IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 66108-6-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
LEWIS ROBERT SOUTHARD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 29, 2012
	)	

Leach, C.J. — Lewis Southard appeals his convictions for child molestation and child rape. He contends that the trial court erred by (1) denying his requests for discovery of the minor victim's Child Protective Services (CPS), medical, and mental health counseling records or for in camera review of them, (2) admitting unfairly prejudicial and repetitive child hearsay statements, and (3) imposing unauthorized community custody conditions. He also argues that the prosecutor committed misconduct during closing arguments by likening the reasonable doubt standard to a partially completed jigsaw puzzle.

Because Southard made no showing that the victim's records likely contained material relevant to his defense, the trial court did not abuse its discretion by denying discovery of the records or an in camera review of those it did not review. The State used the child hearsay statements to show the timeline of events. Thus, they were

neither unfairly prejudicial nor unduly repetitive. As the prosecutor's closing argument did not trivialize or shift the State's burden of proof, it was not improper. But the trial court imposed certain community custody conditions that do not relate to Southard's crimes. Therefore, we affirm Southard's convictions and remand for striking the improper community custody conditions from the judgment and sentence.

FACTS

Lewis Southard and Lindsey C. began dating in 2001. Lindsey C. has a daughter from a previous relationship, M.C., who was about one and one-half years old at the time. In 2002, Southard and Lindsey C. had a daughter, K.S., together. Over their eight-year relationship, the couple separated and reconciled a number of times. In March 2009, the couple broke up for the final time. After Lindsey C., M.C., and K.S. moved out of the home they shared with Southard, M.C. and K.S. continued to visit Southard at his trailer on his mother's property, where he had moved after the break-up.

In July 2009, M.C. attended a family reunion in Oregon with her maternal grandparents. There she told several of her cousins that her mother's boyfriend had been raping her. An older cousin told her father. He spoke with M.C. and then told M.C.'s grandparents about the abuse. After they returned from the family reunion, M.C.'s grandparents told Lindsey C. When she confronted Southard, he denied having any sexual contact with M.C. and expressed surprise that she had come forward with the allegations.

M.C. reported that the abuse occurred multiple times. She provided details about several incidents, describing hand-to-genital, mouth-to-genital, and genital-to-genital contact. She also stated that Southard made her watch a pornographic movie and do what she saw on the screen.

The State charged Southard with two counts of first degree rape of a child and two counts of first degree child molestation. The jury found him guilty of all charges. The trial court included in the judgment and sentence provisions barring Southard from possessing "any item designated or used to entertain, attract or lure children, prohibiting him from accessing the Internet or possessing computers or any computer parts or peripherals, and requiring him to engage in substance abuse treatment and urinalysis testing." Southard appeals.

ANALYSIS

Discovery Requests and In Camera Review

Southard argues that the court violated his due process rights by denying his motions for discovery of M.C.'s counseling records and Department of Social and Health Services safety plan or in camera review of these records, as well as by refusing to disclose any information from M.C.'s CPS records. He contends that due process required the trial court examine the requested records to determine if they contained potentially exculpatory information.[1] On appeal, he also asks this court to review M.C.'s CPS records to determine if the trial court erred by refusing to disclose any

[1] See Pennsylvania v. Richie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

significant information.

We review a decision whether to conduct an in camera review of privileged records for an abuse of discretion.[2] Before a court infringes upon a rape victim's privacy interest in her counseling records, "the defendant must make a particularized showing that such records are likely to contain material relevant to the defense."[3] Evidence is material only if there is a reasonable probability that it would affect the trial's outcome.[4]

Southard asserts that an in camera review of documents does not deprive the victim of any right to privacy, so his need to prepare a defense should control. Because Washington courts have long recognized that even a court's review of counseling records can infringe upon a victim's privacy interests, we disagree. In State v. Kalakosky,[5] the court denied a defendant's request for discovery or in camera review of the victim's counseling notes. The defense request stated only that the "notes may contain details which may exculpate the accused or otherwise be helpful to the defense."[6] The trial court questioned whether the defense's request was simply a fishing expedition. In the absence of a particularized showing that the records likely contained material relevant to the defense, the court refused to invade the victim's

[2] State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993).

[3] Kalakosky, 121 Wn.2d at 550.

[4] State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006).

[5] 121 Wn.2d 525, 529-30, 852 P.2d 1064 (1993).

[6] Kalakosky, 121 Wn.2d at 544.

privacy by ordering either disclosure or in camera review of her counseling records.[7]

Similarly, in State v. Diemel,[8] the defendant requested in camera review of the rape victim's counseling records, arguing that the she may have told her counselor information about the encounter that he could use for impeachment. This court found that the defendant failed to make the "particularized factual showing" required to meet the Kalakosky threshold.[9] As the court stated in Diemel, merely making a "claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection."[10]

Southard attempts to distinguish these cases on the basis that a defendant has greater need of privileged records when a case turns on the credibility of the victim. To this end, he cites State v. Gregory,[11] where our Supreme Court reversed the trial court's denial of an in camera review. In Gregory, the defendant alleged that he and the victim had consensual sex for money. The victim, who had a prior conviction for prostitution, was involved in an ongoing dependency proceeding. Gregory moved for in camera review of the dependency records because they might show relevant prostitution activities of the victim.[12] Key to the court's holding, Gregory made a "concrete connection between his theory of the case and potential evidence he expected to find

[7] Kalakosky, 121 Wn.2d at 549-50.

[8] 81 Wn. App. 464, 466, 914 P.2d 779 (1996).

[9] Diemel, 81 Wn. App. at 468-69.

[10] Diemel, 81 Wn. App. 469.

[11] 158 Wn.2d 759, 794-95, 147 P.3d 1201 (2006).

[12] Gregory, 158 Wn.2d at 794-95.

in the dependency files."[13]

Unlike Gregory, where the victim's history provided a plausible basis for the assertion that she consented to have sex for pay, here Southard provided no factual basis for his assertion that the counseling or medical records might impeach M.C.'s allegations of sexual abuse. Southard offered nothing besides the fact that M.C.'s reports became more detailed over time for his speculation that the records might show Lindsey C. or one of the counselors encouraged M.C. to lie, to change, or to embellish her story. Therefore, the court did not abuse its discretion in denying in camera review of M.C.'s counseling records or safety plan.

Southard also asks this court to review M.C.'s CPS records (those reviewed in camera by the trial court) to determine if the court abused its discretion by not disclosing any additional material to the defense. The State does not oppose this request. According to our Supreme Court, "The appellate courts will not act as a rubber stamp for the trial court's in camera hearing process. The record of the hearing must be made available to the appellate court."[14] We have reviewed the sealed records and agree with the trial court that no potentially exculpatory information exists in those documents. The trial court did not abuse its discretion by not providing them to the defense.

Cumulative Child Hearsay

Southard argues that the trial court erred by admitting cumulative evidence.

[13] Gregory, 158 Wn.2d at 795 n.15.

[14] State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985).

M.C., her maternal grandmother and grandfather, her cousins, one cousin's father, and M.C.'s mother all testified about M.C.'s disclosure of the sexual abuse to them. A nurse practitioner, social worker, and forensic interview specialist also testified about their interactions with M.C. and her disclosures to them. Southard contends that M.C's testimony and testimony of these various other people she made disclosures to were needlessly cumulative and more prejudicial than probative. We disagree.

Child hearsay is admissible even when the child is available and competent to testify and even though the evidence is overlapping or repetitive.[15] But this evidence is subject to exclusion under ER 403 if its probative value is substantially outweighed by the danger of unfair prejudice from the needless presentation of cumulative evidence.[16] We review the admission of evidence challenged as cumulative for abuse of discretion.[17] A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds.[18]

In State v. Dunn,[19] we found that the repetitiveness of the child hearsay statements "stemmed largely from the logical sequence and timing of events" and was not needlessly cumulative or prejudicial. The State charged Dunn with multiple counts of rape of a child and child molestation. The child victim testified in detail about the abuse. Additionally, everyone to whom the child had disclosed the abuse, including

[15] State v. Dunn, 125 Wn. App. 582, 588-89, 105 P.3d 1022 (2005).

[16] State v. Bedker, 74 Wn. App. 87, 93, 871 P.2d 673 (1994).

[17] Dunn, 125 Wn. App. at 588.

[18] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[19] 125 Wn. App. 582, 588, 105 P.3d 1022 (2005).

her parents, a police investigator, and a medical professional, testified and related her statements to the jury.

Similarly, in this case the State presented testimony from people who interacted with M.C. at various points in time, from her initial disclosure to her cousins, her cousin's father, then to her maternal grandparents, her mother, police, medical personnel, social workers, and the child interview specialist. As in Dunn, the challenged hearsay testimony provided different perspectives and information about the order of events. The court did not abuse its discretion by allowing the hearsay statements of these witnesses.

Prosecutorial Misconduct

Southard argues that the State committed flagrant misconduct in closing argument. On rebuttal, the prosecutor used the example of a jigsaw puzzle to explain the relationship between circumstantial evidence, direct evidence and reasonable doubt:

> The Court tells you if you have an abiding belief in the truth of the charge, you're convinced. If you wake up a year from now and you reflect back on your jury duty and you say to yourself he did it —
>
> . . . .
>
> You are convinced, I submit to you, beyond a reasonable doubt. The circumstantial evidence is strong, it's very strong. You know what happened here. You can be given a puzzle and someone can tell you that this puzzle is of any city in the world. You start to put the pieces together, and you can't figure it out, so you get some pieces, you see a mountain range. But it could be any city in the world. You start putting some pieces together, and you see a high rise downtown with apartment buildings and tall buildings but can't still figure it out. It could be any city in the world. But someone throws in there, you turn this piece, and you

> look at it and you see the Space Needle. And without seeing any other piece there, you're convinced beyond a reasonable doubt that that's Seattle.
>
> [M.C] has given you a Space Needle in this case. It's left for you to figure the rest out. You have enough to convict. Find him guilty of all counts. Thank you.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice.[20] If, as occurred here, the defendant did not object to the alleged misconduct at trial, he waived any error, unless the behavior is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[21] Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict.[22] 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.[23]

Southard argues that State v. Johnson[24] controls. There, Division Two concluded that the following statements in the prosecutor's closing argument were incurable misconduct: "In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . To be able to find reason to doubt, you have to fill in the blank, that's your job."[25] The court held that this argument

[20] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

[21] State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

[22] State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

[23] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

[24] 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

misstated the burden of proof and made it appear that the jury had to convict unless it could find a reason not to convict.[26]

The court also addressed a second argument in which the prosecutor described the reasonable doubt standard:

> I like to look at abiding belief and use a puzzle to analogize that. You start putting together a puzzle and putting together a few pieces, and you get one part solved. So with this one piece, you probably recognize there's a freeway sign. You can see I–5. You can see the word "Portland" from looking in the background. You may or may not be able to see which city that is, but it is probably near one that is on the I–5 corridor.
>
> You add another piece of the puzzle, and suddenly you have a narrower view. It has to be a city that has Mount Rainier in the background. You can see it. It can still be Seattle or Tacoma, or if you weren't familiar, you might think that mountain might be Mt. Hood, and it could be Portland.
>
> You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.[27]

Secondary to its concerns about the improper fill-in-the-blank argument misstating the jury's responsibility, the court noted that

> discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so.[28]

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[25] Johnson, 158 Wn. App. at 682.

[26] Johnson, 158 Wn. App. at 685.

[27] Johnson, 158 Wn. App. at 682.

[28] Johnson, 158 Wn. App. at 685.

The State relies on a different recent Division Two opinion, State v. Curtiss.[29] In Curtiss, the prosecutor described the burden of proof as follows:

> [R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.[30]

Taking that statement in context of the entire closing argument, the court determined that the analogy did not shift the burden of proof, but merely explained the relationship between direct and circumstantial evidence and reasonable doubt.[31]

The context of the puzzle analogy in the prosecutor's entire argument distinguishes Curtiss from Johnson. In Johnson, the analogy followed an improper fill-in-the-blank argument that misstated the reasonable doubt standard. The prosecutor made no similar argument in Curtiss. In Johnson, the defendant demonstrated incurable prejudice from the prosecutor's argument, viewed in its entirety. Here, as in Curtiss, Southard fails to show prejudice. He also fails to demonstrate that any alleged error could not have been neutralized by a curative instruction. Accordingly, Southard fails to establish that he is entitled to relief based upon prosecutorial misconduct.

Community Custody

Finally, Southard argues that the court lacked authority to prohibit him from possessing "any item designated or used to entertain, attract or lure children,

[29] 161 Wn. App. 673, 700, 250 P.3d 496, review denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011).

[30] Curtiss, 161 Wn. App. at 700.

[31] Curtiss, 161 Wn. App. at 700.

prohibiting him from accessing the Internet or possessing computers or any computer parts or peripherals, and requiring him to engage in substance abuse treatment and urinalysis testing." This court reviews de novo whether the trial court had statutory authority to impose a challenged community custody condition.[32] If a statute authorizes the condition, we review the sentencing court's decision to impose the condition for an abuse of discretion.[33]

RCW 9.94A.703 sets out mandatory, waivable, and discretionary community custody conditions that the court may impose. Any conditions not expressly authorized by statute must be crime-related.[34] RCW 9.94A.030(10) defines a "crime-related prohibition" as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." The State concedes that the Internet and "items designed to lure" restrictions are not crime-related and should be stricken. State v. O'Cain[35] prohibits a court from imposing Internet restrictions where there is no evidence that the Internet contributed to the crime.[36] Similarly, while the court imposed the restriction against items designed to lure a child, the restriction is not "crime-related" because Southard used no such method with M.C. Therefore, we accept both concessions.

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[32] State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

[33] State v. Autrey, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006).

[34] RCW 9.94A.703(3)(f).

[35] 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

[36] O'Cain does not preclude Internet restrictions if recommended by a sexual deviancy evaluation or as part of sex offender treatment. Therefore, the condition could be imposed later, if appropriate for Southard's treatment.

Southard also challenges the community custody condition requiring him to seek substance abuse treatment. Before ordering a defendant to participate in crime-related substance abuse treatment as a condition of community custody, a trial court must make an express finding that the offender has a chemical dependency that contributed to the offense for which the defendant is being sentenced.[37] The court here made no such finding and the record reflects no chemical dependency issue to justify the requirement.

The State argues that this condition was not imposed as a crime-related condition but as part of a rehabilitation program or other "affirmative conduct" permitted by RCW 9.94A.704(4). We disagree. While the Department of Corrections may impose additional conditions, these conditions should be based upon an offender's risk of reoffense and the risk to community safety.[38] At oral argument, the State acknowledged that sometimes community custody conditions are included as "boilerplate." That appears to have occurred here, where the record does not justify a substance abuse treatment condition. The condition should be stricken from the terms of community custody.

CONCLUSION

Because the court did not err in its resolution of Southard's discovery motions or evidentiary rulings, and Southard fails to show prejudice resulting from the prosecutor's closing arguments, we affirm all convictions. Because the trial court improperly

[37] RCW 9.94A.607(1).

[38] RCW 9.94A.704(2).

imposed noncrime-related community custody conditions, we remand with instructions to strike the three contested conditions.

Leach, C.J.

WE CONCUR: