IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JONAS I. HERNANDEZ, Appellant.	)	DIVISION ONE No. 67174-0-I UNPUBLISHED OPINION FILED: September 24, 2012

Dwyer, J. – In this prosecution for child molestation, the central issue at trial was whether Jonas Hernandez touched the victim for sexual gratification. He appeals his conviction, arguing that the evidence of sexual gratification was insufficient, the prosecutor committed misconduct in closing argument, and he received ineffective assistance of counsel. Because the evidence was sufficient to support an inference of touching for sexual gratification, and because Hernandez's other arguments, including those in his statement of additional grounds for review, lack merit, we affirm.

I

Based on allegations that Hernandez molested 11-year-old J.R., the State charged him with first degree child molestation. The evidence at trial included

the following pertinent facts.

In December 2010, Hernandez lived in a house with his sister Gabriel Cruz and her husband Victor Coronado, their 10-year-old daughter, I.P., and his sister Daniela Cruz. Hernandez shared a bedroom with Daniela and I.P. He slept in a single bed on one side of the room, and I.P. and Daniela slept in a bunk bed on the other side.

On the night of December 11-12, 2010, I.P.'s 11-year-old friend, J.R., stayed overnight at I.P.'s house. J.R. and I.P slept together on the top bunk. J.R. testified that she woke up during the night when someone touched her sweat pants in the area of her vagina. She demonstrated the touch, which the prosecutor described for the record: "you're kind of raising your knuckles up with pulling your fingers together." The court also described the demonstration, stating that J.R. "demonstrated how the defendant rubbed the area with his fingers."

J.R. testified that she pretended to be asleep "after he did it the first time." She wanted "to see if he would do it again, and he kept doing it." She tried "scooting up" toward her pillow and kicking. Each time she did this, the person pretended to be asleep, but eventually started touching her again. After this happened four or five times, J.R. retrieved her cell phone from a bag hanging on the bed post. The phone indicated it was 3:00 a.m. Using the light from her phone, she saw Hernandez standing on the bunk bed ladder and laying across

the bottom end of the bed. J.R. typed messages to I.P. on her phone and tried to wake her. Hernandez eventually got off the ladder and went to his bed. J.R. testified that the touching lasted five to ten minutes.

J.R. told I.P. she wanted to go home. When she got home, she told her parents what had happened. She was shaken and crying. Her parents immediately called the police.

Deputy Nathan Alanis of the Snohomish County Sheriff's Office responded to the call. After speaking with J.R. and her parents, he went next door and spoke with Hernandez. He asked Hernandez what had happened the night before. Hernandez said he stepped on the bunk bed ladder to check on his niece while she was sleeping. Deputy Alanis asked if anything happened while the girls were sleeping, and Hernandez said that he might have slipped and accidentally touched J.R. Deputy Alanis testified that he had not told Hernandez anything about J.R.'s allegations.

Hernandez testified that he and Daniela routinely checked on I.P. at night to make sure she was covered up by her blanket. On the evening in question, Daniela asked Hernandez to check on I.P. and J.R. He stood on the ladder and saw a "bump" on the bed. He was not sure whether it was a blanket or a person. As he tried to "sort out the mess" and adjusted the blankets, he saw the light of a cell phone. He thought that I.P. was awake, so he climbed down the ladder and went to bed.

According to Hernandez, Deputy Alanis spoke with him the next morning and asked if he knew why he was there. Hernandez said he did not know why. Deputy Alanis eventually told Hernandez that he was being accused of touching J.R. Hernandez said he had not touched anyone and only tried to put covers over his niece. The deputy kept asking why J.R. was accusing him of touching her. Hernandez said, "Well, maybe by accident I did touch her."

At the close of the State's case, the defense moved to dismiss on the ground that the State had failed to prove that any touching was for sexual gratification. The court denied the motion and the jury convicted Hernandez as charged.

Defense counsel moved to set aside the verdict, arguing there was insufficient evidence of touching for sexual gratification. Counsel argued that a touching over the clothes was insufficient, especially when there was evidence that Hernandez had a caretaking role. The court denied the motion, stating:

> I think on balance what is presented is a jury issue. And the jury spoke to that issue. If I were to view the evidence in a light most favorable to the defense, I would, quite frankly, grant the motion for the reasons that are set forth in the memorandum submitted by [Defense counsel]. . . .
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> But that's not the standard to be applied on consideration of a motion to dismiss, and I have to look at the evidence in the light most favorable to the State, and that calls for the opposite conclusion. I think there is enough evidence here to support the jury's verdict. In cases where we only have a single episode of touching, the evidence of intent is often gleaned from the touch itself combined with all of the surrounding circumstances. There is enough here, I think, for the jury to find that the touching occurred

> and was for purposes of sexual gratification. In addition to the fact that it occurred late at night; in a dark room; by a defendant who was, if not intoxicated, at least unaccustomed to drinking and after a night of drinking in celebration of his birthday. That coupled with the testimony of [J.R.], I think, is sufficient to support the jury's verdict.
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> And with respect to [J.R.], I think at the heart of the State's case was obviously the testimony of the child witness. And in [J.R.]'s case, she was, I thought, exceptionally credible for children of that age. She was descriptive as to what happened, her accounts over numerous interviews were generally consistent, perhaps with the sole exception of omitting the mention of touching of a thigh. She was clear as to what had happened and where she was touched. She clearly testified, although she spelled out the word, that she was touched between her legs on her vagina. And in observing her testimony, she did not describe this as a fleeting touch or what might have been described as an accident or interpreted as an accident. She demonstrated how the defendant *rubbed the area with his fingers*, *and I think that testimony was particularly persuasive*. So, on balance, I will deny the motion.

(Emphasis added.)

The court also expressly rejected defense counsel's reliance on State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), stating:

> With respect to the Powell case, . . . the only thing really in common here is that the touching was over the victim's clothing. Unlike Powell, the defendant here, I don't believe, was in a caretaking function in the context of being someone known to the victim and spending a lot of time. In Powell I think the defendant was referred to as an honorary uncle, and obviously there was a relationship between the victim and the defendant there.
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> Here there was no relationship. The defendant, by the accounts presented by the defense, was asked to check on his niece and, in doing so, attempted to rearrange the blankets. That doesn't itself establish a caretaking relationship between the two.
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> Here the victim is clearly able to describe how she had been touched. The touch was not, in my view, a fleeting, one-time, potentially accidental touch. And the touch, as noted, was

> specifically of the victim's primary erogenous area. So it wasn't as ambiguous as a touch of a leg or some other part of the body might have been.
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> So, for those reasons, I think the case is distinguishable from Powell.

Hernandez appeals.

II

Hernandez contends, as he did in his motion to arrest judgment below, that the evidence was insufficient to prove he had sexual contact with J.R. We disagree.

A judgment may be arrested when there is insufficient proof of a material element of the crime. CrR 7.4(a). Evidence is sufficient to support a guilty verdict if, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Longshore, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). 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). We defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). We review a trial court's decision denying a motion for arrest of judgment de novo. State v. Ceglowski, 103 Wn. App. 346, 349, 12 P.3d 160 (2000).

To convict Hernandez of first degree child molestation, the State had to

prove that he had "sexual contact" with J.R. RCW 9A.44.083(1). Sexual contact is defined by RCW 9A.44.010(2) as "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." Touching of a child's intimate parts supports an inference of touching for sexual gratification where the defendant is an unrelated adult with no caretaking function. Powell, 62 Wn. App. at 917. If the touching is through clothing, however, there must be additional evidence of sexual gratification. Powell, 62 Wn. App. at 917. In deciding whether the State has proven sexual contact, we consider the totality of the circumstances. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

Hernandez maintains the evidence did not support an inference of sexual gratification and "established only that the touching was inadvertent, equivocal, [and] innocently and reasonably explained." The record belies this claim. J.R. testified that Hernandez repeatedly touched her vaginal area, moving his fingers in a rubbing fashion.[1] When she kicked him and moved away, he pretended to be asleep, but then eventually touched her again. This went on for five to ten minutes. While Hernandez claimed he was performing a caretaking role, any

[1] On direct examination, J.R. testified to multiple touchings over her vaginal area. On redirect examination, she seemed to contradict her earlier testimony, indicating that Hernandez only touched her once. But she later testified that she kept kicking him because she wanted him "to stop touching me." In any event, regardless of whether inconsistencies exist in J.R.'s testimony, we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Corbett, 158 Wn. App. 576, 589, 242 P.3d 52 (2010).

such role was limited to his niece, I.P. The caretaking claim was also at odds with J.R.'s testimony regarding the nature and duration of the touching.

Viewed in a light most favorable to the State, the evidence was sufficient to support an inference that the touching was for sexual gratification. See State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) (defendant rubbed zipper area of boy's pants for 5 to 10 minutes); State v. Whisenhunt, 96 Wn. App. 18, 23, 980 P.2d 232 (1999) (repeated touching of clothing over vaginal area by person without a caretaking role supported inference of sexual gratification); State v. Wilson, 56 Wn. App. 63, 68-69, 782 P.2d 224 (1989) (touching occurred in a place where defendant and victims would not be easily observed and defendant was only partially clothed).

Contrary to Hernandez's assertions, Powell is distinguishable. In that case, the defendant was an honorary uncle known to the victim as "Uncle Harry." Powell, 62 Wn. App. at 916. On one occasion, the defendant hugged the victim around the chest while she sat on his lap. He later touched the front and bottom of her underwear under her skirt when he lifted her off his lap. On another occasion, he touched her thighs on the outside of her clothing. The victim could not describe how he touched her. In finding this evidence insufficient to support an inference of sexual gratification, the Powell court noted that the victim's sitting on the defendant's lap was "not inconsistent with his position as an honorary uncle," Powell, 62 Wn. App. at 916 n. 1, and that the touchings were fleeting

and without a clear purpose. Powell, 62 Wn. App. at 917-18.

Here, by contrast, J.R. testified that Hernandez repeatedly touched her vaginal area, moving his fingers in a rubbing fashion. Significantly, he pretended to be asleep when J.R. kicked him away and persisted in touching her over a five to ten minute period despite her continued kicking. The nature and duration of the touching and the absence of a caretaking role for J.R. distinguish this case from Powell.

Hernandez next claims the prosecutor committed misconduct during several portions of closing argument. Because these claims are raised for the first time on appeal, they are reviewable only if the alleged misconduct was so flagrant and ill intentioned as to be incurable. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). We review a prosecutor's remarks in the context of the total argument, the issues in the case, the evidence, and the court's instructions. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). We afford prosecutors wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Hernandez contends the prosecutor committed misconduct with the following closing arguments:

> And while you're listening to the Defense's version of the events, ask yourself is it consistent with the evidence that has been shown. . . . Because when you hear everything that went in and all of the evidence in this case, *there's only one version of it that's true, and*

> *that version is [J.R.'s]*.
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> . . . .
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> Of course, again she's asking you to think rationally when it's not rational for a 19-year-old to even begin to be rational when he decides to touch the 11-year-old. *Their entire case rests on you accepting their version of the events, not the State's version of the events*.
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> . . . .
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> These witnesses aren't credible. These witnesses are Mr. Hernandez's family. And absolutely they want to help him out. There's no doubt about that. And nobody can fault them for that. But they've been talking. They've talked about how the timeline fits and changed the timeline to make them fit. Mr. Hernandez's sister even talked about how it is that it was essentially her job. And when I said, "It was your job?", she kind of skirted around the issue. *In order for you to accept Defense's version, you have to accept their witnesses' testimony, and the problem is their witnesses' testimony is not credible*.
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> . . . .
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> And then the Defense goes after Deputy Alanis. Deputy Alanis was honest here today, wasn't he, when he talked about what he did. Don't you find him credible? Do you see any reason in the world to believe that Deputy Alanis is not telling the truth? *Because if you accept their version of the events, then Deputy Alanis is just dead wrong*. He told them why he was there. He told Mr. Hernandez exactly why he was there. And Deputy Alanis said he told him why he was there, but he didn't say that he had been accused of touching.

(Emphasis added.) According to Hernandez, these remarks improperly implied that in order to acquit, the jury had to conclude that the State's witnesses were either lying or mistaken. We disagree.

"[I]t 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." State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996)

(emphasis added). When testimony is in direct conflict, however, there is nothing improper about "stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other. This argument is well within the 'wide latitude' afforded to the prosecutor." State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995). Here, the prosecutor never argued that acquittal required the jury to find that the State's witnesses were lying. Instead, he properly argued that there were two conflicting versions of the incident, and only one was credible. See State v. Rafay, Nos. 55217-1-I, 55218-0-I, 57282-2-I, 57283-1-I, 2012 WL 2226989, at *48 (Wash. App. June 18, 2012) (no misconduct where closing arguments "did not expressly contrast an acquittal or finding of not guilty with a jury determination that the State's witnesses were lying" and, when viewed in context, "merely highlighted the obvious fact that the two accounts were fundamentally and obviously *different*"). There was no misconduct.

Hernandez contends the same remarks were improper because they *implied* that the jury had to determine the truth. But the cases he cites involved *express* statements that the jury should "declare the truth." State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010); State v. Walker, 164 Wn. App. 724, 733, 265 P.3d 191 (2011); but see State v. Curtiss, 161 Wn. App. 673, 701-02, 250 P.3d 496, review denied, 172 Wn.2d 1012 (2011) (it is not misconduct to state that a trial's purpose is a search

for truth and justice). No such statements were made by the prosecutor in this case. Rather, the challenged remarks simply addressed conflicts in the evidence and the credibility of the witnesses on those points. This was proper.

Next, Hernandez contends the prosecutor misstated the evidence when he argued as follows:

> And while you're listening to the Defense's version of the events, ask yourself is it consistent with the evidence that has been shown? Did somebody have to think about what it is that they were going to say before they got up here and said it? Did they have to come up with different timelines? Did they have to talk to each other about it? Did they have to come up with some reason why things didn't go down exactly the way that they supposedly did?
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> . . . .
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> [T]hey've been talking. They've talked about how the timeline fits and changed the timeline to make them fit.
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> . . . .
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> The Defense witnesses have talked to each other, they've clearly coordinated with each other, and they've clearly figured out their timelines to make this work.

While it is improper for a prosecutor to mislead a jury by misstating the evidence, State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991), a prosecutor may argue reasonable inferences from the evidence. Hoffman, 116 Wn.2d at 94-95.

The evidence here supported an inference that a defense witness's story might have changed following conversations with another defense witness. Hernandez's sister, Daniela Cruz, and her fiancé Noe Cisneros testified that Cisneros left the house around 2:00 a.m. A week earlier, however, Cisneros told police that he left shortly after 1:00 a.m. On cross-examination, both he and

Daneila conceded they had discussed the events of that night, including the time frames. According to Daniela, they discussed this topic after the police interview: "We have been making comments about that, whether he remembers the times or not." This evidence supports a reasonable inference that the witnesses had coordinated their testimony. The prosecutor's argument was proper.

Hernandez also contends the prosecutor improperly vouched for the credibility of State witnesses when he made the following remarks:

> What reason would [J.R.] have to say this? Why would she say all of this if it wasn't true?
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> . . . .
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> Deputy Alanis was honest here today, wasn't he? Don't you find him credible? Do you see any reason in the world to believe that Deputy Alanis is not telling the truth?

This was not vouching. Prosecutors are allowed to "argue an inference from the evidence, and prejudicial [vouching] will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). The challenged remarks did not convey the prosecutor's personal opinion and were entirely proper.

Finally, Hernandez claims the prosecutor disparaged defense counsel when he argued:

> I'm sure [Defense Counsel] is going to get up here and talk to you about the fact that [J.R.] didn't remember that Mr. Hernandez first touched her on the inside of her leg. Probably because that's not

> exactly the touch she was worried about. She's sitting in a courtroom with a group of adults watching her every move. She's got a judge, she's got a court reporter, she's got a court clerk, *she's got big, scary attorneys,* she's got police officers and she has members of the public in the courtroom. And she's having to talk about what? About someone touching her vagina. She was probably frightened and it was very difficult probably for her to do.

(Emphasis added.) Hernandez argues that the prosecutor "was clearly referring to the defendant's cross-examination of J.R.," and that the remarks disparaged defense counsel. The record does not support this claim. The prosecutor did not reference particular attorneys, but rather referenced all the various court participants in order to illustrate how frightening the courtroom is for a young child and to explain J.R.'s memory lapse. This was proper. State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006) (argument concerning the victim's difficulty testifying in court was proper to the extent it focused on the victim's credibility).

Having concluded that no misconduct occurred, we also reject Hernandez's contentions that cumulative misconduct requires reversal and that his counsel was ineffective for failing to object below.

Hernandez raises additional claims in a Statement of Additional Grounds for Review. These claims are either meritless on their face, based on matters outside the record, addressed in the discussion above, or issues of fact resolved by the jury.

Affirmed.

Dwyer, J.

We concur:

Schindler, J. Grosse, J.