IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON, Respondent, v. KENNETH WAYNE MARTIN, Appellant.	)	No. 65547-7-I DIVISION ONE UNPUBLISHED OPINION FILED: September 26, 2011

Appelwick, J. — Kenneth Martin appeals his convictions for first degree child molestation. He argues that the State failed to prove he touched his granddaughter for the purpose of sexual gratification. He also contends that prosecutorial misconduct and ineffective assistance of counsel deprived him of a fair trial. We affirm.

FACTS

During the summer of 2008, C.R. was 11 years old and was living with her paternal grandmother, Sharon Osorio. One day in the early part of the summer, C.R. visited with her grandparents and great-grandparents on her mother's side of the family. C.R. mowed the lawn at her great-grandparents house. After she finished, she went in the house to take a nap in the spare bedroom. C.R. awoke to find that her grandfather, Kenneth Martin "had his hand under [her] shirt." C.R. said she was wearing a short-sleeved shirt, with a tank top and sports bra underneath. C.R. said Martin's hand was under her shirt, but over her sports bra, but that his hand was moving or "getting there" at the point when she awoke. She also said that at the same time, Martin had a hand on her inner thigh, closer to her crotch than to her knees. C.R.

said she felt scared.

C.R. told her maternal grandmother, Martin's wife, and her mother about what happened right away. Osorio said that following this visit, C.R. began coming into her bedroom to sleep during the night, which she had not previously done. C.R.'s brother also heard C.R. tell their mother she did not want to go to a family gathering because her grandfather would be there.

C.R. said her grandfather touched her a second time, later the same summer, during a family reunion of her mother's side of the family in Birch Bay, Washington. Again, C.R. lay down to nap in the afternoon after a long day of swimming. C.R. was alone in a bedroom and remembered "waking up and my grandpa having his hand under my shirt again." She said his hand was under her clothes, touching her skin on her "breasts." C.R. again told her maternal grandmother, but she took no action.

About a week after the Birch Bay trip, Osorio had a conversation with C.R. about why she was afraid and uncomfortable at night. C.R. told Osorio about the two incidents. Osorio took C.R. to the police station.

The State charged Martin with two counts of child molestation in the first degree. Martin was tried by a jury. The State presented the testimony of C.R., her brother, and Osorio. Martin did not testify. The jury convicted him as charged. Martin appeals.

I. Sufficiency of the Evidence

Martin argues that the evidence was inadequate for the jury to convict him, because the State failed to prove that he touched C.R. for the purpose of sexual gratification.

Sufficient evidence supports a conviction when, viewed in the light most

favorable to the State, any rational fact finder could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A claim of insufficiency admits the truth of the State's evidence and all inferences reasonably drawn from it. Salinas, 119 Wn.2d at 201. We defer to the fact finder on issues of witness credibility and the persuasiveness of evidence. See State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

RCW 9A.44.083 defines the crime of child molestation in the first degree and prohibits sexual contact with a person who is under age 12, where the perpetrator is at least 36 months older and not married to the victim. "Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). "Sexual gratification" is not an essential element of first degree child molestation, but clarifies the meaning of the term "sexual contact." State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). A showing of sexual gratification is required "because without that showing the touching may be inadvertent." State v. T.E.H., 91 Wn. App. 908, 916, 960 P.2d 441 (1998).

Martin relies on State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). In Powell, the defendant hugged a child around the chest, touched her groin through her underwear when helping her off his lap, and touched her thighs. Id. at 916. The court noted that each touch was outside the child's clothes and was susceptible to an innocent explanation. Id. at 918. The touching was described as "fleeting" and the evidence of the defendant's purpose was "equivocal." Id. at 917-18. The court determined that the evidence was insufficient to support the inference that the

defendant touched the child for the purpose of sexual gratification. Id. at 918. The court in Powell stated that when an adult is a caretaker for a child, "in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification."[1] Id. at 917 (footnote omitted).

Martin claims that C.R. alleged touching through clothing, because C.R. said that in the first incident he touched her under her shirt but not under her sports bra. Therefore, he contends that the State was required to establish sexual gratification by extrinsic evidence, beyond the circumstances of the touching alone. He further maintains that with respect to the Birch Bay incident alleged in count II, the evidence did not establish that he touched her breasts. We reject both contentions. When describing the incident at Birch Bay, although C.R. also used general terms such as "chest area" and "breast area," she explicitly testified that Martin touched her "breasts" and that the area he touched on her chest would be covered by a swimsuit.

In addition, the jury may infer sexual gratification from the circumstances of the touching itself, where those circumstances are unequivocal and not susceptible to innocent explanation. See State v. Whisenhunt, 96 Wn. App. 18, 24, 980 P.2d 232 (1999) (defendant's conduct was not susceptible to innocent explanation when he touched the victim's genital area over her clothes on three separate occasions); see also State v. Wilson, 56 Wn. App. 63, 68-9, 782 P.2d 224 (1989); T.E.H., 91 Wn. App. at 916-17. Here, C.R. described her grandfather touching her breasts, under her

[1] Martin does not contend that breasts are not primary erogenous areas.

clothing, on two occasions. She also said Martin touched her inner thighs. The touching occurred both times when C.R. was vulnerable, because she was alone in a room, out of public view, and asleep. This evidence does not support the inference that the touching was inadvertent or that Martin's purpose was equivocal. The touching was not fleeting or open to innocent explanation, as in Powell. Extrinsic evidence of sexual gratification was not required. Viewed in the light most favorable to the State, the circumstances here provided sufficient evidence for the jury to find sexual gratification beyond a reasonable doubt.

II. Prosecutorial Misconduct

Martin claims that the prosecutor engaged in misconduct by mischaracterizing the evidence in closing argument. With respect to count I, Martin complains that the prosecutor twice stated, contrary to the evidence, that he touched C.R. underneath, rather than over, her bra. With respect to count II, Martin contends that the prosecutor asserted, also contrary to the evidence, that he rubbed, not merely touched, C.R.

Specifically, referring to count I, the prosecutor argued the only reasonable inference to be drawn from the touching was sexual gratification, because "[t]here is no other reason for a grown man to approach a sleeping 11-year-old child, who is alone, and stick his hand underneath her little sports bra and rub." The prosecutor reiterated a second time that that the touching that occurred in the first incident was "underneath" the sports bra.

Referring to count II, the State argued:

> Second time around. [C.R.] was alone. She was taking a nap. She was asleep. And he did it again. He took his little hand and stuck it up underneath her little sports bra again.
>
> And I submit to you that, just as for Count I, it is the same for Count II. There is no reason for a grown man to put his hand under an 11-year-old's sports bra and rub when she is asleep and alone except for purposes of . . . sexual gratification.

To prevail on a claim of prosecutorial misconduct, the defendant must show that that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). 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). During closing argument, a prosecutor has "wide latitude" in drawing and arguing reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Martin did not object to any of the allegedly improper remarks at trial. Without a proper objection made at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have corrected the possible resulting prejudice. State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The absence of a timely objection to a prosecutor's statement "suggests that it was of little moment in the trial." State v. Rogers, 70 Wn.

App. 626, 631, 855 P.2d 294 (1993). A defendant cannot remain silent, speculate on a favorable verdict, and, when it is adverse, use the alleged misconduct to obtain a new trial on appeal. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

C.R.'s testimony that Martin's hand was "getting there" and touching her "breast area" arguably supported the inferences argued by the State. But, even assuming these arguments misstated the testimony at trial, the trial court properly instructed the jury that the attorneys' statements were not evidence and that they were to rely only on the evidence produced at trial during their deliberations. We presume juries follow their instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). None of the State's statements were of such flagrant nature that any potential prejudice could not have been obviated by a further curative instruction, had Martin requested one. See Hoffman, 116 Wn.2d at 94.

III. Ineffective Assistance of Counsel

Osorio testified about how C.R. and her brother came to live with her in 2003 or 2004. She explained that the children had resided with Martin and his wife for a time. She further elaborated that Child Protective Services (CPS) "called me and asked me if I could take the children, that they were being removed from the Martins. I don't know why." Martin argues that his counsel rendered ineffective assistance in failing to object to this testimony that C.R. and her brother had been previously been removed from his care. He contends that the evidence was both irrelevant and unfairly prejudicial.

To demonstrate ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322,

334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either part of the test, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Deficient performance is representation that falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). There is a strong presumption that counsel's representation was effective and competent. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish prejudice, "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (alteration on original) (quoting Strickland, 466 U.S. at 694).

Martin cannot establish prejudice. Osorio expressly said she did not know why the children were removed from the Martins' care. There was no basis for the jury to conclude, as Martin suggests, that he had "probably engaged in inappropriate contact with C.R." The challenged testimony about CPS's actions was not elicited by the State, nor did it play any role in its case against Martin. There is no reasonable probability that had counsel objected, the result of the trial would have been different.

IV. Statement of Additional Grounds

Several of the issues Martin raises in his pro se statement of additional grounds appear to involve matters outside of the trial record. This court's review is limited to issues contained in the record. McFarland, 127 Wn.2d at 335. If a defendant wishes to raise issues involving evidence or facts not in the record, he must do so through a personal restraint petition. See Id. Martin also raises issues that have been adequately addressed by appellate counsel. See RAP 10.10(a) (purpose of statement

of additional grounds is to permit appellant "to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel"). Nevertheless, we review the following remaining issues and find them to be without merit.

Although not entirely clear, it appears that Martin challenges the sufficiency of the evidence to establish that the first touching incident occurred within the charging period for count I. As to that count, the State alleged that Martin touched C.R. between June 1 and July 31, 2008. Osorio testified that the summer 2008 visit to C.R.'s great-grandparents' house probably occurred in early June 2008. C.R. said the visit happened in the summer of 2008, and she thought school was already out for the summer break. The defendant presented no contrary evidence. Viewing this evidence in the light most favorable to the State, it was sufficient to establish that the conduct took place within the charging period.

Martin also contends that the prosecutor improperly communicated with the jury when, during C.R.'s brother's testimony, counsel asked, "[C]an the jury hear well enough?" Martin contends that this inquiry was inconsistent with the court's instruction at the beginning of trial that the "lawyers, the parties and the witnesses are not permitted to talk to you during the trial. Even a discussion which had no relation to the case would give a bad appearance. For this reason, the participants in the trial have been instructed by me not to greet you or talk with you during this trial." But, the trial court's instruction pertained to ex parte contacts and contact with individual jurors outside the courtroom. The communication Martin challenges was not secret, ex parte, or inconsistent with the court's instructions. Moreover, although Martin describes this

conduct as "currying favor," we do not find that this single inquiry about the jury's ability to hear the testimony was inappropriate or prejudicial to the defense.

Finally, it appears that Martin contends that his counsel was ineffective for failing to challenge juror 4. During trial, C.R.'s aunt, who was present at trial, informed trial counsel that she was acquainted with juror 4. The court questioned the juror who said she used to work in a small grocery store near C.R.'s aunt's workplace. The juror confirmed that she used to "chat" with C.R.'s aunt, but denied knowing anything about her family except that she had a daughter. The juror said the acquaintance would not impair her ability to be fair and impartial. Martin suggests that the juror possibly "knew others that may have influenced her." However, no evidence in the record supports this speculative assertion. The evidence in the record reveals no basis upon which defense counsel could have challenged the juror.

We affirm.

WE CONCUR: