NOT DESIGNATED FOR PUBLICATION

No. 125,078

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROY GENE HILL,
Appellant.

MEMORANDUM OPINION

Appeal from Pawnee District Court; BRUCE T. GATTERMAN, judge. Opinion filed July 28, 2023. Affirmed.

Michelle A. Davis, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ

PER CURIAM: Roy Gene Hill's case comes to us following a jury's determination that he was guilty beyond a reasonable doubt of indecent liberties with a child under the age of 14 years old for an act he committed against J.S. On appeal, Hill argues that his conviction cannot be permitted to stand because the prosecutor impermissibly injected their personal opinion of the victim's credibility and Hill's guilt into the case. Following a careful analysis of the challenged remarks against the record before us, we are not persuaded that the prosecutor strained the boundaries of what is proper and that Hill's right to a fair trial was compromised as a result. Accordingly, Hill's conviction is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

J.S. lived with her grandmother and step-grandfather and enjoyed a bedroom at the back of their home. In February 2019, Hill, a long-time family acquaintance, was also staying at the residence temporarily as he was simply there to assist the step-grandfather with work on the house. Hill slept on a couch in the living room.

Early one morning J.S. woke to the sensation of something touching her vaginal area. At first she thought it was a dream, but when the movement against her private area continued and she identified it as fingers, she flipped over quickly to find Hill on his knees by her bed. Upon being discovered, Hill slumped over and feigned disorientation, questioning, "[W]here am I? Where am I?" J.S. recognized Hill's voice and ordered him out of her room. Hill persisted with his theatrics but J.S. was not fooled and directed him to leave three more times. Hill finally complied with her directive and repeatedly apologized to J.S. as he closed her door behind him.

Shocked and sobbing, J.S. repeatedly texted and called her grandmother for help. Her grandmother eventually woke up and went to J.S.'s room where she found the child scared and crying. J.S. told her grandmother about the incident with Hill and, after notifying her husband, J.S.'s grandmother promptly contacted 911.

Two law enforcement officers responded to the call and J.S. recounted the same specifics for them as she did for her grandmother. The officers then questioned Hill outside and he denied any knowledge of the incident, claiming he was asleep the entire night. Hill was taken into custody and the sheriff's office contacted the Kansas Bureau of Investigation (KBI).

Later that morning, two KBI agents arrived at the house to investigate. Special Agents Tim Beckham and Dustin Snodgrass interviewed J.S. and her grandparents,

photographed the scene, and collected clothing and bedding for testing. The agents also arranged for J.S. to undergo a professional medical examination and speak with someone at the Child Advocacy Center. Next, the agents interviewed Hill. While standard protocol was to swab the hands of the accused, the agents did not do so in Hill's case because several hours had passed since the incident, and his hands were not isolated to preserve any evidence.

J.S. underwent a sexual assault examination that afternoon and provided the nurse with details of the incident that were consistent with her initial account. The nurse collected swabs for the KBI rape kit; however, the exam was conducted almost 12 hours after the incident, and J.S. had used the restroom beforehand. The lab report ultimately indicated that Hill's DNA was not present.

Kasey Dalke, the program director for the Child Advocacy Center, conducted a recorded forensic interview with J.S. and discussed the details of the incident with her. Special Agent Snodgrass watched the interview from the observation room alongside the Forensics Interviewer Coordinator, Jamie Fager.

The State charged Hill with a single count each of aggravated indecent liberties with a child and violation of the Offender Registration Act based on his prior conviction for attempted aggravated indecent liberties with a child. Hill entered a plea to the registration violation but opted to proceed to trial for the child sex offense.

At the conclusion of the trial, during closing arguments, the prosecutor stated:

> "Okay. [A] girl asleep in her bed, awakened by the rough touch of the finger in a place no one should be touching.
>
> "That was not a dream, ladies and gentlemen.

. . . .

"As we began this in jury selection, I—I pointed out that this was not some smoking gun, scientific evidence-type of case. This is a case that's going to require you, in making that determination, to review the credibility of the witnesses that testified and the circumstances around which they are saying this or that happened.

"And, the standard, again: Is it reasonable? Is there anything in there that creates reasonable doubt in your mind as to the position the State has in this, that Roy Gene Hill is guilty . . . .

. . . .

"The allegation here is that J[.S.] was touched or fondled. Okay. That's the first real—real hurdle you guys have to get to.

"And, how—where—what are we basing that? That's on her testimony. Do you believe her? If you don't believe her, that deliberation is going to be very quick . . . .

. . . .

"As a father, would you be outraged by this type of touching? As a mother, as a grandmother, as a friend, as just an adult, would you be offended by this particular type of touching that was alleged?

"If you find that, then let's get into the who did it. It's the State's position that Roy Gene Hill did it."

Once the parties rested their respective cases, the district court instructed the jury that the State carried the burden to prove that Hill intentionally engaged in lewd fondling or touching of J.S. with the intent to arouse or satisfy his sexual desires. The instruction clarified that "'lewd fondling or touching'" means "fondling or touching in a manner

which tends to undermine the morals of a child, and is so clearly offensive as to outrage the moral sense of a reasonable person."

The jury returned a guilty verdict, and the court imposed a hard 40 prison term in light of Hill's prior conviction for a qualifying sex offense.

Hill now brings the case before us to analyze whether a series of remarks from the prosecutor during the close of its case adversely affected the outcome of his trial and call the validity of his conviction into question.

LEGAL ANALYSIS

The prosecutor's remarks were well within the wide latitude the State is allowed in presenting its case.

It is Hill's contention that the State impermissibly vouched for J.S.'s credibility, injected its personal opinion into the case, and endeavored to play upon the sympathies and passions of the jury. The State refutes that the prosecutor engaged in such conduct and asserts that to the extent any error is detected, it is properly considered harmless.

Appellate courts use a two-part test to evaluate claims of prosecutorial error which consists of an error piece and a prejudice component. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

> "To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18,

> 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.'" *Sherman*, 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011]).

In determining whether a particular statement falls outside the wide latitude given to prosecutors, we consider the context in which the statement was made, rather than analyzing it in isolation. *State v. Thomas*, 307 Kan. 733, 744, 415 P.3d 430 (2018). In crafting closing arguments, a prosecutor is permitted to discuss the evidence and draw "'inferences'" therefrom. *State v. Tahah*, 302 Kan. 783, 788, 358 P.3d 819 (2015) (quoting *State v. Crawford*, 300 Kan. 740, 749, 334 P.3d 311 [2014]).

We review prosecutorial error claims arising out of comments made during closing argument even when they are not accompanied by a timely objection, such as occurred here. That said, we may properly figure the presence or absence of an objection into our analysis of the alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Hill first claims that the State committed prosecutorial error when, during its closing, the prosecutor stated that the jury had to "'believe'" J.S. to convict Hill and that "[i]t's the State's position that [Roy Gene Hill] did it." Hill argues that the comments are most aptly characterized as improper vouching for J.S. and an expression of the State's personal opinion on Hill's guilt. Thus, the argument goes, they fell well outside the bounds of what is considered proper as they were not derived from any facts in evidence.

The State may argue the evidence demonstrates a defendant is guilty so long as the prosecutor does not state his or her personal opinion regarding the ultimate guilt or innocence of the offender. *State v. King*, 308 Kan. 16, 30, 417 P.3d 1073 (2018). A prosecutor is also prohibited from offering his or her personal opinion concerning the

credibility of a witness because such comments amount to unsworn, unchecked testimony, and the determination of the truthfulness of a witness is exclusively within the province of the jury. *King*, 308 Kan. at 30 (quoting *State v. Akins*, 298 Kan. 592, Syl. ¶ 6, 315 P.3d 868 [2014]).

In *State v. Charles*, 304 Kan. 158, 174-75, 372 P.3d 1109 (2016), *abrogated on other grounds by State v. Huey*, 306 Kan. 1005, 399 P.3d 211 (2017), the Kansas Supreme Court warned future prosecutors that "'I believe'" and "'I think'" statements should be replaced with "'the evidence shows'" or "'I submit'" or a similar, less potentially subjectively loaded phrase. Then, in *King*, the Kansas Supreme Court clarified that "'I believe'" and "'I think'" statements by the prosecution when making evidentiary conclusions during closing argument amount to impermissible conveyances of the prosecutor's opinion to the jury. 308 Kan. at 32-33. But the use of "'I submit'" statements in closing argument when prefacing an evidentiary conclusion is permitted because it allows the prosecutor to advance the State's case without injecting his or her personal opinion. 308 Kan. at 31-32.

First, we tackle Hill's challenge concerning the prosecutor's use of the term "'believe.'" Hill misinterprets the intent behind the term's usage here. As the State noted in presenting its case, this was a matter based on the parties' competing version of events. There was not scientific evidence to tip the scale one direction or the other. Thus, the prosecutor properly stated that in order to return a verdict of guilty it had to "believe" J.S., or stated another way, conclude her account of the incident was the more trustworthy of the two. He did not offer that she was particularly credible or provided a version of events that was worthy of their trust and belief. Use of the term was not erroneous when we consider the precisely intended connotation.

Next, we see a distinction without a difference between the Supreme Court's sanctioned "I submit" and the phrase used by the prosecutor here, "It is the State's

position." In our view, both serve to merely communicate the State's theory of the case free of the taint said to accompany a personal opinion. The prosecutor first addressed the jury by stating, "It's the State of Kansas' position that the evidence and the testimony that was presented at this trial . . . is sufficient to find Roy Gene Hill guilty . . . ." That assertion was followed shortly thereafter by the prosecutor's discussion of the jury instructions, the required elements of the charged offense, and the evidence adduced that supported each of those elements. The prosecutor then stated, "[L]et's get into the who did it. It's the State's position that Roy Gene Hill did it." What followed was a recitation of the evidence presented which buttressed this conclusion, including that J.S. knew Hill, she heard his voice, saw his face, and recognized his long hair. We likewise detect no error here.

Further, what Hill classifies as "personal opinion" is actually a truism. That is, it quite obviously is the State's position that Hill committed the acts in question as evidenced by the charges filed and subsequent prosecution. Thus, the prosecutor merely reduced to words what the jury already knew to be true from the fact a criminal proceeding occurred. We are not persuaded that the prosecutor's use of the challenged phrase was simply a beard for a more nefarious assertion.

Finally, this case also exemplifies the rationale behind the analytical rule which directs reviewing courts to conduct assessments of prosecutorial error by viewing the challenged remarks as part of a greater whole rather than determining whether they are problematic standing alone. Following that directive here bears out that the prosecutor actually went to great lengths to ensure the jurors clearly understood that it was only their assessment of, or opinion regarding, the evidence that mattered. At the outset of its closing the State reminded the jury, "But, as Judge Gatterman just advised you, it's not the opinion of the State that matters. This argument that myself and counsel will be presenting, is just that, it's an argument. It's our opportunity to persuade you."

Then, as illustrated by the quoted portion of the State's closing argument set out earlier in this opinion, it explained that this was a case based on competing accounts, not scientific evidence, and therefore the jury was required to make assessments regarding the credibility of the witnesses. The record reflects that principle was woven throughout the State's entire closing argument. At one of its earliest points, it highlighted the instruction they received which informed them, "It is for you to determine the weight and credit to be given the testimony of each witness." Further into the argument, when discussing its fulfillment of the elements of the crime, the State again reminded the jurors, "The State would suggest to you—and, again, whether you believe her, or not, is entirely up to you. It's—my opinion, or law enforcement opinion, or any other witness that testified, *is irrelevant to that determination of credibility*." (Emphasis added.)

The same theme emerged as the State discussed how to analyze J.S.'s testimony, "If you believe there are some nuances of inconsistency, then it's for you, and you alone, to decide if those nuances of inconsistencies are enough to create some reasonable doubt in your mind as to whether or not you believe [J.S.] that she was touched."

The jury was also advised it had the responsibility to determine what weight to give the argument that J.S.'s grandfather was built similarly to Hill, and likewise with respect to any deficiencies in the investigation:

> "[I]t's for you, and you alone, to decide if those oversights are enough to negate that we've reached the point that you believe that [J.S.] was touched."
>
> . . . .
>
> "Law enforcement gave you some explanations as to why they did it. But it's for you, and you alone, to decide if that creates reasonable doubt in your mind."

When the prosecutor returned to the podium for his rebuttal argument he opened with the following remark, "When in doubt, blame the police, shotty [*sic*] police work. Ladies and gentlemen again, it's you, and you alone, who gets to decide if their omissions create reasonable doubts in your mind."

Finally, when touching on the sondness of Hill's assertion that law enforcement failed to test for semen when the allegation was one of digital penetration, one of the last things the jury heard from the prosecutor was yet again, "But that's for you, and you alone, to decide what you believe that evidence was in this case."

An examination of the entirety of the prosecutor's argument fails to support Hill's contention that it was so subjectively loaded as to be considered the improper airing of his personal opinion on Hill's guilt and J.S.'s credibility. We decline to find that the prosecutor's use of the phrase "it is the State's position" fell outside the wide latitude afforded to prosecutors in presenting the State's case.

Hill next contends that the prosecutor sought to impermissibly inflame the passions of the jury by asking the jurors whether the alleged conduct would offend them "[a]s a father . . . . As a mother, as a grandmother, as a friend, as just an adult . . . ."

Jurors must render verdicts that are the product of the evidence adduced when measured against the controlling law, not that arise out of sympathy, emotion, or prejudice. Therefore, prosecutors are not permitted to prey upon these emotions and deliver arguments that fan the flames of the jury's passions or prejudices or otherwise distract the jury from its true obligation. *State v. Holt*, 300 Kan. 985, 992, 336 P.3d 312 (2014).

Again, and at the risk of repetition, claims of prosecutorial error must be analyzed with an awareness of their surrounding context. *State v. Thomas*, 307 Kan. 733, 744, 415

P.3d 430 (2018). Doing so here, we note that the jury was instructed as to the elements of the charged crime which required them to determine whether Hill lewdly fondled or touched J.S. In conjunction with that instruction, the court informed the jury that "'lewd fondling or touching' means fondling or touching in a manner which tends to undermine the morals of a child, and is so clearly offensive as to outrage the moral senses of a reasonable person."

Turning to the challenged statements, we find they were intertwined with these instructions and made in the context of explaining to the jurors that they may use their common knowledge and experience when considering whether the touching would outrage the moral senses of a reasonable person.

> "Again, we have that term reasonable. And, I'd ask you to, when you consider that decision, if—if we've met our burden, that you do it in conjunction with your common knowledge.
>
> "As a father, would you be outraged by this type of touching? As a mother, as a grandmother, as a friend, as just an adult, would you be offended by this particular type of touching that was alleged?"

The statement, when reunited with its context, suggests the prosecutor was simply attempting to illustrate a relevant legal concept. A reasonable person undeniably includes those who possess common knowledge and experience as a parent or relative, but the prosecutor's comment was not tailored to summon those deep emotional bonds; its reach was broader to also encompass friends and mere adults. That is, they were generic and did not impermissibly implore the jurors to rely on parental and familial instincts in rendering their verdict. The prosecutor's attempt to flesh out what common experience and knowledge the jury may draw from is not so flagrant and gross as to compromise Hill's right to a fair trial. And any reference to outrage cannot be classified as error given that concept was essentially an element the State was required to prove to establish Hill's

guilt. See K.S.A. 2018 Supp. 21-5506(b)(3)(A) (Aggravated indecent liberties with a child is any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both.); PIK Crim. 4th 55.121 (2016 Supp.) ("'Lewd fondling or touching' means fondling or touching in a manner which tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person. Lewd fondling or touching does not require contact with the sex organ of one or the other."). There is no reasonable doubt that the jury would have found this touching to outrage the moral senses of a reasonable person despite the prosecutor's inclusion of familial relationships. We reject Hill's claim that the State's comments amount to prosecutorial error.

To the extent any error could be attributed to the analyzed remarks we are satisfied they were harmless, as there is no reasonable possibility the error affected the outcome of the trial considering the entire record. J.S. asserted quickly and consistently that a man she knew as Hill, from his appearance and voice, touched her vaginal area. The jury was properly instructed as to the elements of the offense, they received additional information from the court to clarify the terminology used in the elements instruction, and was properly advised it could incorporate its common knowledge and experience regarding matters that the witnesses testified about.

Hill has failed to sustain his burden to establish that the prosecutor committed errors so egregious they undermined his right to a constitutionally fair trial. His conviction for perpetrating aggravated indecent liberties against J.S. is affirmed.

Affirmed.