IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 63914-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
BRANDON LEMAR BROWN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 20, 2010
	)	

Becker, J. – In order to support a conviction for multiple acts of sex abuse occuring during the same charging period, the evidence must permit the jury to distinguish and unanimously agree on specific and distinct acts constituting each count. Here, the State's evidence, including the victim's testimony describing specific sexual acts and distinct locations during the charging period, was sufficient to permit the jury to find Brandon Brown guilty of two counts of third degree child rape. We also reject Brown's claims of reversible evidentiary error and prosecutorial misconduct. We therefore affirm Brown's conviction for two counts of third degree child rape and one count of promoting commercial sexual abuse of a minor.

FACTS

The State charged Brown with two counts of third degree child rape and one count of promoting commercial sexual abuse of a minor. At trial, D.H. testified that she met Brown in December 2007 while riding a bus in Renton and that the two soon began "hanging out" together. D.H., who was 15, eventually agreed to work for Brown as a prostitute. D.H. believed that the money she earned would help "build a future" for the couple. According to D.H., she and Brown had sex "almost every day" while they were together.

Brown taught D.H. everything she needed to know to work as a street prostitute, including how to determine if a potential customer was a police officer, the number of condoms to carry, and what to charge for each sex act. Brown did not permit D.H. to talk to other pimps or prostitutes. D.H. gave all of her earnings to Brown, who used the money to pay their expenses.

During 2008, Brown and D.H. stayed at several motels, including the Garden Suites on Pacific Highway South and the Seal's Motel at 125th and Aurora. D.H. worked the streets and also brought customers to the rooms.

On February 11, 2009, Brown and D.H. were driving on the Alaska Way viaduct when Brown became upset and slapped D.H. after she received a telephone call from a male friend. When Brown held D.H. to prevent her from getting out of the car, a nearby motorist saw the struggle and called 911. The police stopped the car and separated Brown and D.H. D.H. eventually admitted that she had been working as a prostitute for Brown and was also having sex

with him.

Brown initially told the officers that he and D.H. were "cousins by marriage," but he could provide no further information about the relationship. He claimed that D.H. had never been to his house. He denied hitting her and explained that he and D.H. were "dancing" in the car when the other motorist saw them. Brown also denied having sex with D.H. or being her pimp.

At trial, Brown testified that D.H. was "just a friend." He claimed that he "barely" ever saw her, but admitted that she had been to his mother's home many times. He denied ever accepting money from D.H. or having sex with her. Brown acknowledged staying at the Garden Suites and the Seal's Motel, but denied that D.H. had stayed with him.

The jury found Brown guilty as charged, and the court imposed concurrent standard-range terms totaling 144 months.

DECISION

Sufficiency of the Evidence

Brown contends that the evidence was insufficient to support his conviction for two counts of third degree child rape. He argues that D.H.'s testimony that she and Brown "would have sex . . . almost every day" described only a "generic scenario." He maintains that because she never identified any specific dates on which the sexual intercourse allegedly occurred or provided any identifying details, the evidence was insufficient to permit the jury to

distinguish among multiple incidents and to agree on two separate and distinct incidents of sexual intercourse.

To convict the defendant when multiple acts are alleged, the jury must unanimously agree on the act or incident that constitutes the crime. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In sexual abuse cases, "where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence 'clearly delineate[s] specific and distinct incidents of sexual abuse' during the charging periods." State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (alteration in original) (quoting State v. Newman, 63 Wn. App. 841, 851, 822 P.2d 308, review denied, 119 Wn.2d 1002 (1992)), review denied, 130 Wn.2d 1013 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999).

After balancing the rights of the accused and the young victims of multiple sexual assaults, this court has concluded that "generic" testimony may be sufficient to support a conviction for multiple counts of sexual assault if it meets certain minimum requirements:

> First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred.

Hayes, 81 Wn. App. at 438. Based on the victim's generic testimony that the defendant "put his private part in mine" and that the conduct occurred at least "four times" and up to "two or three times a week" during the charging period, and a description of the usual course of conduct, the Hayes court concluded that the evidence was sufficiently specific to support all four charged counts of child rape. Hayes, 81 Wn. App. at 438-39.

D.H. testified that she and Brown had sex "almost every day" and confirmed that this meant both "oral sex and penis to vagina sex." D.H. also acknowledged that she had sex with Brown when she stayed with him for several months at the Seal's Motel and when she stayed with him for at least a week at the Garden Suites. D.H. explained that at the Garden Suites, she would have sex with Brown after returning from her work as a prostitute. Independent evidence established that Brown and D.H. had stayed at the Garden Suites in February 2008 and at the Seal's Motel for several months beginning in August 2008. D.H. also testified that she had sex with Brown in his bedroom at his mother's home in Renton, describing several distinguishing details about the room, including the presence of black sheets.

Viewed in the light most favorable to the State, the evidence established

the occurrence of multiple acts of sexual intercourse at three separate locations during the charging period from January 1, 2008, through February 11, 2009. The evidence was therefore sufficient to support a conviction for at least two separate and distinct criminal acts during the charging period. D.H.'s failure to identify a specific date or time or to provide additional details about the offenses are factors affecting credibility and "are not necessary elements that need to be proved to sustain a conviction." Hayes, 81 Wn. App. at 437.

Expert Testimony

Brown contends that the trial court erred in admitting, over a defense objection, the testimony of Seattle Police Sergeant Ryan Long, the head of the Seattle Police Department vice unit. Long testified about the general characteristics of the pimp/prostitute relationship. Brown argues that the testimony was irrelevant because Long had no personal knowledge about the case and that the evidence was, in any event, cumulative and unduly prejudicial.[1]

Expert testimony is admissible under ER 702 "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Such testimony is helpful to the trier of

[1] Brown also contends that Long was not properly qualified as an expert witness. Because this challenge is raised for the first time on appeal, we decline to consider it. See State v. Mak, 105 Wn.2d 692, 719, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986).

fact when "it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). We review the trial court's decision to admit testimony under ER 702 for an abuse of discretion. State v. Roberts, 142 Wn.2d 471, 520, 14 P.3d 713 (2000).

Long testified that he had been the head of the vice unit for three years and participated in more than 1,000 investigations of prostitution related offenses. He also received specialized training in prostitution enforcement. In addition to identifying the areas of Seattle where street prostitution is common, Long described the stages of prostitution recruitment and the general terminology and rules governing the pimp/prostitution relationship.

Washington courts have concluded that similar expert testimony was helpful to the jury "because the average juror would not likely know of the mores of the pimp/prostitute world." State v. Simon, 64 Wn. App. 948, 964, 831 P.2d 139 (1991) (detective related conversations with prostitutes about the pimp/prostitute relationship), rev'd in part on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992); see also State v. Yates, 161 Wn.2d 714, 767, 168 P.3d 359 (2007) (expert testified about the general practices of prostitutes), cert. denied, 128 S. Ct. 2964 (2008). Here, given the nature of the charges against Brown, Long's testimony was relevant and helpful to the jury. Because Long did not

offer any opinion on the case or comment on the credibility of the State's witnesses, the testimony was not unduly prejudicial. The trial court did not abuse its discretion in admitting Long's testimony.

Motion for Mistrial

Brown contends the trial court abused its discretion in denying his motion for a mistrial after a State witness violated a pretrial ruling. Prior to trial, when addressing the admissibility of Brown's statement to police, the trial court excluded any reference to a portion of the statement in which Brown allegedly discussed his presence at a police shooting while staying at the Seal's Motel: "we just want to get the essence of [Brown] having lived at the Seal Motel, not the long discussion of what he thinks is going on there."

At trial, Seattle Police Officer Megan Bruneau testified that as she transported Brown to the precinct, he asked if the police were going to shoot him "because he had been at the Seal's when the officers were shooting people and . . . that we just shoot people." Brown also indicated he was present at a shooting incident involving the North Precinct officers. The court denied Brown's motion for a mistrial, but gave a curative instruction directing the jury not to consider the "alleged incident of police misconduct at the Seal's Motel."

We review the trial court's decision to deny a motion for mistrial for an abuse of discretion. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102

(1983). A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Brown argues that the improper testimony created an enduring prejudice because it implied that he spends his time at a motel "surrounded by unsavory characters who participate in shootings." But as the trial court recognized in formulating the curative instruction, Brown's statement was primarily an allegation of police misconduct. Moreover, the reference was brief and provided almost no further details about the alleged shooting incident. Under the circumstances, the potential prejudice was negligible and easily cured by the court's admonition to the jury. The trial court did not abuse its discretion in denying Brown's motion for a mistrial.

Prosecutorial Misconduct

Brown contends that his right to a fair trial was violated when the deputy prosecutor made the following comments during closing argument:

> It should not be lost on any of us in this courtroom, but the real villain and the real evil that the laws of the State of Washington are designed to protect against (inaudible) criminalized that someone's profiting off of the back of a child who is engaged in prostitution.[2]

After the deputy prosecutor commented on the "dangers" that young prostitutes like D.H. face, defense counsel objected that the comments were an improper

[2] Report of Proceedings at 571.

appeal to the jury's emotions. The trial court effectively overruled the objection, permitting the deputy prosecutor to "explain briefly your understanding of the purpose of the law, but we don't want to spend a --- dwell on that for a long time." Brown argues that the comments improperly appealed to the jury's passion and prejudices and implied that because Brown was charged with an "evil" offense, he was not entitled to the same constitutional protections as others.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

The prosecutor has a duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). But references during closing argument to the heinous nature of a crime and its effect on the victim may be proper if they do not appeal to the passions and prejudice of the jury. See State v. Claflin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014

(1985); see also State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968) ("A prosecutor is not muted because the acts committed arouse natural indignation.").

Here, the challenged comments served only as an introduction to the deputy prosecutor's specific review of the relevant law and facts and did not rise to the level that courts have characterized as improper conduct. See, e.g., State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (prosecutor improperly encouraged the jury to render a verdict based on the defendant's association with a group that the prosecutor described as "butchers that kill indiscriminately" and "a deadly group of madmen"). Contrary to Brown's assertions, the deputy prosecutor did not suggest that the seriousness of the offenses reduced the State's burden of proof, and the subsequent argument focused on the application of the law to the specific facts of the case. We find no misconduct. Moreover, given the strength of the State's evidence, there was no reasonable likelihood that any impropriety in the argument affected the jury's verdict. Any error was therefore harmless and did not deprive Brown of a fair trial.

Cumulative Error

Brown contends that even if no single error merits reversal, the cumulative effect of the errors materially affected the jury's verdict. Because Brown has not shown an accumulation of errors, the cumulative error doctrine does not apply. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868

P.2d 835, cert. denied, 513 U.S. 849 (1994).

Statement of Additional Grounds

In his statement of additional grounds for review, Brown seeks reversal based on the assertion that D.H. has recanted her testimony. But this contention rests on matters outside the record and therefore cannot be addressed on direct appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, C. J.

Spearman, J.