IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 67132-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
FOREST E. GILL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 1, 2011
	)	

Lau, J. — A jury convicted Forest Gill of three counts of first degree rape of a child and one count of first degree child molestation. Gill appeals, arguing that numerous instances of prosecutorial misconduct denied him a fair trial and that his counsel was ineffective for failing to object to that alleged misconduct and for opening the door to prejudicial evidence. He also argues that some of his community custody conditions were improperly imposed. We affirm Gill's convictions but remand with instructions to strike the challenged community custody conditions.

FACTS

The State charged Forest Gill with three counts of first degree rape of a child

and one count of first degree child molestation based on allegations of improper sexual contact with his wife's daughter, SH. At trial, witnesses testified that SH lived with her father and stepmother but had visitation with her mother. On at least four occasions, Gill had sexual contact with SH. The jury convicted Gill as charged. The court sentenced Gill to 381 months to life on the three rape counts and 198 months to life on the child molestation count. The court also imposed community custody and numerous community custody conditions.

Gill appeals, arguing that the State committed multiple instances of misconduct, that his trial counsel was ineffective, and that several of his community custody conditions are improper.

ANALYSIS

Prosecutorial Misconduct

Gill first argues that the State committed numerous instances of prosecutorial misconduct in its closing and rebuttal arguments. Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). 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. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). During closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing

inferences about credibility based on evidence in the record. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Gill first argues that the State misstated the burden of proof by arguing that the jury could not consider the lack of evidence. But read in context, the State's statements were a permissible argument tied directly to the court's instructions. The State did not argue that the jury could not consider the lack of evidence. Rather, it argued that the jury cannot consider evidence that was never presented. The State argued:

> And Jury Instruction No. 1, the third paragraph, tells you that the evidence that you are to consider in this case is the testimony presented—that means those witnesses that took an oath to swear to tell the truth, that testified—any exhibits that were marked, or any stipulations. I'm sorry. Any exhibits that were marked and admitted. There were no exhibits that were admitted. And there are no stipulations between the parties. So, my entire jury selection, the time spent talking to you about evidence, was because the only evidence that you have in this case to consider came from that chair. That's it. It tells you, if evidence was not admitted, it wasn't presented, then you can't consider it. So, there's all sorts of things that we'd like to be presented that, for whatever reason, weren't presented. But, the instructions tell you, you cannot consider that in reaching your conclusion. You can only consider what was testified to in this case. That's it.

Report of Proceedings (Nov. 12, 2009) (RP) at 201-02. The State went on to emphasize that the attorney's arguments were not evidence: "What Mr. Shaw says about that is not evidence. What I say about that is not evidence." Read in context, the State argued that the jury could not

consider evidence that was never presented and that attorneys' arguments were not evidence. The State did not argue that the jury could not consider the lack of evidence in terms of finding Gill not guilty. Rather, it clarified its argument on rebuttal by reading a portion of instruction 2 to the jury and explicitly telling the jury it could consider the lack of evidence.

> Well, read Jury Instruction No. 2 and it tells you—I'll read exactly what Mr. Shaw read to you, at the very bottom: "If such a doubt as would exist in the mind of a reasonable person, after fully, fairly, and carefully considering all of the evidence or lack of evidence." Okay? Well, what evidence are you allowed to consider? Go back to Jury Instruction No. 1. The only evidence that you can consider during your deliberations consists of the testimony, the exhibits, and the stipulations. You don't get a free pass to go back there, like Mr. Shaw suggests, and start speculating, well, where was the neighbor? Where was this person? Where was that person? You don't get to speculate. You don't get to let that influence you. You consider Jury Instruction No. 1, the system presented. You don't get to go back there and say, "I would like towels." Well, we all like towels with evidence. Why don't we have towels with evidence? How about, it took her four years to tell anybody what happened. Do you really think this evidence is still existing on a towel in the basement of somebody's house? That's not how it works. That's not what the law tells you.

RP at 226-27. Thus, the State argued that while the jury can consider the evidence or lack of evidence, it is not allowed to speculate about evidence never presented. This argument was not misconduct.

And Gill fails to establish that the alleged misconduct was not curable by an instruction. Had Gill objected, the court could have remedied any alleged misstatement of the law by instructing the jury to reread instructions 1 and 2. The court instructed the

jury:

> The evidence that you are to consider during your deliberation consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.
>
> . . . .
>
> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law . . . [but] the lawyer's statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

Instruction 1. And in instruction 2, the court defined the reasonable doubt standard, saying, "It is such a doubt as would exist in the mind of a reasonable person, after fully, fairly, and carefully considering all of the evidence or lack of evidence." We presume that juries follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 7, 873 P.2d 514 (1994). Gill has failed to establish that the allegedly improper comments were "so flagrant and ill intentioned" that any "resulting prejudice . . . could not have been neutralized by an admonition to the jury." Russell, 125 Wn.2d at 86.

Gill next argues that the State misstated the burden of proof by telling the jury that they could find the defendant guilty even if they wanted more evidence, that Gill was not entitled to the benefit of the doubt, and that the jury only had to have a belief that this incident happened. Again, Gill mischaracterizes the State's argument. The State argued:

> Finally, I want to talk about reasonable doubt, because Mr. Shaw suggests that there's no way that the testimony you heard establishes each of these elements beyond a reasonable doubt. Mr. Shaw read you the third

> paragraph on Instruction 2, but Mr. Shaw forgot to read you, apparently, the last line of that instruction. I wonder why he did that. Let's read it: "If, from such consideration, you have an abiding belief in the truth of the charge"—I'll read it again: "You have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."
>
> What does that mean? Abiding belief means you have a lasting belief in the truth of these charges. Right? That's what it means, if you go back in there and you say, "You know what? I believe this happened. I believe the evidence presented gives me a lasting belief that this happened. Yeah, I would like more evidence." Of course you would like more evidence. But, if you can say that to yourself, "I have a belief that this happened, I have an abiding belief in the truth of the charge," then I carried the burden in this case, the State has carried the burden. If you go back there and you say, "I believe what she told me. I believe that this happened." And then you say, "but." Okay, ask yourselves, if you have reached the point before you say "but," then you have an abiding belief. Now, it's okay to say "but," because we all would like more evidence in any criminal case. But, if you get to the point where you say, "I believe that this happened, I believe what she told me," then you are satisfied beyond a reasonable doubt. That's the instruction. That's the law.
>
> So, I'm asking you to consider all the instructions, not the parts that Mr. Shaw points out, not the parts that I point out. Read them as a whole. And, as a whole, you will find, if you have an abiding belief in the truth of these charges, in your mind you have a lasting belief that this happened in the way that they say it happened, then he's guilty.

RP at 229-30. This argument correctly states the burden of proof. The State's argument is directly tied to the court's instructions and relies on instruction 2's "abiding belief" language. That language is taken directly from 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 14 (3d ed. 2008) (WPIC) and has been expressly approved in numerous appellate decisions. See State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995); State v. Lane, 56 Wn. App. 286, 299–301, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988) (cited with approval in Pirtle); State v. Price, 33 Wn. App. 472, 655 P.2d 1191 (1982).

The State told the jury not that they must simply believe SH's testimony, but they must have a lasting and abiding belief. The State correctly told the jurors that they may like more evidence, but if they do not need it to have an abiding belief in the truth of the charge, then the State has proved the case beyond a reasonable doubt. Moreover, the State tethered this argument to the jury instructions: "So, I'm asking you to consider all the instructions, not the parts that Mr. Shaw points out, not the parts that I point out. Read them as a whole." RP at 230. The State's argument is properly based on the jury instruction. There was no misconduct.

Gill next argues that the State impermissibly commented on his decision not to testify, thus violating his rights under the Fifth Amendment by stating that the evidence was "unrefuted" and that the jury had no "reason to doubt" SH's allegations. RP at 202; 204; 206; 212; 213. A prosecutor violates a defendant's right not to testify if he or she makes a statement "'of such character that the jury would "naturally and necessarily accept it as a comment on the defendant's failure to testify."'" State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (quoting State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987)). But a prosecutor "may say that certain testimony is undenied as long as he or she does not refer to the person who could have denied it." Fiallo-Lopez, 78 Wn. App. at 729. A prosecutor may also comment that evidence is undisputed when the comments are so brief and subtle that they do not emphasize the defendant's testimonial silence. Ramirez, 49 Wn. App. at 336. And remarks that suggest the defendant has a duty to call witnesses, while improper, do not bear directly on the defendant's decision not to testify and are not incurable. State v. French, 101

Wn. App. 380, 389, 4 P.3d 857 (2000).

The record shows that the State did not directly comment on Gill's decision not to testify, did not indicate that Gill was the only person who could rebut the State's evidence, and did not identify witnesses Gill should have called to rebut the State's evidence. The State's remarks merely underscored the lack of any evidence to rebut the State's case, similar to remarks held not to warrant a new trial in State v. Ashby, 77 Wn.2d 33, 459 P.2d 403 (1969). In that case, the defendant argued that the following remarks by the State were certain to direct the jury's attention to the defendant's silence:

> "So I say it is not disputed that he sold those articles to the defendant, Mr. Ashby. Members of the jury, that testimony also is undisputed. Consider it just for a few moments. Has anyone disputed that particular evidence that those articles were sold to Mr. Ashby?"

Ashby, 77 Wn.2d at 37. The Ashby court affirmed the conviction after concluding these remarks did not necessarily draw the jury's attention to the fact that the defendant did not testify. The court stated:

> "Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his . . . ."

Ashby, 77 Wn.2d at 38 (quoting State v. Litzenberger, 140 Wash. 308, 311, 248 P. 799 (1926)).

Similarly, the State here did not state that Gill was the person who was in a position to refute the SH's testimony. And Gill was not the only witness who could have refuted the SH's testimony—witnesses could have testified that Gill or SH were not together at the time of the abuse.

Moreover, the State's argument primarily emphasized the consistency between SH's disclosures of the abuse and the absence of effective cross-examination that would have undermined that testimony or exposed inconsistencies. As in Ashby, we conclude the State properly commented on the lack of rebuttal evidence.

Relying on State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), Gill next argues that the State committed misconduct by arguing that the jury had three choices in evaluating SH's testimony. The State argued:

> I'm going to suggest that, really, you have three options here in evaluating [SH]'s testimony, in light of the other three witnesses the State put on and the two witnesses that the defense put on.
>
> The first one is that she was coached to say these things. Right? That's an option. That's a possibility. . . .
>
> . . . .
>
> Option No. 2: [SH] is making this entire thing up herself. That's a possibility. We talked about it in jury selection quite a bit. Kids can make stuff up. Ask yourself, what evidence did you hear that she made this up? . . .
>
> . . . .
>
> So, Option No. 3 is: She's telling you the truth. She's telling you the truth. Those are the three options. Maybe Mr. Shaw can come up with another one, but I can only come up with three options here.

RP at 203-06.

This argument did not constitute misconduct. It is improper for the State to argue that in order to acquit, a defendant or to believe a defendant's testimony the jury must find that the State's witnesses are lying. See State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991). Such an argument is improper because it misstates the jury's duty, since it need only find that the State has failed to prove all the elements beyond a reasonable doubt. Barrow, 60 Wn. App. at 875-76.

In Fleming, the State told the jury

that "for you to find the defendants . . . not guilty of the crime of rape in the second degree, . . . you would have to find either that [the victim] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom." Fleming, 83 Wn. App. at 213 (italicization omitted). On appeal, we held that because the argument misstated the law and misrepresented the role of the jury and the burden of proof, "it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." Fleming, 83 Wn. App. at 213.

Here, unlike in Fleming, the State unequivocally told the jury during closing argument that the State had the burden to prove each element of the charged crime beyond a reasonable doubt.

> The Judge gave you the to convict instruction, and there's four counts. And as long as each of those elements are met on each count, then the State has met its burden and Mr. Gill is guilty. And if there is insufficient evidence for any of the four elements on each count, then he's not guilty.

RP at 212 (emphasis added). The State again emphasized its burden and the reasonable doubt standard in rebuttal, stating:

> Finally, I want to talk about reasonable doubt, because Mr. Shaw suggests that there's no way that the testimony you heard establishes each of these elements beyond a reasonable doubt. Mr. Shaw read you the third paragraph on Instruction 2, but Mr. Shaw forgot to read you, apparently, the last line of that instruction. I wonder why he did that. Let's read it: "If, from such consideration, you have an abiding belief in the truth of the charge"—I'll read it again: "You have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."

RP at 229. And unlike in Fleming, the State did not restrict the jury to the "options" that the witness was either lying or mistaken, but acknowledged that there could be other explanations: "Those are the three

options. Maybe Mr. Shaw can come up with another one, but I can only come up with three options here." RP at 206. Thus, the State's argument did not misstate the law or shift the burden of proof, but rather provided an analytical framework designed to help the jury evaluate the evidence. Such argument is not improper and is specifically endorsed in WPIC 1.02 and the court's corresponding instruction to the jury: "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law."

WPIC 1.02.

Furthermore, "[w]here, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." Wright, 76 Wn. App. at 825 (footnote omitted). The Wright court so held because the State's argument that "the jury would need to believe that the State's witnesses were mistaken" did not foreclose the possibility that the testimony was "'incorrect . . . without any deliberate misrepresentation. . . . '" Wright, 76 Wn. App. at 824 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991)). Likewise here, the State's remarks merely pointed out that Gill's general denial defense and testimony from the State's witnesses could not both be correct. The State did not tell the jury to acquit if they did not believe the State's witnesses; it told the jury to acquit if it didn't meet their burden. The State's argument was not improper. Finally, Gill has not demonstrated that the alleged error could not have been cured with an instruction. The trial court could have reminded the jury about the burden of

proof instruction. If defense counsel fails to request a curative instruction, we are not required to reverse.

Gill next argues that the State committed misconduct by sarcastically referring to ordeals that the victim went through as "fun." Gill argues that these comments were intended to create sympathy for the victim in the eyes of the jury. Gill objected to these comments below. Read in context, these statements were not an improper appeal to the jury's sympathies but rather were intended to highlight SH's consistent disclosures and her lack of a motive to lie. The State detailed how SH had to disclose the abuse to multiple people, was physically examined by a doctor, was interviewed by the parties' attorneys, and had to testify at trial. After recounting each of these instances, the State made a comment to the effect "that sounds like fun." RP at 207. The State then summed up his argument, stating, "Would she go through all of that if this wasn't the truth? What does your common sense tell you? Absolutely not, not when there are much more painless ways to achieve whatever it is that they're going to say she was trying to achieve, right?" RP at 208. This argument was not an improper appeal to the jury's sympathy but rather a permissible argument that SH's testimony was credible and she had no motive to lie.

Ineffective Assistance

Gill next argues that his counsel was ineffective for failing to object to the alleged instances of misconduct. To prevail on a claim of ineffective assistance, a 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). Counsel's performance is deficient if it fell below an

objective standard of reasonableness. Stenson, 132 Wn.2d 668. Our scrutiny of defense counsel's performance is highly deferential, and it employs a strong presumption of reasonableness. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). "Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained." State v. Fortun–Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697. Here, because no misconduct occurred, Gill cannot show that an objection would have been sustained. Accordingly, this ineffective assistance claim fails.

Gill also argues that his counsel was constitutionally ineffective by opening the door to testimony regarding past improper contact between Gill and SH. The State counters that counsel's performance was not deficient and that Gill cannot show prejudice. Gill does not respond to this argument.

During cross-examination, Gill asked the following question to SH's father, Albert Rodrigues: "[S]he never indicated at any time, to your knowledge, until around Christmas time of 2008, that Forest Gill was not treating her properly, correct?" RP at 139. Rodrigues responded, "Um, to me, no, she hasn't." RP at 139. On redirect examination, the State asked, "Were there ever any issues between her and Mr. Gill prior to—" to which Rodrigues

responded, "No. Oh, a long time ago it was brought up, but not to me. It was to [SH]'s grandmother." RP at 140. Defense counsel objected, arguing that under ER 403, the testimony about past allegations of abuse was more prejudicial than probative. The court allowed the testimony apparently on the grounds that Gill's counsel had opened the door. On redirect, Rodrigues then testified that he brought SH to "the advocacy building" as part of an investigation of "sexual abuse." RP at 147-48. On re-cross-examination, the following exchange occurred:

> [DEFENSE COUNSEL]: So, the investigation went nowhere, right?
> [RODRIGUES]: Yep.
> Q: And, if you believed that Dawn and anyone hanging with Dawn, namely, Forest, was a danger to your daughter, [SH], you wouldn't let her visit, correct?
>
> A: Yeah.
> Q: Because you love her and you want to protect her; is that accurate?
> A: Yep.

RP at 147-48.

Gill contends that his counsel's question opening the door to this testimony constitutes deficient performance that denied him a fair trial.[1] But Gill cannot establish prejudice under the second prong of the Strickland test given the nature of the testimony and the other evidence at trial. First, Rodrigues testified that the investigation went nowhere and that he would have intervened if he thought anyone was a danger to SH. Second, SH's own testimony of multiple incidents of improper

[1] Gill also argues that his counsel was deficient because he was unaware of the prior allegations. But our review of the record indicates that defense counsel was familiar with the allegations but did not think his question would open the door to testimony about them.

touching was unrebutted. Third, SH made consistent disclosures to several people. Pediatric nurse Michelle Breland testified that SH told her that Gill had caused her pain "a couple times when he tried to put his private in mine." RP at 166. And SH's stepmother, Angela Cayo, testified that SH disclosed to her daughter that Gill had been abusing her. Given that Rodrigues testified that nothing came of the investigation and SH's unrebutted testimony was supported by that of Breland and Cayo, Gill has failed to establish a reasonable probability that the outcome of the trial would have been different absent counsel's allegedly deficient performance. Thomas, 109 Wn.2d at 226.

Community Custody Conditions

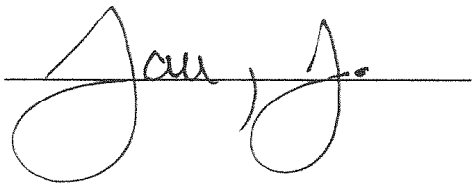
Gill next argues that a number of the community custody conditions were improper. Gill first maintains that condition 14,[2] which prohibits access to pornographic material, is constitutionally deficient because "it fails to define the prohibited conduct sufficiently and fails to provide ascertainable standards to prohibit arbitrary or discriminatory enforcement." Appellant's Br. at 53. The State concedes "that condition number 14 . . . is unconstitutionally vague per State v. Bahl, 164 Wn.2d 739, [ ] 756-57, 93 P.3d 678 (2008)." Resp't's Br. at 31. We accept the State's concession of error.

Gill next challenges conditions 24, 26, and 27 on the grounds that they are not

[2] Condition 14 provides in full: "Do not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material."

crime related as required by former RCW 9.94A.700(5) (2008). Condition 24 provides, "You shall not have access to the Internet without childblocks in place," while conditions 26 and 27 require chemical dependency and mental health evaluations, respectively. The State concedes that these conditions are not crime related but maintains that the conditions "can be imposed, if necessary, as part of defendant's sex offender treatment" if recommended by the sexual deviancy treatment provider. Resp't's Br. at 31. But Gill does not challenge the requirement that he complete a sexual deviancy evaluation and follow all treatment recommendations. We agree with Gill that these conditions constitute prohibitions that can be justified only if they are directly related to the circumstances of his offense. See State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008) (concluding that an Internet access restriction in rape case was an improper prohibition because it was not crime related).

We affirm Gill's convictions but remand to the trial court to strike conditions 14, 24, 26, and 27.



WE CONCUR: