IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHNATHAN DANIEL ROSWELL, Appellant.	No. 31242-5-II UNPUBLISHED OPINION

Worswick, A.C.J. – Johnathon Daniel Roswell seeks review of his conviction for one count of third degree child molestation. He contends that the State presented insufficient evidence to sustain his conviction, that the trial judge improperly commented on the evidence, and that the prosecutor committed misconduct during closing argument. We affirm.

Facts

During July 2003, fourteen-year-old A.M. and thirteen-year-old J.C.[1] met nineteen-year-old Roswell at a swimming pool at the Arbor Terrace apartments. Over the course of several weeks the minors, along with Roswell and others, swam, skinny-dipped, listened to music, and drank alcohol. On August 6, Roswell and A.M. French kissed, and Roswell fondled A.M.'s

[1] We use the girls' initials to protect their privacy.

naked breasts. The State charged Roswell with one count of third degree child molestation against A.M. and one count of second degree child molestation against J.C.[2]

A.M.'s Testimony

A.M. testified at trial that she was fourteen years old in July 2003. During that month, A.M. and her friend J.C. would jump the fence at Arbor Terrace apartments to swim at the apartment complex pool almost nightly. The girls would usually swim and use the hot tub and listen to music. After the girls met Roswell, the three would frequently meet and swim at the pool.

A.M. testified that the day she first met Roswell at the pool, she specifically told him that she was fourteen years old and that J.C. was thirteen years old. Roswell told her that he was fifteen and she believed him. A.M. testified that they never discussed their ages after that first day, and A.M. never lied to Roswell about her age or J.C.'s age.

There was no romantic contact between A.M. and Roswell until August 4. On that date, A.M., J.C., Roswell and some other males were at the pool, and they drank some beer. A.M. French kissed Roswell. She could not remember if she was clothed when they kissed, but she knew that she drank quite a few beers and at some point took her clothes off. That night, no other romantic or sexual contact occurred aside from the kiss.

The next evening, A.M. and J.C. arrived at the pool between 10:30 and 11:00 p.m. and Roswell showed up later. A person named Brandon came for an hour or two and when he left, he

[2] At the close of the State's case, the court granted Roswell's motion to dismiss Count II, pertaining to J.C. That ruling is not challenged on appeal.

left a bottle with two-to-three inches of alcohol in it.[3] A.M., J.C., and Roswell drank the contents of the bottle. A.M. became very intoxicated and removed her swimsuit. A.M. believed that Roswell had shorts on when they were in the hot tub, but she could not be certain. While they were in the hot tub, A.M. French kissed Roswell, who then touched A.M.'s naked breasts. Roswell "squish[ed]" A.M.'s breasts together and "ma[de] them talk." 1 Report of Proceedings (RP) at 137. It was at this time that the police arrived.

In response to police questioning, A.M. told Port Orchard police officer David Kaeka that she was fourteen and would be fifteen in September. Roswell was not present when she told Officer Kaeka her age. A.M. did not learn that Roswell was over eighteen until after the police arrived and inquired about their ages.

Officer Kaeka's Testimony

Officer Kaeka testified that on August 6, in the early morning hours, he and Officer Minh Truong responded to a noise complaint at the Arbor Terrace apartments. The officers approached the pool enclosure from different directions. Officer Kaeka walked down the hill overlooking the hot tub. The hot tub's underwater lights were illuminated and enabled Kaeka to observe what was occurring in the tub. The hot tub's lights were the only lights illuminated in the pool area, leaving the rest of the scene in darkness.

Officer Kaeka observed the scene as he walked down the hill and from the bottom of the stairs leading to the pool area. He saw three people in the hot tub, one male and two females, and

[3] Roswell testified that his friend Anthony brought a half-gallon bottle of rum with two-to-three inches of booze left in it. In any event, Roswell's friend provided a large bottle with a significant amount of alcohol left in it, which the girls consumed.

could see that none were wearing tops. The trio in the hot tub did not immediately notice him.

Officer Kaeka saw Roswell and A.M. facing each other and Roswell had his hands on A.M.'s breasts. Kaeka shined his flashlight on Roswell, who slid his hands from A.M.'s breasts down her sides and back. A.M. backed away from Roswell when she realized Officer Kaeka was there. Kaeka observed that Roswell, A.M., and J.C. were completely naked.

Officer Kaeka directed the trio to get out of the hot tub. A.M. asked Roswell for her swim suit, he gave it to her, she put it on, and she got out of the hot tub. Officer Kaeka asked the girls their ages and A.M. said that she was fourteen and J.C. said that she was thirteen. A.M. did not misrepresent her age to Kaeka at any time. When Kaeka asked Roswell his age, Roswell said he was eighteen but his identification card showed that he was actually nineteen.

Roswell's Testimony

Roswell testified that his friend Anthony, who was twenty or twenty-one, introduced him to A.M. and J.C. at the apartment pool. Roswell stated that he asked the girls their ages the first night he met them, but there was "really no answer at first." RP at 289. According to Roswell, both A.M. and Anthony later said that the girls were sixteen and fourteen but they did not identify which girl was sixteen. Thereafter, Roswell saw A.M. and J.C. at the pool four or five times a week for the next two or three weeks.

Several days after meeting the girls, Roswell talked with J.C. about the girls' ages. J.C. told Roswell that she was thirteen. Roswell asked her if A.M. was sixteen, and J.C. told him that A.M. was not. He never asked A.M. for clarification. He acknowledged that he was unsure of

and had doubts about A.M.'s age, and he admitted that he did nothing to discover A.M.'s true age. Roswell stated that he knew a lot of thirteen- and fourteen-year-olds from his baby-sitting duties.

The night before Roswell was arrested, he was at the pool with A.M., J.C., and four guys who had arrived later with some beer. Roswell said that he drank less than half a beer, and gave the other half of his beer to J.C. Roswell said that A.M. drank at least four bottles of beer, and that A.M. and J.C. appeared to be intoxicated. He described A.M. as "all over the place drinking everybody's beer." RP at 293.

Roswell stated that after A.M. had been drinking she kept hanging around him and hanging on him, even though he told her that he "wasn't really interested." RP at 294. A.M. always asked Roswell if she could kiss him before she did so. Roswell said that he probably should have told A.M. no.

The night Roswell was arrested, he had agreed to meet the girls at the pool around 11:00 p.m. His friend Anthony, who had been there earlier that evening, returned with a bottle of Gatorade and a half-gallon bottle of rum that still had two or three inches of rum left in it. Roswell had one or two shots, and the other three drank the rest. Anthony left when most of the alcohol was gone.

The girls were skinny dipping when Roswell arrived that night. They put their suits on before they came over to talk to him. They took off their swimsuits again at some point during the evening, and then again about thirty minutes before the police arrived. The last time the girls

came over, Roswell took their swimsuits and "hid them" or "put them away." RP at 297. After they took off their suits, he was "horsing around" with them. RP at 297. A.M. kissed him once or twice in the hot tub. Roswell testified that he did not touch J.C., but he did touch A.M.'s arms, shoulders, and stomach. When asked if he remembered anything that would explain A.M.'s testimony that he was touching her breasts and making them talk, Roswell denied ever touching A.M.'s breasts, but admitted that he liked making "weird voices" to make people laugh.

According to Roswell, he pushed A.M. away when the police arrived because he did not like the officer's bright flashlight shining in his face. Roswell said that A.M. was directly in front of him when the police arrived. He admitted that his hands "could have been" on A.M.'s breasts, but if they were he did not intend for such touching to be sexual. RP at 299. Roswell explained that he was not sure if he touched A.M.'s breasts, but if he did it was to "get her out of the way." RP at 300. Roswell also said that he thought A.M. was sixteen.

Roswell asserted that A.M. always initiated any kissing that he and she engaged in. He conceded that once or twice they French kissed, that she did not force him to kiss her, that he participated in the kissing, and that he and A.M. had kissed right before the police arrived on the night he was arrested. He also claimed that he had his trunks on when the police arrived, but that he had been naked earlier.

Roswell said that he did not see the police officer before the flashlight came on. Roswell said that his hands were on A.M.'s shoulder or a little lower before the flashlight came on. He explained that A.M. was standing up and he was seated, and he had his hands on her shoulders to

keep her from falling on him.

Rebuttal Testimony

In rebuttal, Officer Kaeka testified that Roswell did not appear to be pushing A.M. away when Officer Kaeka first saw them, and there was no outward motion to Roswell's arms. Officer Kaeka watched them for thirty or forty seconds before he shined his flashlight on them. He said that Roswell's hands were on A.M.'s breasts for that entire time, groping and squeezing them. Roswell did not appear to be trying to hold A.M. up, and Roswell was naked when he got out of the tub.

Instructions

After the parties rested, the trial court instructed the jury in part as follows:

> A person commits the crime of child molestation in the third degree when that person has sexual contact with another person who is at least fourteen years old but less than sixteen years old and who is not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.
>
> Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

Clerk's Papers (CP) at 24 (Instruction 5). The court also instructed the jury on Roswell's asserted defense stating in part:

> . . . .
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> It is, however, a defense to the charge of child molestation in the third degree that at the time of the offense the defendant reasonably believed that A.M. was at least sixteen years of age, or was less than thirty-six months younger than the defendant based upon declarations as to age by A.M.
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> . . . .

CP at 26 (Instruction 7).

In closing argument, the State argued that the evidence showed that Roswell fondled

A.M.'s breasts and that such act was sufficient sexual contact to convict him as charged of third degree child molestation. The defense's closing argument acknowledged that the alleged breast fondling was the basis of the State's case, asking the jury to consider "has the State proven beyond a reasonable doubt that there was any touching of [A.M.'s] breasts [by Roswell]?" RP at 381.

Following closing arguments, the jury deliberated. During deliberations, the jury submitted the following inquiry to the court: "Is French Kiss a Sexual Act, Yes or No." CP at 29. Following discussion with counsel, the court responded:

> You have been provided with all the instructions and exhibits in this case. Neither party argued that a French kiss was sexual touching. Sexual or other intimate parts includes, but is not limited to, the genitals, breasts, buttocks, lower abdomen and hips, and also includes the parts of the body in close proximity to the breasts, lower abdomen and hips. The touching may be done over clothing.

CP at 29.

The jury found Roswell guilty of third degree child molestation of A.M. as charged. The trial court sentenced Roswell within the standard range. Roswell appeals.[4]

Discussion

Sufficiency

Roswell contends that the State's evidence was insufficient to convict him of third degree child molestation. He contends that the evidence only showed an inadvertent touching of A.M.'s

[4] Roswell was sentenced on November 21, 2003 and filed a timely appeal. His appeal was subsequently dismissed for abandonment and a mandate issued. Later, Roswell successfully petitioned for recall of the mandate and following completion of briefing his appeal is now before us.

breasts. We disagree.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of evidence is challenged in a criminal case, we must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Credibility determinations are for the trier of fact and are not subject to review. *Thomas*, 150 Wn.2d at 874. We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

To establish that Roswell committed third degree child molestation, the State had to prove:

> (1) That on about August 6, 2003, the defendant had sexual contact with A.M.;
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> (2) That A.M. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
>
> (3) That the defendant was at least forty-eight months older than A.M.; and
>
> (4) That the acts occurred in the State of Washington.

CP at 25 (Instruction 6). *See also* RCW 9A.44.089; 11 Washington Practice: Washington Pattern

Jury Instructions: Criminal 44.25, at 808 (3d ed. 2008) (WPIC). Roswell's insufficiency challenge concerns only the "sexual contact" portion of the first element noted above. "Sexual contact" is defined 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." RCW 9A.44.010(2). Such "intimate parts of a person" can be either clothed or unclothed. *State v. Howe*, 151 Wn. App. 338, 346, 212 P.3d 565 (2009) (citing *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008)).

> Contact is "intimate" within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. Which anatomical areas, *apart from genitalia and breast*, are "intimate" is a question for the trier of fact.

Howe, 151 Wn. App. at 346 (quoting *Jackson*, 145 Wn. App. at 819 (footnotes omitted)) (emphasis added). *See also In re Welfare of Adams*, 24 Wn. App. 517, 519, 601 P.2d 995 (1979) (court may find direct contact with breasts and genitalia to be touching of a sexual or other intimate part as a matter of law).

Roswell points to his own testimony arguing that, if he touched A.M.'s breasts, such contact was inadvertent as he pushed her away when the police arrived. But that contention ignores the testimony of A.M. and Officer Kaeka. A.M. testified that Roswell fondled and squeezed her breasts together while making them "talk." And Officer Kaeka testified that he observed Roswell handle and grope A.M.'s breasts for thirty-to-forty seconds. The jury was entitled to find Roswell's fondling of A.M.'s bare breasts, following the couple's French kiss as

they sat naked facing each other in a hot tub, to be sexual contact. Roswell's assertion of insufficient evidence fails.[5]

Jury's Inquiry

Roswell next raises two arguments based upon the jury's inquiry to the trial court during deliberations. He contends that "if the jury was unanimous regarding the French kiss, there is insufficient evidence that the mouth is an 'other intimate part' within the meaning of the statute" defining sexual contact. Br. of Appellant at 14. He also contends that the trial court's failure to provide a unanimity instruction requires reversal and remand for a new trial. We disagree.

As a threshold matter, Roswell's contentions assume that the jury's question during deliberations transformed his case into a multiple acts case. It did not. This case was not instructed, presented, or argued as a multiple acts case, and, in our view, the evidence presented to the jury regarding the charging period does not suggest multiple acts of sexual contact. A jury inquiry, if properly answered, cannot create an assumption as to the basis for the jury's decision. *See State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached). "'[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.'" *Ng*, 110 Wn.2d at 43 (quoting *State v. Mille*r,

[5] Roswell's reliance upon *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991) is misplaced. In *Powell*, Division Three found that the evidence was insufficient to sustain a conviction for first degree child molestation, where an adult family friend had allegedly inappropriately touched a fourth-grade girl once when he picked her up and again when he tickled her on the thigh while riding in his truck. The touching at issue occurred outside the girl's clothing, it was equivocal, and each incident was subject to innocent explanation. *See Powell*, 62 Wn. App. at 917-18. That is not the case here.

40 Wn. App. 483, 489, 698 P.2d 1123 (1985)). In other words, questions from the jury cannot be used to impeach a verdict. *Ng*, 110 Wn.2d at 43. The jury's inquiry during deliberations did not transform this case into a multiple acts case. Accordingly, inquiries relevant to multiple acts cases, i.e. election, unanimity instruction, etc., do not arise here.

Even if we were to accept Roswell's speculative assertion that the jury may have considered the French kiss a separate sexual contact, a proposition that we reject, such approach would not assist Roswell. Roswell's primary contention is insufficient evidence. Applying the sufficiency standard noted above, there is no lack of relevant evidence regarding the French kiss. It is uncontroverted that A.M. and Roswell engaged in French kissing before police arrived on the night in question.[6] Roswell's assertion of insufficient evidence fails.

Roswell's contention that a unanimity instruction is required would also fail in any event. A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). , *modified on other grounds*, *State v. Kitchen*, 110 Wn.2d 403, 406, 756 P.2d 105 (1988). Thus, where there is evidence of multiple acts, the State must elect the particular criminal act on which it will rely for conviction, or the trial court must instruct the jury that they must unanimously agree that the same underlying criminal act has been proved beyond a reasonable

[6] Roswell's contention of insufficient evidence regarding whether the mouth is an "other intimate part" for purposes of sexual contact misconstrues the proper inquiry. As noted earlier, aside from breasts and genitals, what body parts qualify as intimate for purposes of sexual contact is a jury question in light of the circumstances presented and common sense. *See Howe*, 151 Wn. App. at 346.

doubt. *Petrich*, 101 Wn.2d at 572; *Kitchen*, 110 Wn.2d at 411. But this rule applies only where the State presents evidence of "several distinct acts." *Petrich*, 101 Wn.2d at 571. As noted above, in our view this is not a multiple acts case, and thus the need for an election or a unanimity instruction is not triggered.

But assuming, without holding, that the French kiss here amounted to sexual contact,[7] Roswell's contention that a unanimity instruction was required fails. A unanimity instruction is not necessary where evidence demonstrates a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citing *Petrich*, 101 Wn.2d at 571). To determine whether a continuing course of conduct constitutes a single charged count, we evaluate the facts in a commonsense manner considering (1) the time that elapsed between the criminal acts; and (2) whether the different acts involved the same parties, the same location, and the same ultimate purpose. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). Where considering these

[7] While other jurisdictions have held that a French kiss is sexual contact, *see State v. Stout*, 34 Kan. App. 2d 83, 87-88, 114 P.3d 989 (2005) (collecting "persuasive . . . authorities from other jurisdictions which have recognized that a french kiss is an inherently sexual act generally resulting in sexual excitement and arousal"); *Altman v. State*, 852 So.2d 870, 875-76 (Fla. Dist. Ct. App. 2003) ("an ordinary person of common intelligence would understand that tongue-kissing a minor child is sexual contact"), whether a French kiss alone is a sexual contact appears to be an open question in Washington. In *State v. Allen*, 57 Wn. App. 134, 139, 788 P.2d 1084 (1990), the court seemed to say that kissing, as well as touching between the legs and on the chest, is sexual contact for purposes of proving indecent liberties. But *State v. R.P.*, 122 Wn.2d 735, 736, 862 P.2d 127 (1993), held there was insufficient evidence to convict a junior high school student of sexual contact where he picked up a classmate after a track practice and hugged her, kissed her, and placed a hickey on her neck. As discussed above, we need not reach the matter of whether the French kiss here was sexual contact in order to resolve this case. *See Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 165-66, 795 P.2d 1143 (1990) (a reviewing court is not obliged to decide all the issues raised by the parties, but only those which are determinative).

factors convinces us that the evidence presented shows a continuing course of conduct, a unanimity instruction is not required nor is the State required to make an election. *See Handran*, 113 Wn.2d at 17; *Love*, 80 Wn. App. at 361.

Here, the testimony regarding what transpired on August 6 shows a progression of escalating conduct that became sexually charged at some point in time. On that night Roswell, A.M., and J.C. were drinking together, skinny dipping together, and "horsing around" in the pool and hot tub. As the night progressed, A.M. French kissed Roswell, who responded by fondling A.M.'s breasts, at which point the police arrived. The testimony describes a single escalating course of conduct culminating in the sexual contact--breast fondling. Were we to reach Roswell's asserted unanimity issue, we would hold that under these circumstances no unanimity instruction or election was required.[8]

Affirmative Defense

Roswell next contends that the State failed to disprove his affirmative defense that he reasonably believed A.M. to be at least sixteen years old. Roswell misconstrues the appropriate burdens.

We apply the two-tiered test articulated in *State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996), to evaluate whether the State or a defendant has the ultimate burden of persuasion when a defendant asserts an affirmative defense. *State v. Fredrick*, 123 Wn. App. 347, 353, 97

[8] Moreover, even if the acts were characterized as distinct, the error is harmless if a rational trier of fact could have found each incident proved beyond a reasonable doubt. *Handran*, 113 Wn.2d at 17-18; *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990). As discussed above, the record contains sufficient evidence that on August 6 both the French kiss and the breast fondling occurred while Roswell and A.M. faced each other in the hot tub.

P.3d 47 (2004). First, we determine whether the defense is an element of the crime or whether the defense negates an element of the crime. *Lively*, 130 Wn.2d at 10. If a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a reasonable doubt. *Lively*, 130 Wn.2d at 11. Second, we determine whether the legislature intended, nevertheless, to place the ultimate burden of persuasion on the State to prove the absence of the defense beyond a reasonable doubt. *Lively*, 130 Wn.2d at 11. "*If* the statute does not expressly assign the burden to either the State or the defendant, and provides no indication of the legislature's intent to overrule common law, the statute will be presumed to follow judicial precedent." *Lively*, 130 Wn.2d at 11 (emphasis added).

The defense at issue is found in RCW 9A.44.030, which states in relevant part:

> . . . .
>
> (2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That *it is a defense which the defendant must prove by a preponderance of the evidence* that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.
>
> (3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:
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> . . .
>
> (g) For a defendant charged with child molestation in the third degree, that the victim was at least sixteen, or was less than thirty-six months younger than the defendant;
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> . . . .

RCW 9A.44.030 (emphasis added). The defense turns on whether Roswell had a "reasonable belief" regarding A.M.'s age based on A.M.'s declarations. The *reasonableness of Roswell's belief* regarding A.M.'s age is not an element of the crime of third degree child molestation (see discussion of relevant elements supra), nor does the defense negate an element of the charged crime. Moreover, the legislature expressly placed the burden of proving the defense on the defendant. Accordingly, there is no burden shifting and Roswell caries the burden of persuasion as to his asserted defense.[9]

Roswell points to his own testimony that A.M. told him that she was 16. But A.M.

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[9] *Cf. State v. Patel*, 170 Wn.2d 476, 480, 242 P.3d 856 (2010) (plurality opinion), which explained in an analogous context as follows:

> To prove second degree rape of a child, the State must prove beyond a reasonable doubt that the defendant had "sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). The defendant's intent with respect to the victim's age is not an element of the crime, meaning that the State is not required to prove that the defendant knew the victim was underage. Instead, the statute focuses on the criminal result of the defendant's conduct: sex with an underage partner. While intent with regard to the age of the victim is not an element of the crime, a defendant's knowledge of the victim's age is relevant in that defendants may assert an affirmative defense and prove by a preponderance of the evidence that they reasonably believed the victim was older based on the victim's own declarations. RCW 9A.44.030(2).

Compare also the affirmative defense of "unwitting possession," which is recognized as a defense to the crime of possession of a controlled substance, primarily to ameliorate the harshness of what would otherwise be a strict liability crime. *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981). The availability of the defense does not impermissibly shift the burden of proof because "knowledge" is not an element the State must prove. *See State v. Sanders*, 66 Wn. App. 380, 389-90, 832 P.2d 1326 (1992). Thus, the burden remains on the State to prove the elements of unlawful possession of a controlled substance (the nature of the substance and the fact of possession), and the defendant then properly assumes the burden to prove the affirmative defense of unwitting possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

testified that she told Roswell that she was fourteen, and that she never lied to him about her age. J.C. also testified that she told Roswell that A.M. was not sixteen. It is the jury's exclusive province to decide credibility issues and the weight to be given the evidence. *See Thomas*, 150 Wn.2d at 874-75 (reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence). The jury did so here in rejecting Roswell's proffered defense and we will not disturb that determination.

Judicial Comment on the Evidence

Roswell next contends that the court's additional instruction following a jury question during deliberations was an impermissible comment on the evidence. We disagree.

Article IV, § 16 of our constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted. *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999). To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements. *Elmore*, 139 Wn.2d at 276; *see also State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) (an impermissible comment on the evidence is an indication to the jury of the judge's personal attitudes toward the merits of the cause). A jury instruction, however, is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law. *State v. Johnson*, 152 Wn. App. 924, 935, 219 P.3d 958 (2009)

(citing *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986)); *see also Ciskie*, 110 Wn.2d at 282-83. Moreover, "additional instructions on the law *can* be given during deliberation," and whether to give further instructions in response to a request from a deliberating jury "is within the discretion of the trial court." *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008) (citing CrR 6.15(f); *State v. Brown*, 132 Wn.2d 529, 612, 940 P.2d 546 (1997); and *Ng*, 110 Wn.2d at 42-43).

Here, during deliberations, the jury inquired whether a French kiss was a sexual act. Following discussion with the parties, the trial court gave the following instruction:

> You have been provided with all the instructions and exhibits in this case. Neither party argued that a French kiss was sexual touching. Sexual or other intimate parts includes, but is not limited to, the genitals, breasts, buttocks, lower abdomen and hips, and also includes the parts of the body in close proximity to the breasts, lower abdomen and hips. The touching may be done over clothing.

CP at 29. The first sentence is clearly not a comment on the evidence. The second sentence also is not a comment on the evidence. Though it is a statement about the arguments, it does not indicate the attitude of the court on the merits of the case. The third and fourth sentences are accurate statements of the law and do not comment on the evidence. *See Adams*, 24 Wn. App. at 519-20; *State v. Harstad*, 153 Wn. App. 10, 21-22, 218 P.3d 624 (2009).

Moreover, the trial court also instructed the jury as follows:

> The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

CP at 20. We presume that the jury follows the trial court's instructions. *State v. Sivins*, 138 Wn. App. 52, 61, 155 P.3d 982 (2007). Under these circumstances, we hold that the trial court's additional instruction in response to the jury's inquiry during deliberations was not an improper judicial comment on the evidence.

Prosecutorial Misconduct

Roswell contends that the prosecutor committed misconduct in closing argument by violating the trial court's ruling, by improperly shifting the burden of proof to the defense, and by improperly seeking to evoke bias, sympathy, or passion from the jury. We disagree.

In order to establish prosecutorial misconduct, Roswell must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Carver*, 122 Wn. App. at 306. 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. *Carver*, 122 Wn. App. at 306. In addition, a prosecutor's improper remarks are not grounds for reversal if the defense counsel invited or provoked the comments; they are a pertinent reply to defense counsel's arguments, and are not so prejudicial that a curative instruction would be ineffective. *Carver*, 122 Wn. App. at 306 (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995)). Further, reversal is not required if the error could have been obviated by a curative

instruction that the defense did not request. *Russell*, 125 Wn.2d at 85.

Violation of the Court's Ruling and Burden of Proof

Prior to closing argument and outside the presence of the jury, the court declined the State's request for a "missing witness" instruction, regarding the defense's failure to call as a witness Roswell's friend Anthony.[10] The State informed the court that in closing argument it intended to argue lack of evidence regarding Roswell's asserted defense including lack of a witness to corroborate Roswell's' contention that A.M. had told him that she was sixteen. The State argued that it was "entitled to an argument about the fact that Anthony has not been called to testify." RP at 354. The court responded that such argument was "appropriate, particularly in light of the fact that the Defense has raised an affirmative defense by which they have a burden." RP at 354-55. Roswell then asked the court to not allow the State to argue anything about Anthony. The court responded that it would not preclude a party from arguing about facts that were presented at trial and Anthony had been mentioned during testimony. The court ruled that if the State intended to argue the matter of Anthony's absence it should *raise* the matter in closing rather than wait until rebuttal so that the defense would have a chance to respond. The State sought clarification asking whether the court was prohibiting the State from responding in rebuttal to any argument that the defense might make on the matter, and the court said it was not.

In closing, the State acknowledged that it had the burden of proving all elements of the charged crime beyond a reasonable doubt. The State later argued that there was no corroboration for Roswell's assertion that A.M. told him she was sixteen, and noted "the Defendant has no

[10] Roswell testified that Anthony was present when A.M. told Roswell that she was sixteen.

obligation to disprove the crime, but he does have an obligation to prove his defense." RP at 371. In this context, the State wondered aloud why the defense had not called Anthony as a witness since he was purportedly with Roswell and A.M. when they met and present when A.M. allegedly told Roswell that she was sixteen. The State reiterated, "There's no corroboration, and it's his burden of proof to bring it." RP at 372.

Defense counsel responded in closing argument stating:

> Anthony. Who—where is Anthony? The Defense hasn't brought in Anthony. Does the Defense have an obligation to bring in Anthony? No.
>
> One would imagine that the State of Washington would have the resources to go find Anthony, if the State of Washington wanted Anthony to testify. So please don't be fooled by the State's telling you that it is my obligation, Mr. Roswell's obligation, to bring this Anthony fellow into court. It's not. The State could have done the same thing. It's a non-issue.

RP at 391-92.

In rebuttal the State responded that it had no obligation to produce any evidence in relationship to Roswell's asserted defense and that the burden to prove the affirmative defense fell on the defense.

> The question to ask yourself is, why did he choose, when it's his burden of proof, to not find Anthony and call him to testify in this particular case, when it's his burden? And you would think that Anthony would be a very, very, very crucial witness to the Defense, when your defense is, She told me she was 16 years old, and you tell—and when you testify that Anthony is sitting right there next to you, when she says this.

RP at 405. At this point, defense counsel objected and the court sustained.[11] The State's noted

[11] The grounds for the objection and the reason for sustaining it are not clear.

comments in rebuttal were in response to the defense's assertions during its closing argument and did not violate the trial court's ruling. Moreover, the State did not improperly shift the burden to the defense, but correctly delineated the respective burdens—the State's burden to prove the elements of the crime charged and the defense's burden to prove its asserted affirmative defense.[12] Accordingly, these assertions of misconduct fail.

Appeal to Jury's Passions

Roswell contends that the State's rebuttal argument improperly appealed to the jury's passions. But the State's comments were in reply to defense counsel's closing argument.

Defense counsel began his closing argument by suggesting that Roswell was a victim of the licentious age in which we live, and particularly a victim of A.M.'s wanton conduct.

> [Y]oung people today are living in a very scary world. It's not the world that you grew up in. It's not the world that I grew up in. We have a heightened sense of protecting our children because of things we hear about and things we read. We today raise our young children in a different world. We raise them in a world where a young man, 19 years old, hangs out at a swimming pool, meets a couple of girls. Everyone gets to drinking. The girls peel off their clothes, run around. One of the girls is attracted to him. She's naked. She tells him she's 16, and she starts kissing him. And then it happens again the next night. And she says, Are you going to be back tomorrow? Sure. He comes back tomorrow. Someone else shows up with some alcohol, girls peeling off their clothes again, kissing him again, and he's charged with a crime. He is sitting here. He came into this courtroom charged with two counts of child molestation for that. That's the world our young kids live in today. That's not the world we grew up in.

RP at 379-80. Defense counsel continued, stating:

> [A.M.], nice young lady, perhaps a bit wayward, but that's a judgment, and that's not something I'm going to ask you to consider.

RP at 384. He went on to catalog A.M.'s misbehavior, stating:

[12] Defense counsel acknowledged this burden in closing argument.

> It's not an issue in this case what you think of the way she lives her life. It's not. It's not an issue that she's sneaking out of her house at night, hooking up with her girlfriend, jumping the fence, trespassing, drinking with guys. It's not an issue.

RP at 384. Defense counsel continued to focus on A.M.'s conduct, implying that A.M. was at fault for the crime, depicting her as the instigator and provocateur.

> She liked Mr. Roswell, and she told you that. She kissed him. She liked him. She wanted to be around him. She made sure that he was coming back the next night. Are you coming back? We'll be here. Saw him every night, taking off her clothes in front of him, kissing him without any provocation, a couple times, maybe a few times, maybe open-mouth kissed. She liked Mr. Roswell. It's not a sin. It happens.

RP at 385-86. In rebuttal, the State in part addressed defense counsel's depiction of Roswell as the victim, and defense counsel's focus on A.M.'s conduct.

> We ask you to do a lot, when you come into the courtroom. We've never asked you to abandon your common sense outside the courtroom door. We ask you to look very carefully at the evidence and not let sympathies or biases or prejudices affect you. Mr. Kelly did his very best to try to introduce sympathies and biases and prejudices into your consideration when he went on and on about the different world that these kids live in, how horrible it is that a 19-year-old can't frolic naked with 13- and 14-year olds naked in a public place any more. Darn it, what a terrible place it is we live.
>
> He wants you to feel bad for this Defendant. He wants you to look at these two girls like they're a couple of whores and they got what they deserved—

RP at 408. The defense objected and the court sustained the objection, but the defense did not seek a curative instruction.

The State's noted remarks during rebuttal were a direct reply to defense counsel's arguments. *See Carver*, 122 Wn. App. at 306. Moreover, in context the State's comments were

not so prejudicial that a curative instruction would have been ineffective, and the defense did not seek such an instruction. Under these circumstances we hold that Roswell's assertions of prejudicial misconduct fail.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Hunt, J.

Van Deren, J.