IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICHARD ALLEN RASMUSSEN, Appellant.	)))))))))	No. 67258-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 5, 2012

Schindler, J. — A jury found Richard Allen Rasmussen guilty of two counts of child rape in the first degree. Rasmussen seeks reversal on the grounds that a police detective improperly vouched for the victim's credibility, the trial court erred in denying his motion for a mistrial, and the Deputy Prosecutor committed reversible misconduct during closing argument. We reject these arguments and the argument Rasmussen makes in his statement of additional grounds, and affirm.

FACTS

In 2007, L.R. told the Federal Way police that her father sexually abused her from about 1998 to 2004. But L.R. was not ready to describe the abuse in detail until 2009, when she spoke with Detective Heather Castro. After the interview, the State charged Richard Allen Rasmussen with two counts of first degree child rape.

At trial, L.R. testified that Rasmussen and her mother divorced in 1995, when she was two years old. L.R. and her two brothers continued to live with Rasmussen for several years. L.R. loved her father but was also scared of him at times. On occasion, Rasmussen would get drunk and become sad or angry and tell L.R. how much he hated her mother.

L.R. recalled that Rasmussen began touching her when she was five or six years old. Generally, this occurred when Rasmussen was intoxicated and crying. When L.R. sat next to him, Rasmussen would put his hand underneath her nightgown and touch her private parts. L.R. did not know how to respond and did not want to upset Rasmussen. Rasmussen would tell L.R. that "he created me and that he loved me."

L.R. remembered an incident when she was six or seven years old and in the first grade. One evening, L.R. was home alone and reading a Mary Kate & Ashley Magazine in her bedroom. She heard Rasmussen come home, climb the stairs, and come into her room. Rasmussen was drunk and told L.R. that he loved her and that she reminded him of her mother.

L.R. accompanied Rasmussen to his bedroom, where he removed her nightgown and performed oral sex on her. Rasmussen then removed his pants and put his penis into L.R.'s mouth and into her vagina. After Rasmussen ejaculated, L.R. returned to her room. L.R. did not tell anyone about the incident because she was scared and because Rasmussen told her that he loved her and "it was our secret."

L.R. described another incident that occurred one afternoon when she was seven. Her grandmother was planning to get married and took her two brothers to rent tuxedos. After they left, Rasmussen said he was "going to help [L.R.] be a better daughter" and told her to go to his bedroom. Rasmussen removed his robe and ordered L.R. to perform oral sex on him. He then had her remove her clothes and put her fingers into her vagina. Finally, he had vaginal intercourse with her. When Rasmussen finished, he told L.R. that she was a good daughter and he loved her. L.R. did not think about telling anyone because she did not want to hurt her father and because he had threatened to hurt her mother.

L.R. said similar incidents occurred on numerous occasions and that the abuse stopped when she was about 11 years old. L.R. eventually revealed the sexual abuse to her eighth-grade band teacher. When L.R.'s mother found out about the abuse in 2006, L.R. did not want her to call the police because she "didn't want to let my dad down." L.R. accompanied her mother to the police in 2007 to disclose the abuse, but was not ready to reveal specific details until her interview with Detective Heather Castro on October 21, 2009, when she was 17 years old.

Rasmussen testified that he was moody and loud around his children when he was drinking and that he was not always a model father. But Rasmussen flatly denied having any sexual contact with L.R.

The jury found Rasmussen guilty as charged.

ANALYSIS

Opinion on Witness Credibility

Rasmussen contends the trial court erred in allowing Detective Castro to impermissibly comment on L.R.'s credibility. During Detective Castro's direct testimony, the Deputy Prosecutor asked Detective Castro to describe L.R.'s demeanor when she appeared for the interview in October 2009. Detective Castro described L.R. as very quiet but noted that she became tearful at times and her voice would crack. The court overruled the defense objection and permitted Detective Castro to testify that L.R. "appeared very distressed and upset that she had to speak with me."[1] During cross-examination, the defense questioned Detective Castro about the way the interview was conducted. On redirect, Detective Castro testified that in structuring the interview, she took into consideration the fact that L.R. was "still very upset and scared."

Rasmussen claims that Detective Castro effectively vouched for L.R.'s credibility. Rasmussen argues that Detective Castro's testimony describing L.R. as "upset" and "scared" was an improper opinion that L.R. "was acting like someone who

[1] Q Without telling us anything that [L.R.] said, can you describe for the jury what her demeanor was like when she was talking to you?
A She was very quiet. At times, she got tearful, and her voice would crack a little bit. She's obviously --
[DEFENSE COUNSEL]: Objection. At this point, making a personal opinion.
THE COURT: Overruled.
A She -- may I continue?
THE COURT: Please do.
A She appeared very distressed and upset that she had to speak with me.

had been sexually abused." The case law does not support Rasmussen's argument.

A witness may not express an opinion, either directly or indirectly, about another witness's credibility. See State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). But the trial court has discretion to admit testimony describing a person's demeanor when it is based on factual observations that directly and logically support the witness's conclusion. See, e.g., State v. Stenson, 132 Wn.2d 668, 722, 724, 940 P.2d 1239 (1997) (paramedic's testimony that he was "surprised" at defendant's reaction to wife's death was proper when based on personal observations). When determining the admissibility of demeanor testimony, the court considers several factors, including: " '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.' " State v. Aguirre, 168 Wn.2d 350, 359, 229 P.3d 669 (2010) (quoting State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)[2]). A police officer's improper opinion raises additional concerns because "an officer's testimony often carries a special aura of reliability." Kirkman, 159 Wn.2d at 928.

Our supreme court considered a comparable demeanor argument in Aguirre. In Aguirre, a police officer testified that the rape victim was reserved and reluctant to talk, and seemed upset during her interview. After considering the relevant factors, the court rejected the contention that the officer's testimony improperly vouched for the victim's credibility. See Aguirre, 168 Wn.2d at 360.

[2] (Internal quotation marks and citation omitted.)

Here, as in Aguirre, the challenged testimony did not describe L.R. as a rape victim. Detective Castro's brief characterization of L.R. as upset and scared was based solely on her objective observations of L.R.'s behavior and physical appearance during the interview. Nor did Detective Castro purport to relate L.R.'s demeanor to an assessment of her credibility. Under the circumstances, the testimony did not improperly vouch for L.R.'s credibility. See Aguirre, 168 Wn.2d at 360. The trial court did not abuse its discretion in admitting Detective Castro's testimony.

State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004), cited by Rasmussen, is readily distinguishable. In Barr, a police officer claimed he was trained to recognize when a defendant's statements and body language manifested guilt and offered his opinion that the defendant's behavior indicated deception. Barr, 123 Wn. App. at 382; see also State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (victim advocate's testimony that " 'I felt that this child had been sexually molested by [the defendant]' " was improper opinion). Detective Castro did not imply that she was trained to draw any comparable inferences from L.R.'s demeanor.

Motion for Mistrial

Rasmussen contends the trial court erred in denying his motion for a mistrial. During redirect, the Deputy Prosecutor asked Rebecca Zuckerberg, L.R.'s mother, to

explain what she meant when she described L.R. as "anxious" to talk about the abuse with her.

> [L.R.] has told me that she understands that this is a very painful thing for me to hear. And she has also told me that the reason she never said anything was because she was told that if she did, that I would get hurt.

The trial court sustained defense counsel's objection that the testimony was nonresponsive, granted the motion to strike, and instructed the jury to disregard the testimony. Defense counsel later moved for a mistrial, arguing the curative instruction was insufficient to cure the prejudice. The court denied the motion.

Rasmussen contends that Zuckerberg's comment effectively branded him as a violent person. Because violence was not otherwise an element of the charged offense, he argues the comment was so inherently prejudicial that the curative instruction was insufficient to preserve his right to a fair trial.

We review the trial court's decision on a motion for a mistrial for an abuse of discretion. State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). The trial court's decision to deny a motion for a mistrial "will be overturned only when there is a 'substantial likelihood' the prejudice affected the jury's verdict." State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)). Determining whether a trial irregularity is so prejudicial as to warrant a mistrial depends on (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the

jury to disregard it. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

Zuckerberg's testimony about the alleged threat was nonresponsive, and the trial court properly sustained defense counsel's objection. But the single reference to the threat was general and did not relate to a specific element of the charged offense. There was no suggestion that Rasmussen ever attempted to carry out the threat, and the trial court promptly instructed the jury to disregard the comment.

Moreover, L.R. testified that one of the reasons she delayed in reporting the abuse was Rasmussen's threat to hurt her mother, and defense counsel had a full opportunity to cross-examine L.R. about her reasons for the delayed report. We presume that the jury followed the court's instruction to disregard Zuckerberg's testimony and conclude the trial court's curative instruction was sufficient to prevent any unfair prejudice. State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). The court did not abuse its discretion in denying the motion for a mistrial.

Prosecutorial Misconduct

Rasmussen contends the Deputy Prosecutor committed reversible misconduct during closing argument by informing the jury that a reasonable doubt is "a doubt for which a reason exists." He argues the comment improperly shifted the burden of proof by suggesting Rasmussen had to convince the jury there was a reason to find him not guilty.

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). Where, as here, the defendant fails to object, we will not review the alleged error unless the defendant demonstrates the misconduct was "so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Our supreme court has directed trial courts to use 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008) (WPIC) to instruct juries on the burden of proof and the definition of reasonable doubt. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007); see also State v. Castillo, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). The trial court instructed the jury on reasonable doubt using WPIC 4.01:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. 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. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Here, during closing arguments, the Deputy Prosecutor merely paraphrased WPIC 4.01:

> Your jury instructions, ladies and gentlemen, give you your definition of reasonable doubt. But they don't give you a formula for reasonable doubt. Reasonable doubt is a doubt for which a reason exists. It is that sense that if you have an abiding belief in the truth of what [L.R.] told you, then you are satisfied beyond a reasonable doubt.[3]

[3] (Emphasis added.)

Contrary to Rasmussen's assertions, the argument did not distort the presumption of innocence by implying the jury had to find a reason in order to find the defendant not guilty. See State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010) (improper " 'fill-in-the-blank' " argument misstates law on presumption of innocence). Because the argument was properly based on the jury instructions, there was no misconduct. See State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009) (Deputy Prosecutor's statement that " 'reasonable doubt' is one for which a reason exists" was proper and did not minimize or shift the State's burden of proof).

Statement of Additional Grounds for Review

In his statement of additional grounds for review, Rasmussen contends the trial court erred by denying his motion for a new trial. During allocution at the sentencing hearing on June 2, 2011, Rasmussen proceeded to read from a handwritten, 51-page document titled "Sentencing Statement," in which he repeatedly professed his innocence and raised numerous allegations of ineffective assistance of counsel, witness perjury, and prosecutorial misconduct.

After about 40 minutes, when Rasmussen had reached page 12 of the statement, the court interrupted him. After reviewing the document, the court determined that Rasmussen did not intend to address any specific sentencing issues and that he was asking the court to discharge his counsel, appoint new counsel, and

grant him a new trial. The court denied the motion as untimely and without merit.

Under CrR 7.5(b), a motion for a new trial must be served and filed within 10 days of the verdict. Rasmussen's motion was untimely, and he failed to provide either the Deputy Prosecutor or his own counsel with notice. The trial court did not abuse its discretion in denying the motion. See State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

Rasmussen contends the Deputy Prosecutor committed misconduct by harassing his elderly and ailing mother with "trick math questions" during cross-examination. But he does not identify any specific improper questions. Because Rasmussen has failed to identify "the nature and occurrence of [the] alleged errors," we will not consider them. RAP 10.10(c).

Rasmussen contends the trial court erred when it prevented him from testifying about the way that L.R. sat during her testimony. He alleges that throughout her testimony, L.R. sat sideways facing the jury and covered the left side of her face with her hand. When defense counsel asked Rasmussen, "How did you feel looking at her when she sat in that chair sideways?" the trial court sustained the Deputy Prosecutor's objection based on relevance.

Rasmussen claims he was permitted to describe his feelings at other points during his testimony. But the trial court's evidentiary rulings in other contexts are irrelevant. Rasmussen fails to demonstrate that his feelings about L.R.'s posture and

gestures during her testimony were relevant to any disputed issue at trial. The trial court did not abuse its discretion in sustaining the objection. See State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (appellate court reviews evidentiary rulings for an abuse of discretion).

Rasmussen's suggestion that L.R.'s position while testifying violated his right of face-to-face confrontation is also without merit. Article I, section 22 of the Washington constitution does not require literal, " 'eyeball to eyeball confrontation.' " State v. Foster, 81 Wn. App. 444, 459, 915 P.2d 520 (1996) (quoting Commonwealth v. Willis, 716 S.W. 2d 224, 230, 55 USLW 2069 (Ky. 1986)), aff'd, 135 Wn.2d 441, 957 P.2d 712 (1998). L.R. was physically present in the courtroom and subject to cross-examination. The "ability of the trier of fact to see, hear, and assess the credibility of the witness" satisfied Rasmussen's right of confrontation. See Foster, 81 Wn. App. at 461.

Finally, Rasmussen contends he was denied effective assistance of counsel. Rasmussen bears the burden of demonstrating both (1) that defense counsel's representation fell below an objective standard of reasonableness; and (2) resulting prejudice, i.e., a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a "strong presumption" that counsel's performance was reasonable. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). We review ineffective assistance claims de novo. State v. Sutherby, 165

Wn.2d 870, 883, 204 P.3d 916 (2009).

Rasmussen alleges that his trial attorneys failed to (1) present exculpatory evidence, (2) interview and call crucial witnesses, (3) investigate evidence of another suspect, (4) acknowledge the truth of the allegations in his motion for a new trial, (5) assist the trial court in making a legible copy of his 51-page sentencing statement, and (6) challenge the trial court's bail decision. Rasmussen also claims that defense counsel forced him to testify. But these contentions, as well as Rasmussen's allegations that the jury might not have been able to hear all of L.R.'s testimony and that certain jurors may have been biased, all rest on matters outside the record and therefore cannot be addressed on direct appeal. See McFarland, 127 Wn.2d at 337-38.[4]

We affirm.

Schindler, J.

WE CONCUR:

Appelwick, J.

Cox, J.

[4] Rasmussen's remaining allegations are too conclusory to permit appellate review.