

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RUSSELL CORWIN ASHMAN,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262373

Macomb Circuit Court

LC No. 2004-003408-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b), and one count of assault with the intent to commit criminal sexual conduct, MCL 750.520g. The court sentenced him to prison terms of 15 to 40 years for each first-degree CSC conviction, 4 to 15 years for the second-degree CSC conviction, and 23 to 120 months for the assault with intent to commit CSC conviction. Defendant appeals as of right. We affirm.

The victim in this case is defendant's youngest daughter. During the course of an investigation involving criminal sexual conduct between defendant's father and defendant's oldest daughter, police interviewed the victim concerning defendant's father. The police also asked the victim whether anyone had ever touched her inappropriately. The victim indicated that her brother had touched her and that defendant had touched her. She testified that defendant first touched her inappropriately when she was 11 or 12 years old, and that inappropriate conduct occurred until she was in the ninth grade. She testified that defendant rubbed her chest and vagina, forced her to perform fellatio, performed oral sex on her, digitally penetrated her vagina, had her fondle his penis, and masturbated while she was in the room. On two occasions defendant attempted to penetrate her vagina with his penis, but stopped when she threatened to yell. She testified that when she was in the eighth grade defendant showed her magazines containing pictures of naked women in their 20s.

Defendant argues that he was denied a fair trial by several instances of prosecutorial misconduct. First, defendant argues that the prosecution committed misconduct by characterizing the magazines recovered from defendant's bedroom as "child pornography" despite instructions from the trial court not to do so. This Court reviews preserved claims of prosecutorial misconduct case by case, examining the conduct in context to determine whether the defendant received a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30;

650 NW2d 96 (2002). In this case, the prosecution stated in opening statement that the recovered magazines were “basically child porn.” Defendant objected and the trial court directed the prosecution not to use the term “child pornography.” Defendant also objected when the prosecution asked a witness if there was any regular or adult porn recovered that did not say “Barely 18” or “Nearly 18.” The trial court directed the jury to ignore the labels the attorneys may have placed on the magazines. The trial court noted that no one was suggesting that it was illegal to possess the magazines. The trial court also informed the jury that the magazines were only relevant to the extent they were utilized by defendant in committing the charged offenses.

Assuming that the prosecutor acted improperly by referring to the magazines as child pornography, defendant was not denied a fair and impartial trial by the prosecutor’s comments. When the prosecution stated or implied that the magazines contained pornography; the trial court gave an immediate instruction on how the evidence was to be used. Jurors are presumed to follow their instructions and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The second time the trial court instructed the jury, it essentially said that the magazines were not child pornography. At one point, the trial court directed the jury to ignore the labels the attorneys placed on the magazines, and also instructed the jury that the statements of the attorneys are not evidence. Moreover, the magazines themselves were included among the evidence the jury was instructed to decide the case on, so regardless of how the prosecution characterized the magazines the jurors could examine the evidence and decide for themselves its significance. Under these circumstances, we conclude that defendant was not denied a fair and impartial trial by the prosecutor’s characterization of the magazines as child pornography.

Defendant further argues that the prosecutor’s emotional display and exit from the courtroom constitutes misconduct requiring reversal. Defendant neither states why this conduct was improper, nor cites any legal authority to support his claim that the prosecutor’s display constitutes misconduct requiring reversal. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant’s failure to cite any supporting legal authority constitutes an abandonment of this issue. *Watson*, *supra* at 587.

Defendant also contends that the prosecutor improperly questioned him and other witnesses about the credibility of other witnesses. It is improper for the prosecutor to ask a witness, including defendant, to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). However, such questions are curable with a limiting instruction from the trial court. *Messenger*, *supra* at 180. In this case, defendant never objected to the questions. Because a curative instruction could have alleviated any prejudicial effect had defendant objected, this Court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant also argues that the prosecutor’s closing argument that for the victim, “incest was a way of life. It was a way of life in the whole Ashman household. The grandfather, father, to brother,” was improper. This issue is reviewed for plain error because defendant failed to object to the statement. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Here, evidence was presented to show that defendant, defendant's father and one of defendant's sons all engaged in incest. Because the prosecutor's statement was based on the evidence, we conclude that it was not clear error. A prosecutor is generally given great latitude to argue the evidence and all inferences relating to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also argues that the cumulative effect of the alleged instances of prosecutorial misconduct deprived him of a fair trial. This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even where individual errors would not. *McLaughlin*, *supra* at 649. We find no such cumulative effect.

Next, defendant argues that the trial court abused its discretion by admitting into evidence the pornographic magazines recovered from his bedroom. The decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). This Court will find an abuse of discretion only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). "A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Bauder*, *supra* at 179.

Contrary to defendant's suggestion, the trial court did not admit the magazines under MRE 404(b). Instead, the trial court admitted the magazines under the "res gestae" exception to MRE 404(b), in which evidence of prior bad acts is admissible where those acts are so blended or connected with the charged offense that proof of one incidentally involves the other or explains the circumstances of the crime. *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), citing *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). In *Delgado*, *supra*, our Supreme Court commented:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [*Delgado*, *supra* at 83.]

In this case, evidence was presented to suggest that the magazines were used in the commission of the crimes. The victim testified that defendant showed her magazines containing pictures of naked women in their 20's. Defendant's cellmate testified that defendant told him that defendant was using the magazines to train his younger daughter to believe that what she viewed in the magazines was "all right" because she was going to be "next." Another prisoner claimed that defendant told him he had shown his daughters pornographic magazines.

The trial court did not abuse its discretion in admitting the evidence under the res gestae exception to MRE 404(b). There was evidence suggesting that defendant had used the magazines to train the victim into thinking that the contents of the pornographic magazines were

permissible activities. The training of the victim is intimately connected with the charged offenses and explains the circumstances of the crimes, thus making the magazines part of the res gestae of the crimes.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot