IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK GOSSETT, Appellant.	No. 40845-7-II UNPUBLISHED OPINION

Penoyar, C.J. — Mark Gossett appeals his convictions of two counts of second degree child rape (domestic violence)[1] and two counts of second degree child molestation (domestic violence).[2] He argues that the prosecutor committed misconduct during closing argument by arguing that the case came down to whether the jury believed the alleged victim, AG, and that he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's argument. Gossett also contends that the trial court erred in admitting AG's statements to her "surrogate grandfather" under the excited utterance exception to the hearsay rule. Additionally, he asserts that the community custody condition prohibiting him from possessing or viewing pornographic materials is unconstitutionally vague. Finally, he raises numerous claims in his statement of additional grounds (SAG).[3] Because the community custody condition is unconstitutionally vague, we remand for resentencing. Otherwise, we affirm.

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[1] In violation of RCW 9A.44.076 and RCW 10.99.020(5).

[2] In violation of RCW 9A.44.086 and RCW 10.99.020(5).

[3] RAP 10.10.

FACTS

In June 2000, AG and her biological sister, SG, were placed as foster children in Mark and Linda Gossett's home. In December 2001, the Gossetts adopted the sisters. According to AG, life at the Gossetts' home changed dramatically after the adoption. The Gossetts were strict and used corporal punishment to discipline AG.

In January 2008, after getting into an argument with Linda,[4] AG moved in with Jennifer Myrick, a woman she had met at the Gossetts' church. In June 2008, AG told Myrick and Myrick's best friend, Roberta Vandervort, while she "was very, very upset," that Gossett had sexually abused her and that she "couldn't handle holding the secret any longer." Report of Proceedings (RP) at 121-22. AG told Myrick and Vandervort that the sexual abuse began around the time she was in eighth grade and before she received her orthodontic head gear.

In July 2008, AG met with Thurston County Deputy Sheriff Kurt Rinkel and told him that Gossett began touching her in eighth grade. AG turned 14 in November of her eighth grade year. AG also told Sergeant Evans[5], on two occasions, that the sexual abuse started when she was 14 years old. On November 20, 2008, the State charged Gossett with two counts of second degree child rape (domestic violence) and two counts of second degree child molestation (domestic violence).[6]

[4] This opinion refers to Linda Gossett by her first name and Mark Gossett as "Gossett" to avoid confusion. We intend no disrespect.

[5] Officer Evans's first name is not in the record.

[6] The State later amended the information to charge Gossett with one count of intimidating a current or prospective witness (domestic violence), in violation of RCW 9A.72.110(1)(a) and RCW 10.99.020(5). The trial court severed the charge from the information.

At trial, David Glidewell, AG's "surrogate grandfather," testified that in June 2008, AG told him, while she was "[s]ad, nervous, [and] almost in tears," that she had left home because Gossett had sexually assaulted her "and gotten into bed with her." RP at 207, 220-21. Glidewell also testified that AG "mentioned that it was non-penetrating and that she got knocked off on the floor." RP at 222. Over defense counsel's objection, the trial court admitted AG's statements under the excited utterance exception to the hearsay rule.

AG testified that Gossett kissed her for the first time when she was in seventh grade, in 2002, before she had head gear. She also testified that in 2003, before she turned 14, he started inserting his fingers into her vagina and that the sexual abuse lasted until she moved out of the Gossetts' home in January 2008. At trial, AG stated that Gossett never touched her inappropriately in front of other people and had told her that if his wife found out, AG's "life would be a living hell." RP at 303.

Gossett testified at trial and denied having sexually abused AG. According to SG, AG had difficulty adjusting to the Gossetts' rules. SG never saw Gossett act inappropriately with AG.

During closing argument, the prosecutor stated:

> Ladies and gentlemen, there's a lot of components to this whole trial. And what it comes down to are the elements. The elements of nine and ten, the to-convicts. It comes down to whether or not you really believe [AG]. Her story makes sense. It fits together with all of the things that are going on by other witnesses that testified for the defendant himself. It's confirmed by that.

RP at 1456. Defense counsel did not object.

The jury found Gossett guilty of all four counts. As a condition of community custody, the trial court ordered Gossett to comply with the following condition: "Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist

and/or community corrections officer. Pornographic materials are to be defined by the therapist and/or assigned community corrections officer[.]" Clerk's Papers (CP) at 196. Gossett appeals.

ANALYSIS

I. Prosecutorial Misconduct

First, Gossett argues that the prosecutor committed misconduct during closing argument by arguing, "It comes down to whether or not you really believe [AG]." RP at 1456. Gossett contends that this statement improperly shifted the burden of proof and presented the jury with a false choice. We disagree.

To obtain reversal on the basis of prosecutorial misconduct, Gossett must show (1) the impropriety of the prosecutor's comments and (2) their prejudicial effect. *See State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Because Gossett failed to object to the prosecutor's misconduct at trial, we ascertain whether the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *See State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). This standard of review requires the defendant to establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict" and (2) no curative instruction would have obviated the prejudicial effect on the jury. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). We review allegedly improper arguments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the trial court's instructions. *Russell*, 125 Wn.2d at 85-86.

In *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), the prosecutor improperly argued that in order to find the defendant not guilty, the jury had to find that the victim lied or was mistaken. Division One of this court held that the prosecutor committed misconduct because the argument misstated the law and improperly shifted the burden of proof. *Fleming*, 83 Wn. App. at 213. Here, the prosecutor said that the jury could convict if it believed AG. The prosecutor did not imply that in order to acquit, the jury had to believe that AG was lying. This argument does not shift the burden of proof from the State to the defendant.

To support his argument that the prosecutor improperly presented the jury with a false choice, Gossett relies on *State v. Miles*, 139 Wn. App. 879, 162 P.3d 1169 (2007). In *Miles*, the prosecutor told the jury that because the defense and the State had presented two conflicting versions of events "if one is true, the other cannot be" and "[i]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you." 139 Wn. App. at 889-90. We held that the prosecutor's argument constituted misconduct because it presented the jurors with a false choice: they could find the defendant not guilty only if they believed his evidence. *Miles*, 139 Wn. App. at 890. We reasoned that the jury did not have to believe the defendant to acquit him; it "only had to entertain a reasonable doubt as to the State's case." *Miles*, 139 Wn. App. at 890.

This case is distinguishable from *Miles*. Here, the prosecutor did not present the jury with a false choice. The State merely argued that AG's credibility should be central to the jury's consideration of the case. This argument implied that if the jurors believed AG, they should convict. It also implied that if they disbelieved AG, they should acquit. But this argument did not imply that disbelieving AG would be the only way for the jury to find reasonable doubt.

Specifically, unlike in *Fleming* and *Miles*, the prosecutor's argument here did not imply what the jury should do if it had a reasonable doubt about AG's testimony. Because the prosecutor did not make improper remarks, no prosecutorial misconduct occurred.

II. Ineffective Assistance of Counsel

Next, Gossett asserts that he received ineffective assistance of counsel when defense counsel failed to object to this same portion of the prosecutor's closing argument. To prevail on a claim of ineffective assistance of counsel, Gossett must show both that (1) "counsel's performance was deficient" and (2) the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). As we discussed above, the prosecutor did not make improper statements. Accordingly, defense counsel's failure to object to the statements did not constitute deficient performance and Gossett's claim of ineffective assistance of counsel fails.

III. Excited Utterance

Gossett further argues that the trial court erred when it admitted Glidewell's testimony that AG told Glidewell that she had left home because Gossett had sexually assaulted her. The State concedes that the trial court erred in admitting the statement but contends that the error was harmless. We accept the State's concession but conclude that the error was harmless.

We review a trial court's decision to admit a hearsay statement as an excited utterance for an abuse of discretion. *State v. Young*, 160 Wn.2d 799, 805, 161 P.3d 967 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Stenson*, 132 Wn.2d at 701.

The hearsay rule generally excludes an out-of-court statement offered to prove the truth of

the matter asserted. ER 801(c); ER 802. But a hearsay statement may be admitted if it is an excited utterance. ER 803(a)(2). For hearsay to qualify as an excited utterance, three requirements must be met: (1) a startling event or condition must have occurred; (2) the declarant must have made the statement while under the stress of the startling event; and (3) the statement must relate to the startling event or condition. *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

The declarant must make the statement while still "under the influence of external physical shock" and without "time to calm down enough to make a calculated statement based on self interest." *Hardy*, 133 Wn.2d at 714. Although the passage of time between the startling event and the declarant's statement is a factor to consider in determining whether the statement is an excited utterance, it is not dispositive. *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992). AG's statements to Glidewell occurred months after she had moved out of the Gossett home. AG disclosed the abuse to Myrick and Vandervort before she spoke with Glidewell. Because AG was not under the stress of the startling event, we accept the State's concession that the trial court erred in admitting this testimony.

But an evidentiary error is harmless if there is no reasonable probability that the error affected the trial's outcome. *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002). The State asserts that the error was harmless because

> [AG] testified for more than six hours at trial. She was cross-examined extensively and described her abuse by [Gossett] in detail. There is simply no chance that the statements related by Glidewell had any significant effect on the jury's determination of credibility or its decision to convict. [Glidewell] merely related the fact of the sexual assaults and the detail that they were non-penetrating. There was no information that the jury did not get from [AG].

Resp't's Br. at 9-10 (internal citation omitted). Indeed, AG testified extensively at trial and was subject to cross-examination. Her testimony was consistent with the statements she made to Myrick and Vandervort, and Gossett does not challenge the admission of Myrick's and Vandervort's testimony regarding AG's statements. Glidewell's testimony was of minor significance relative to the record as a whole and did not contain information that was not otherwise introduced through other witnesses. Accordingly, we hold that the improper admission of Glidewell's testimony was harmless error.

IV. Community Custody Condition

Next, Gossett asserts that the community custody condition prohibiting him from possessing or viewing pornographic materials is unconstitutionally vague. The State concedes this issue. We accept the State's concession.

In *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008), our Supreme Court held that a community custody condition prohibiting the defendant from accessing or possessing pornographic materials as directed by his supervising community corrections officer was unconstitutionally vague. The court reasoned, "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." *Bahl*, 164 Wn.2d at 758.

As a condition of community custody, the trial court ordered Gossett to comply with the following condition, "Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or community corrections officer. Pornographic materials are to be defined by the therapist and/or assigned community corrections

officer[.]" CP at 196. In light of the Supreme Court's decision in *Bahl*, we accept the State's concession and remand for resentencing.

V. Statement of Additional Grounds

A. Prosecutorial Misconduct

1. False Statements

In his SAG, Gossett argues that the prosecutor made false statements to the jury in her closing argument. Specifically, Gossett contends that the prosecutor lied when she stated:

> And if you just sat and talked with [AG], she'd tell you, I know the marked event, I know the event it all started, and it was with the head gear. Counsel wants you to believe the head gear, it's later, it's in the picture, it's 2004 and five. Well, if you listen to the testimony, we know she got her head gear installed 5-14 of '02. Right? She's 12 years old. She has it continuously, and it was permanently installed, where she couldn't take it off in October of '04. That's when those pictures are from.

RP at 1513. Gossett contends that the prosecutor altered AG's testimony because AG testified, during cross-examination, that the sexual abuse began when she was in eighth grade.

Because Gossett was charged with second degree child rape, the State had to prove AG's age. *See* RCW 9A.44.076(1) ("A person is guilty of rape of a child in the second degree when the person has 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."). AG received head gear in 2002, but her head gear was not put on permanently until 2004. AG testified that Gossett kissed her for the first time when she was in seventh grade, in 2002, before she had head gear. AG testified that in 2003, before she turned 14, Gossett started touching her vagina. The prosecutor properly argued, based on AG's testimony, that AG had testified that the sexual abuse began before she had head gear and that, while she did not have permanent head gear until 2004, she first received head gear in 2002 at the age of 12. No misconduct occurred.

2. Impeachment

Gossett next asserts that the "prosecutor used impeachment as a guise for submitting to the jury substantive evidence that otherwise was unavailable." SAG at 8. We disagree.

Specifically, Gossett contends that the trial court erred in allowing the State, over defense counsel's objection, to ask Linda if a Cascade Boys Ranch employee had described "your family as a dysfunctional, over-restrictive environment?" SAG at 8. Even if the trial court erred in allowing the State to ask this question, any error was harmless. The prosecutor impeached Linda multiple times, without objection, with the same question, asking, "[The principal, nurse, and counselor at the Tenino School District] felt it was your home environment that was so restrictive that [the Gossetts' foster child, TG,] couldn't function; is that right?" RP at 1218. The prosecutor also asked Linda, without objection, "[I]t was believed during this time that you were scapegoating and isolating [TG], blaming him for his problems; is that right?" RP at 1219. The impeachment evidence Gossett challenges came in, without objection, through other questions. There is no reasonable probability that its admission affected the trial's outcome.

Gossett cites several other portions of the record to support his argument that improper impeachment evidence was introduced at trial. But Gossett did not object to the prosecutor's impeachment of Linda at trial. The rules of evidence require a party to object to evidence in order to preserve a challenge for appeal. ER 103(a)(1). Appellate courts generally will not review claims of error that were not presented to the trial court. RAP 2.5(a). Gossett does not argue that the alleged errors are of constitutional magnitude. We conclude that this issue has not been preserved for appeal.

3. Witness Credibility

Gossett further asserts that the prosecutor improperly expressed her personal belief as to the credibility of witnesses. We disagree.

"Although it is improper for a prosecutor to vouch for a witness's credibility, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010) (footnote omitted). Closing argument does not constitute improper vouching "unless it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion about credibility." *Lewis*, 156 Wn. App. at 240 (citing *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)). "[P]rosecutorial remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are a pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would be ineffective." *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

Gossett asserts that the prosecutor improperly commented on the testimony of defense witness Carol Benek, a counselor at Tenino High School, by stating, "Well, and Carol Benek. You know, Carol Benek, bless her heart, I think she's probably a really nice lady. She just had it wrong, folks." RP at 1517. Benek testified that, after speaking with AG, her impression was that AG and her sister, SG, had been sexually abused by their biological father and had received counseling for it.[7] AG testified that her biological father never sexually abused her. Here, the prosecutor merely commented on Benek's credibility based on AG's testimony that her biological father never sexually abused her.

[7] We note that the prosecutor did not object to Benek's testimony.

Gossett further contends that the following statements constituted misconduct:

> Now, counsel talked about all these giant inconsistencies and said, well, we've heard that she told a whole different story to Sergeant Evans. Did anybody hear from Sergeant Evans? Did he testify? No, he didn't. We know exactly what she told him, but I'd submit if it was glaringly different, we'd hear a lot more about it, and we didn't.

RP at 1515.

> [Defense counsel s]aid, well, why didn't you tell? You were surrounded by State Patrol. Well, who is living in this little chalet on the property, this one-room hut, that apparently all of Washington State Patrol loves to rent from them? These people, well, one of them, [Richard] Wiley, we assume or we hear, is this commissioned officer. Where's Wiley? We didn't hear from him.

RP at 1522-23. The prosecutor's arguments were a pertinent reply to defense counsel's arguments. During closing, defense counsel argued to the jury that AG gave inconsistent accounts of the first time Gossett kissed her. Further, defense counsel also attacked AG's credibility during closing on the basis that AG never disclosed the abuse to the Washington State Patrol employees who rented the Gossetts' guest house.[8] Defense counsel's closing argument invited the prosecutor's arguments. Accordingly, we conclude that no prosecutorial misconduct occurred.

4. False Evidence

Next, Gossett argues that the prosecutor committed misconduct by knowingly eliciting false testimony from AG. At trial, AG and Laura Chase both testified about an incident in which they met at Starbucks. AG testified that Chase was not at Starbucks with anyone. Later, AG

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[8] Defense counsel argued, "They had two different state patrol people live in the guest house. Now, Mr. Wilton was not a trooper, but Wiley was, had a marked car. Do you think for a moment if she'd gone to any of those people and said my dad is sexually abusing me, that they'd just send her home?" RP at 1489.

testified that she was hesitant to disclose information to Chase, because she had seen the Gossetts' car drive past the Starbucks, and AG thought Chase had notified the Gossetts of their meeting. Contrary to Gossett's assertion, this testimony is not contradictory. The record does not support Gossett's argument that the State knowingly introduced false evidence.

B. Expert Testimony

Gossett also asserts that the trial court erred in allowing Kelly Simmons-Jones, a medical social worker, to testify for the State regarding delayed disclosure of child sexual abuse. He asserts that this was profile or syndrome testimony that the trial court should have excluded. He also asserts that the trial court should have excluded Simmons-Jones's testimony on complex trauma. We disagree.

Expert testimony regarding a profile or syndrome of child sexual abuse victims is not admissible to prove the existence of abuse or that the defendant is guilty. *State v. Jones*, 71 Wn. App. 798, 819, 863 P.2d 85 (1993). The trial court ruled that Simmons-Jones could only testify "as to similarities or patterns among children reporting or among people reporting instances of abuse after experiencing complex trauma or sexual abuse as children. . . . [T]his witness cannot testify as to the believability of any witness in this case or the veracity of any statements pertaining to this particular case." RP at 701. Simmons-Jones did not testify that AG fit the profile of a child sex abuse victim. The trial court did not err in admitting her testimony.

Further, Gossett's argument that Simmons-Jones's testimony on complex trauma did not meet the *Frye*[9] test also fails. "The *Frye* test is an additional tool used by judges when proffered evidence is based upon novel theories and novel techniques or methods." *Anderson v. Akzo*

[9] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Nobel Coatings, Inc., 172 Wn.2d 593, 606, 260 P.3d 857 (2011). Simmons-Jones defined "complex trauma" as "kids with varying types of abuse or neglect." RP at 668. After hearing the offer of proof, the trial court stated, "I did not hear anything come out this morning in testimony that this person would base any testimony on novel theories." RP at 697. The trial court did not err in concluding that, here, *Frye* did not apply.

C. Sufficiency of the Evidence

Gossett also alleges that, because there was conflicting testimony, "[t]he jury, with the evidence presented, could never have obtainded [sic] 'sufficient certainty' to convict on any of the charged counts." SAG at 25. We defer to the fact finder's resolution of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. O'Neal*, 126 Wn. App. 395, 424, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007). Gossett's claim fails.

D. Cumulative Error

Finally, Gossett contends that the cumulative error doctrine warrants reversal of his convictions. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless, when the errors combined denied the defendant a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). The trial court did err in admitting AG's statements to Glidewell under the excited utterance exception, but this error was harmless. The only other error relates to the unconstitutionally vague community custody condition. The two errors combined did not deny Gossett a fair trial.

We affirm but remand for resentencing.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Van Deren, J.

Worswick, J.