NOT DESIGNATED FOR PUBLICATION

No. 124,887

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SHAWN MICHAEL PUETT,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; JASON GEIER, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

Nicholas David, of The David Law Office LLC, of Lawrence, for appellant.

Jodi Litfin, deputy district attorney, *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before GREEN, P.J., SCHROEDER and CLINE, JJ.

SCHROEDER, J.: Shawn Michael Puett, in his timely appeal from his jury trial conviction for two counts of aggravated indecent liberties with a child under 14 years old, argues the prosecutor impermissibly diluted the State's burden of proof and made improper statements regarding the two victims' credibility during closing arguments. Based on a careful review of the challenged remarks and the record, we are convinced the prosecutor's statements did not dilute the definition of reasonable doubt and, if any error occurred when the prosecutor discussed the victims' testimony, it was harmless and Puett's right to a fair trial was not compromised. We affirm.

FACTS

The facts are well known to the parties and will be briefly stated. In September 2019, K.B. and her three daughters—P.M.M. (born in 2012), P.J.M. (born in 2013), and P.M. (born in 2015)—lived with K.B.'s boyfriend, Puett.

On September 7, 2019, K.B., Puett, and the girls went to their neighbor's house for a barbeque. Later that night, Puett came home after P.M.M. and P.J.M. fell asleep on the living room couch watching a movie and sat down on the couch between the two girls.

While the girls were sleeping, the evidence reflects Puett touched P.M.M.'s "private part" underneath her pajamas, and she felt the skin of Puett's hand on her body. Puett also touched P.J.M.'s "private parts" and "bottom" between her legs, underneath her underwear with his hand. He also made both girls touch him and kiss him on the lips. This made the girls uncomfortable and scared.

The next morning, K.B. left the house to buy cigarettes. When she left, Puett was still in the living room. After K.B. left, Puett told P.M.M. and P.J.M. to go up to his bedroom with him. P.M. was already in Puett's room playing a video game, but Puett told her to leave. Puett "put lotion on [P.M.M.'s and P.J.M.'s] hands and made [them] touch . . . his private parts." The girls touched Puett at the same time. Later that day, both P.M.M. and P.J.M. told their mother what Puett had done to them. K.B. responded by calling the police to investigate.

Because Puett's claims on appeal center around the prosecutor's closing argument, we have tailored our explanation of the facts to his claims. The prosecutor and defense counsel focused their closing arguments on P.M.M.'s and P.J.M.'s credibility. The prosecutor made statements emphasizing that P.M.M.'s and P.J.M.'s accounts were consistent with each other and remained consistent over time.

Puett responded during his closing argument the State failed to prove his guilt because it presented no physical evidence and his interview showed that he denied the allegations when confronted by police. Puett also argued the jury should not credit P.M.M.'s and P.J.M.'s testimony because they were inconsistent with the lack of physical evidence.

The jury found Puett guilty of two counts of aggravated indecent liberties with a child, and Puett was sentenced accordingly. Additional facts will be added as necessary as we discuss Puett's claims of prosecutorial error.

ANALYSIS

The prosecutor's statements during closing arguments did not affect the outcome of the trial.

Puett argues the prosecutor committed error during the State's closing arguments. We use a two-part test to evaluate claims of prosecutorial error, reviewing error and prejudice.

> "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.'" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

We review claims of prosecutorial error arising out of comments made during closing argument even when, as here, the appellant failed to raise a timely objection to the comments. We may, however, consider the presence or absence of an objection as a part of our analysis of the alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

In making closing arguments, a prosecutor may discuss and draw inferences from the evidence. *State v. Tahah*, 302 Kan. 783, 788, 358 P.3d 819 (2015). The State may argue the evidence shows a defendant is guilty but cannot state a personal opinion about a defendant's guilt or innocence. A prosecutor cannot offer a personal opinion about 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. *State v. King*, 308 Kan. 16, 30, 417 P.3d 1073 (2018).

Puett asserts that, during closing arguments, the prosecutor provided his personal opinion regarding P.M.M.'s and P.J.M.'s credibility and truthfulness and, in turn, improperly vouched for their credibility. Puett also contends the prosecutor provided an incorrect definition of reasonable doubt.

The prosecutor's statements did not cause prejudice.

In determining whether a particular statement falls outside the wide latitude given to prosecutors, we do not analyze comments in isolation and must instead consider the context in which the statement was made. *State v. Thomas*, 307 Kan. 733, 744, 415 P.3d 430 (2018). We thus consider the statements Puett challenges on appeal within the broader arguments the prosecutor made to the jury.

During the first statement Puett challenges, the prosecutor discussed P.M.M. and P.J.M.'s relationship with Puett before making the comment Puett now challenges:

"Prior to September 7th of 2019, [K.B.] was in a relationship with [Puett], and this relationship had some problems. But . . . whatever the problems were in this relationship, one of the problems was not [Puett]'s relationship with the girls. The evidence indicates that they had a good relationship.

"When [P.M.M.] was interviewed in her forensic interview, you'll recall or you might recall she said, he's a good dad. He [lets] us do stuff. You heard testimony from . . . the biological father and step-mother to these girls, and their testimony was that their perception was that the girls' relationship was good. That they looked at him as a stepfather and wanted him to be in that role.

"*And the reason why this is important is because at some point, you're going to have to evaluate the credibility of their testimony. One of the questions that might come up is, why would the girls say these things? Why would they say that these things happened? And the State submits we have an answer to that for you. The reason the girls said these things [is] because they are the things that happened, because they are the truth.*

"And so as I go along in this argument, one of the things I want to point out to you are all these different instances where a possible explanation has been dealt with." (Emphasis added.)

In the next statement, the prosecutor discussed the method in which K.B. and others obtained the girls' accounts of what Puett did to them:

"The evidence shows then that [K.B.] then separately discussed with [P.J.M.], not with [P.M.M.] there but with [P.J.M.] alone, what had happened and [P.J.M.] confirmed that there had been inappropriate touching. Mom did not get all the details at that point in time, but it was alarming enough for her that she took action, which was to call the police. And she had seen enough to make a decision at that point that this relationship was over. She could no longer continue to live with Mr. Puett or in that house, and very soon after that, no longer in the State of Kansas.

"She notified law enforcement and advised them of what had happened, and when law enforcement got involved in the situation, the children were taken for a forensic interview.

"During that forensic interview, the girls were interviewed separately. They were interviewed by Jill Chapman. She testified that she is a forensic interviewer, and she has been trained in a particular protocol, a way in which she asks children questions in order to avoid leading them or implanting ideas into their mind, and you could see evidence of that when you watched the video.

"Because Ms. Chapman does not come in there and say, okay, I heard [Puett] touched you. Where did he touch you? Did he touch you on your genitals?

"She asked these questions in an open way. Tell me what happened with [Puett]. Tell me what happened first. Tell me what happened second. She's allowing the children to supply the details. And both children being interviewed, not at the same time, but one after another, are able to tell what *the State would submit to you is essentially the identical same story, which is important because it's one of the reasons why that account is accurate and you can rely on it, and why the girls' testimony in court is believable.* The girls provided a significant amount of detail." (Emphasis added.)

And Puett claims the prosecutor committed error when stating at the end of the State's rebuttal closing argument:

"There is no apparent reason for them to lie. There is no apparent evidence that they have made a mistake. *The State would submit that what the girls said in 2019 and what they said on the witness stand, they are saying those things because they are the truth, because that's what happened.* And if you believe that testimony, the State submits it proves beyond a reasonable doubt that Shawn Puett committed two counts of aggravated indecent liberties with a child. And because of that, we ask you to find him guilty of those crimes." (Emphasis added.)

Specific phrases can be problematic. 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), our Supreme Court suggested prosecutors should replace the use of "'I think'" statements with "'the evidence shows' or 'I submit'" or a similar phrasing. See *State v. Alfaro-Valleda*, 314 Kan. 526, 538, 502 P.3d 66 (2022); see also *State v. Corbett*, 281 Kan. 294, 316, 130 P.3d 1179 (2006) (finding phrase "'I/we submit'" used to advance

idea for jury's consideration rather than expressing personal opinion). Later, in *King*, the court clarified when a prosecutor says "'I believe'" and "'I think'" when making evidentiary conclusions during closing argument, those phrases can amount to impermissible conveyances of the prosecutor's opinion to the jury. 308 Kan. at 32-33.

Referencing this standard, the State emphasizes the prosecutor consistently used the recommended "I/we submit" language. The State also cites several examples where our appellate courts have approved of similar comments, supporting its claim the prosecutor properly recounted the evidence before discussing P.M.M.'s and P.J.M.'s lack of motivations to be untruthful. See *State v. Ortega*, 300 Kan. 761, 777, 335 P.3d 93 (2014) (approving of prosecutor's rhetorical questions probing whether there was any motivation for witness to lie because "[e]xamining whether a witness has a motive to lie is a valid consideration in weighing credibility"); *State v. Armstrong*, 299 Kan. 405, 427, 324 P.3d 1052 (2014) ("[I]t is not improper for a prosecutor to offer 'comments during closing arguments regarding the witness' motivations to be untruthful.'"); *State v. Huerta-Alvarez*, 291 Kan. 247, 262, 243 P.3d 326 (2010) (finding prosecutor's remarks in closing regarding victim's credibility "were generally in the nature of reviewing what [the victim] said, asking the jury to assess the credibility of her statements, and querying the jury why she would not have made up a more convenient story if in fact she had fabricated the story at all"); *State v. McReynolds*, 288 Kan. 318, 326, 202 P.3d 658 (2009) (prosecutor may offer jury explanation of "'what it should look for in assessing witness credibility'"). The State also distinguishes one of the cases that Puett cites as support for his argument. See *State v. Pabst*, 268 Kan. 501, 507-11, 996 P.2d 321 (2000) (finding reversible error where prosecutor repeatedly stated defendant lied).

Because a prosecutor may legitimately discuss the circumstances tending to demonstrate a witness' reliability or lack thereof, much of what the prosecutor discussed here fell within the wide latitude afforded to prosecutors when presenting the State's case. See *State v. Pribble*, 304 Kan. 824, 835, 375 P.3d 966 (2016). However, even if we

assume, without deciding, the comments rose to the level of prosecutorial error, we observe Puett suffered no prejudice.

Because we are presuming the prosecutor here made impermissible conveyances of opinion, we must review the statements for harmless error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (If error is found, we must next determine whether the error prejudiced the defendant's due process rights to a fair trial.). We will, however, consider Puett's remaining claims of prosecutorial error before addressing harmlessness.

The definition of reasonable doubt did not dilute the State's burden of proof.

Puett next claims that the prosecutor committed error by incorrectly defining reasonable doubt and impermissibly lowering the State's burden of proof. We disagree.

A prosecutor may not attempt to shift the burden of proof to the criminal defendant or misstate the legal standard about the applicable burden. *State v. Williams*, 299 Kan. 911, 939, 329 P.3d 400 (2014); see also *State v. Crawford*, 300 Kan. 740, 753, 334 P.3d 311 (2014) (warning "efforts to define reasonable doubt often, perhaps inadvertently, lower the State's burden, lead the jurors into '"a hopeless thicket of redundant phrases and legalese,"' and '"obfuscate rather than assist the jury in the discharge of its duty"'"). But a prosecutor may properly discuss the weaknesses of the defense's case by pointing to a lack of evidence supporting the defendant's theory. *Williams*, 299 Kan. at 940; *State v. Duong*, 292 Kan. 824, 832-33, 257 P.3d 309 (2011).

Puett challenges three comments that the prosecutor made during the State's rebuttal closing argument:

"The last thing I'm going to talk to you about is reasonable doubt. So on the screen right now is Defendant's Exhibit Number 2. It's something we talked about in jury selection. What does a child look like when they have been sexually molested? What does their face look like? What is their behavior like? Do you think you know the answer to that question? Do you think you know the answer to that question to the extent that you can say that this photograph indicates that these children were not sexually molested the night before.

"We know from a phone that these photographs were taken on September 8th, 2019, around 9:30 in the morning. According to their statements, it was the night before that the defendant came in and started digging around in their pants and made them touch his genitals.

"So here, you see the two girls and they look happy and they have smiles. So obviously, they weren't sexually molested, correct, because there's no way they would smile when a picture was being taken by a person who they thought of as their stepfather. Or maybe there's another explanation for that. Maybe the explanation for that is that kids will do what they are told. If someone takes a picture and says smile, then they will smile.

"*The fact that the kids didn't run from the house screaming right that very minute, the State would submit should not give you a reasonable doubt as to their guilt.* Because children don't get to pick who the adults are in their household. They have to live with those people. And in truth, what the State would submit is that these photographs actually support our claims, because they corroborate that the girls were in this room where the second act of sexual molestation happened. You can see that the defendant is here and that the girls are here in this same area.

"The State was also able to show you State's Exhibit 59, which according to [P.J.M.], was a photograph she took of the defendant's tattoo, the one with the pirate. This tends to indicate that what the girls were saying in their forensic interview was accurate.

"But ultimately, the State would submit to you that the fact that the girls took a couple of pictures with Mr. Puett and they appeared not to be in terror for their lives does not necessarily give you a reasonable doubt.

"Now, it is the State's burden of proof in a criminal case. The defendant is not required to prove that he is innocent or not guilty. The burden never shifts away from the State. But a defendant can make arguments to you, as Mr. Puett has in this case, and it's a perfectly fair question to ask, just as I did a moment ago with that last example with the

photographs. *Is that meaningful? Is that important? Is that substantial? Because if it's not, it should not give you a reasonable doubt.*

"*And so can you imagine any set of circumstances in which a girl might be sexually molested by a caregiver and then shortly thereafter, take a smiling photograph. If you can, I would suggest that that doesn't give you a reasonable doubt as to the defendant's guilt.*

"The other thing that the defense argued on the same point is if these girls were in fact so afraid of Mr. Puett, why would they even bother going up into that room with him? But keep in mind, at that point, the girls didn't have any choice about him living in the house. He was mom's boyfriend.

"And I'll submit another question in response to that argument, which is, what reason would [P.M.M.] have had to go to the park and tell her mom that [Puett] had been touching her inappropriately if that had not happened?

"Now, like I say, the defendant doesn't have to prove that he's not guilty or prove that these children are lying, but assessing their credibility is important in this case because if what those girls said when they testified is true, and if what they said in their forensic examination is true, if that really happened, the State would submit that we have through that evidence proven the fact[s] that establish Mr. Puett's guilt." (Emphases added.)

Puett briefly references several cases where our appellate courts have ruled on this topic. See, e.g., *State v. Brinklow*, 288 Kan. 39, 48-50, 200 P.3d 1225 (2009) (finding prosecutor's repeated use of phrase "sometimes you just know" in closing constituted lowered reasonable doubt standard); *State v. Wilson*, 281 Kan. 277, Syl. ¶ 4, 130 P.3d 48 (2006) ("No definition or explanation can make any clearer what is meant by the phrase 'reasonable doubt' than that which is imparted by the words themselves."); *State v. Mitchell*, 269 Kan. 349, 360, 7 P.3d 1135 (2000) (finding prosecutor's remarks defining reasonable doubt "attempted to alter the State's burden"); *State v. Jackson*, 37 Kan. App. 2d 744, 747-48, 157 P.3d 660 (2007) (finding misconduct when prosecutor added comment "'if you're reasonably sure of defendant's guilt, vote guilty'" to definition of reasonable doubt in closing). Puett, however, relies primarily on *State v. Magallanez*, 290 Kan. 906, 235 P.3d 460 (2010), and *State v. Banks,* 260 Kan. 918, 927 P.2d 456 (1996).

He then distinguishes these cases and the facts presented here from *State v. Stevenson*, 297 Kan. 49, 298 P.3d 303 (2013), and *State v. Garcia-Garcia*, 309 Kan. 801, 441 P.3d 52 (2019).

In *Magallanez*, our Supreme Court found reversible error in a prosecutor's misrepresentation of the burden of proof during closing arguments. 290 Kan. at 914. There, the prosecutor defined reasonable doubt as "'an individual standard. It's a standard that when you believe he's guilty you've passed beyond a reasonable doubt.'" 290 Kan. at 912. Somewhat similarly, in *Banks*, our Supreme Court found a prosecutor impermissibly lowered the State's burden of proof by stating: "'Reasonable doubt means if you are going to say these men are not guilty of something, you have to give a reason for it.'" 260 Kan. at 926. The *Banks* court reasoned that this improperly implied that the jury must be able to articulate a specific reason for finding the defendant not guilty. 260 Kan. at 927.

In *Stevenson*, our Supreme Court addressed whether an analogy used to explain reasonable doubt impermissibly lowered the State's burden of proof. There, the prosecutor spelled out the words "'Wheel of Fortune'" but left out one letter, explaining to the members of the jury that just as they could still read the "'Wheel of Fortune'" sign when it was missing one letter, they could find the defendant guilty without every conceivable piece of evidence. 297 Kan. at 52-53. Our Supreme Court disapproved of the demonstration but determined that the prosecutor was merely explaining the difference between proof beyond reasonable doubt and proof beyond all doubt. 297 Kan. at 53. The *Stevenson* court explained that "the prosecutor's arguments . . . did not state or imply that the State's burden of proof was anything less than beyond a reasonable doubt." 297 Kan. at 54.

And in *Garcia-Garcia*, our Supreme Court found the prosecutor provided a legally incorrect definition of reasonable doubt as being a "'two-part test'"—requiring the jury to determine if doubt existed before determining whether the doubt was reasonable. 309

Kan. at 816. However, the court held the definition "merely echoed the State's burden" and was followed immediately by the prosecutor emphasizing the correct burden of proof. 309 Kan. at 817.

The State responds the prosecutor's statements here are not like those made in *Magallanez* or *Banks*. Instead, the prosecutor correctly told the jury the State had the burden of proof and the defendant did not have to prove his innocence. We observe, when looking at the statement in context, the prosecutor toed the line. He asked the jury to consider whether Puett's evidence was meaningful, important, or substantial. The prosecutor was just arguing Puett failed to rebut P.M.M.'s and P.J.M.'s testimony by admitting pictures of the girls smiling with him after the touching occurred. The prosecutor did not use these terms to define reasonable doubt but, instead, was asking the jury to consider the significance and relevance of the photos when determining the credibility of the victims' testimony.

Our Supreme Court has held a prosecutor does not shift the burden of proof by pointing out a lack of evidence to support a defense. *State v. Cosby*, 293 Kan. 121, 136-37, 262 P.3d 285 (2011) (finding prosecutor's statements asking jury if it had heard any evidence that suggested witness' testimony was wrong did not improperly shift the burden of proof because prosecutor was only commenting generally on defendant's failure to rebut witness' testimony and not commenting on defendant's failure to testify). We observe no error here as the State's argument did not dilute the State's burden of proof.

If error occurred it was harmless and caused no prejudice.

"[P]rosecutorial 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. We must "consider any and all alleged indicators of prejudice, as argued by the parties, and then determine whether the State has met its burden." 305 Kan. at 111. The primary focus of this analysis must be concerned with Puett's right to a fair trial. See 305 Kan. at 111. Because we have determined the prosecutor did not commit error when discussing the State's burden of proof, we will now focus on the prosecutor's statements involving how the jury should consider the girls' testimony.

The State asserts the prosecutor's statements did not affect the jury's verdict because the jurors received proper instructions regarding attorney opinions and arguments involving the State's burden of proof and presumably followed those instructions. The State also claims the evidence firmly supports Puett's convictions despite the prosecutor's statements.

Juries are generally presumed to have followed the instructions given by the district court. *State v. Rogers*, 276 Kan. 497, 503, 78 P.3d 793 (2003). Likewise, the instructions are a relevant consideration for appellate courts when assessing whether a jury was misled by a prosecutor's alleged improper comments. *State v. Huddleston*, 298 Kan. 941, 956, 318 P.3d 140 (2014).

When providing preliminary instructions before the presentation of evidence, the district court informed the jury:

> "It is your duty to presume that the defendant is not guilty of the crimes charged. The law requires the State to prove the defendant is guilty beyond a reasonable doubt. The burden is always on the State. The defendant is not required to prove innocence or to produce any evidence."

The district court also instructed the jury to limit its consideration of the attorneys' comments: "Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, . . . they should be disregarded." Before deliberations, the district court repeated these instructions and gave the following instruction on witness credibility:

> "It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified."

The prosecutor also consistently stated "the evidence shows" or "the evidence indicates" when discussing the trial evidence and the girls' credibility to argue Puett's guilt was shown beyond a reasonable doubt.

Under the analysis required by *Sherman*, the weight of the evidence cannot become the primary focus of our inquiry but "may secondarily impact this analysis one way or the other." 305 Kan. at 111. A review of the evidence reflects P.M.M. and P.J.M. made separate but consistent disclosures to their mother and the investigators. They likewise provided consistent testimony at trial. Moreover, in line with the girls' allegations, police found a bottle of lotion in Puett's bedroom and pictures of Puett on his phone P.M.M. said she took while in the bedroom. P.M.M. and P.J.M. also indicated in their physical examinations at the hospital that Puett touched their genitals.

Puett does not point out any inconsistencies in P.M.M.'s and P.J.M.'s testimony about the abuse. Instead, as he did at trial, Puett focuses on the pictures of the girls, which he alleges showed the girls were not afraid of him later that morning after the alleged abuse.

Thus, we agree with the State the evidence, including the almost immediate disclosure to K.B. and consistency of P.M.M.'s and P.J.M.'s allegations, supports the conclusion the complained-of statements by the prosecutor, if error, were harmless errors. Finally, although not determinative, defense counsel's failure to object to the prosecutor's statements also supports our conclusion. See *State v. Lowery*, 308 Kan. 1183, 1211, 427 P.3d 865 (2018). We are convinced beyond a reasonable doubt the trial record as a whole reflects the prosecutor's comments did not affect the outcome.

There was no cumulative error.

Puett argues the cumulative effect of the trial errors deprived him of a fair trial and thus requires reversal. Because his arguments only raise claims of prosecutorial error, and we have collectively found no prejudicial error in the complained-of comments, there can be no cumulative error. See *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021).

Affirmed.