFENSE: – I think it as –
>
> COURT REPORTER: One at a time, I can't get anything when you both talk at the same time.
>
> COURT: Overrule the objection.
>
> PROSECUTION: Thank you.

Appellant argues on appeal that the prosecutor improperly commented on appellant's reasons for admitting digital penetration of C.L., where there was no evidence to support what appellant was thinking at the time. He asserts that this was a serious error by the trial court to permit this comment because the comment had no basis in the evidence, and it prejudiced appellant. He cites to *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999), and *Williams v. State*, 294 Ark. 345, 742 S.W.2d 932 (1988).

The State responds first that appellant failed to preserve this particular argument for appeal for failing to apprise the trial court of his argument at trial. Parties are bound on

appeal by the scope and nature of the objections and arguments presented at trial. *See Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004); *Morris v. State*, 86 Ark. App. 78, 161 S.W.3d 314 (2004).

In addition, the State points out that any such objection was untimely, citing to *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989). The record reflects that the State had already mentioned many times in the initial closing argument what appellant might have been thinking when he made the admissions to the police. The prosecutor had said, without objection, that:

> He was going to try to cover his tracks. ... He thinks that he's going to get out of this by just saying I just stuck my finger in her and there was no sexual intercourse, and I had some sort of snag on my finger and that's what cut her.

Even defense counsel stated in the defense closing that it was apparent that, in the statement, appellant was trying to get himself out of some trouble, thinking that digital penetration was a less criminal act than rape. Objecting during the State's rebuttal closing was too late in time to preserve a valid objection on this basis. Moreover, appellant cannot complain where the same evidence was entered without objection, and here even supported by defense counsel's comments.

Nevertheless, if the objection had been properly preserved, we would affirm. We believe that the prosecutor's comments were a legitimate inference to be drawn from the evidence presented at trial. In *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985) , it was held that "although it is not good practice for counsel to inject their personal beliefs into the

closing arguments, mere expressions of opinion by counsel in closing argument are not reversible error so long as they do not purposely arouse passion and prejudice." 287 Ark. at 94, 696 S.W.2d at 740. *See also Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003) (holding that prosecutor's closing argument that the murder victim may well have been a victim of a sex crime, even though direct evidence supporting that theory was lacking, was not reversible; prosecutor's statements were plausible, such that the supreme court did not conclude that the prosecutor purposely aroused passion and prejudice so as to constitute reversible error). In this case, these comments on why appellant gave this statement are plausible inferences to be drawn under the circumstances.

Moreover, were we to consider the prosecutor's comments inappropriate, any potential error was rendered harmless in this instance because, regardless of appellant's motivation for making a statement, he repeatedly admitted to having digitally penetrated C.L.'s vagina, which constitutes rape. There was testimony from both S.S. and C.L. that appellant had sexual intercourse with each of them that night. When the evidence is overwhelming and the error is slight, we can affirm for lack of prejudice. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

Affirmed.

GLADWIN and BAKER, JJ., agree.