STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK FRANK BUNNICH,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 175786
LC Nos. 93-001085
93-001086

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). The trial court sentenced him to 25 to 40 years of imprisonment for each first-degree criminal sexual conduct conviction, and 10 to 15 years of imprisonment for the second-degree criminal sexual conduct conviction. His sentences are to run concurrently. Defendant appeals from his convictions as of right. We affirm.

Defendant argues that the trial court's decision to admit as evidence pornographic magazines concerning sex with children had the effect of denying him his constitutional rights to testify in his own behalf and to call witnesses in his defense. US Const, Am VI; Const 1963, art I, §§ 17, 20. Initially, we observe that defendant testified that he was waiving his right to testify knowingly and voluntarily. Nonetheless, to address defendant's contention that the court's ruling forced him to waive this right, we examine the court's ruling regarding the admissibility of this evidence.

After the prosecution's case-in-chief, defense counsel informed the court that he had just learned that the prosecution seized these magazines and moved to suppress them.[1] Defense counsel argued that that the magazines may have been obtained through an illegal search and alternatively, that they were inadmissible to impeach defendant's character. The prosecution stated that she had not intended to use the evidence in her case-in-chief, but was prepared to use the evidence to rebut

defendant's character evidence, and argued that it was admissible for that purpose. The court ruled that the evidence was admissible if defendant placed his character into evidence and the magazines were relevant to the intent element of the second-degree criminal sexual conduct charge. MCL 750.520c; MSA 28.788(3). Defense counsel then offered to place defendant on the stand to generally deny the charges against him without introducing any character evidence. The prosecution responded that she could introduce the evidence as proof of defendant's interest in sex with children if he denied sexually abusing the children. The court concurred and concluded that the evidence would be admissible if defendant's character or intent became an issue.

Defendant contends that the evidence was inadmissible under MRE 404(a) and 404(b) because defense counsel proffered that defendant would simply take the stand to deny the charges against him, and that no character evidence would be introduced. Defendant's argument misconstrues the court's ruling. The court declined to rule that the magazines were inadmissible based solely upon defense counsel's suggestion that defendant deny the charges against him. Instead, she reasoned that *if* the defense placed defendant's character in issue, the prosecution could utilize the magazines in rebuttal. This is consistent with MRE 404(a), which requires that defendant place his character in issue before the prosecution may introduce character evidence in rebuttal.

The court's alternative holding that the evidence was admissible pursuant to MRE 404(b) is also correct. Defendant was charged with second-degree criminal sexual conduct. To prove this charge, the prosecution must prove beyond a reasonable doubt that defendant intentionally touched the victims for the purpose of sexual arousal or gratification. MCL 750.520a(k); MSA 28.788(1)(k). Defendant's alleged interest in child pornography raised a factual question regarding defendant's interest or motive in touching the children such that the evidence was admissible under MRE 404(b). *People v VanderVliet*, 444 Mich 52, 77-78; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994) (citing *Estelle v McGuire*, 502 US 62; 112 S Ct 475; 116 L Ed 2d 385 (1991))(A general denial of the charges does not preclude a matter from being at issue). Accordingly, the court did not abuse its discretion in ruling that the evidence could be admissible for purposes other than showing defendant's propensity to commit the crime.

In connection with this argument, defendant also argues that his right to present a defense was prejudiced by the late disclosure of these magazines. Contrary to defendant's contentions, the prosecutor explained to the court that she understood that all documents had been provided to defense counsel by the prosecutor who was originally assigned to the case, despite the absence of a formal discovery order or agreement. She was not aware that defense counsel had not received a copy of a supplemental police report concerning the seizure of these magazines. Nonetheless, the prosecutor argued that the evidence should be admitted despite any alleged noncompliance with a discovery agreement or court rule.

Although there was no discovery order, defendant contends that the prosecution's agreement to provide discovery imposed a continuing obligation on the prosecution to provide defendant with supplemental reports as well. Thus, when defense counsel alerted the court that he had not received the

supplemental police report concerning these magazines, defendant insists that the court should have excluded the magazines on this basis alone. We disagree.

A trial court has discretion to deal with questions of noncompliance with a discovery statute, rule, order, or agreement. *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987); *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). In addition, the court has the discretion to excuse the pretrial notice prerequisite under MRE 404(b)(2) for good cause shown. MRE 404(b)(2). In response to defendant's claim that the prosecution withheld the supplemental police report, the court allowed defendant to challenge the admissibility of the evidence and also conducted a hearing, at defendant's request, to determine whether the magazines were obtained illegally. Accordingly, we find no abuse of discretion.

Alternatively, assuming our review disclosed error in the court's ruling, this Court will not reverse a trial court's evidentiary ruling if, after examination of the entire record, the error was harmless. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Because defendant chose not to testify, we will not engage in endless speculation that the trial court's ruling *may* have been prejudicial error. Compare *Luce v United States*, 469 US 38, 41; 105 S Ct 460; 83 L Ed 2d 443 (1984)("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context."). Thus, we decline to hold that a defendant's right to testify or call witnesses is infringed when a trial court correctly rules that damaging evidence may be introduced against him if he takes the stand. The risk of prejudice is inherent in the adversary nature of a criminal proceeding, and the evidentiary rules are designed only to prevent unfair prejudice. Compare *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995)("All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible."). Consequently, because defendant's choice not to testify was not precipitated by an illegal ruling in the trial court, we find that his waiver of his right to testify was valid. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

Defendant next contends that the trial court erred by instructing the jury that intoxication was not a defense to first-degree or second-degree criminal sexual conduct. Defendant argues that this potentially misled the jury to believe that he admitted sexual contact with his victims, but sought to lessen his criminal responsibility by claiming the episodes occurred during alcoholic blackouts. We disagree. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offenses and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Id.*

The trial court correctly instructed the jury on the proper elements of first-degree and second-degree criminal sexual conduct. Moreover, the challenged instruction was a correct statement of law. *People v Langworthy*, 416 Mich 630, 645; 331 NW2d 171 (1982) (intoxication not a defense to first-degree criminal sexual conduct); *People v Brewer*, 101 Mich App 194, 196; 300 NW2d 491 (1980) (intoxication not a defense to second-degree criminal sexual conduct). Lastly, there was evidence to support the trial court's instruction on intoxication. Defendant told police that he was an

alcoholic during the period he was alleged to have committed his offenses, but that "he did not think" he experienced alcoholic blackouts during alleged sexual contact with the victims.

Defendant also claims that the prosecutor's use of leading questions during the direct examination of a five year old witness had the effect of denying him a fair trial, as the questions amounted to prosecutorial testimony. We disagree. The trial court has the discretion to allow prosecutors to ask leading questions on direct of child witnesses testifying in criminal sexual conduct cases. *People v Kosters*, 175 Mich App 748, 756; 438 NW2d 651 (1989). Our review discloses that the questions were not unduly suggestive in light of the witness' age and understanding. See *Kosters, supra*.

Finally, defendant argues that several instances of prosecutorial misconduct denied him a fair trial. Because defendant failed to object below, the issue may only be reviewed on appeal if a special instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Although the prosecutor made some factual errors in her opening argument, there is no evidence that the errors were made in bad faith. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Furthermore, the prosecutor's statements regarding one victim's testimony was proper in rebuttal to defense counsel's attack on the witness' credibility during his closing argument. See *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Lastly, we find that the prosecutor did not appeal to the jury's sympathies or sense of a civic duty. Thus, after reviewing the prosecutor's remarks in context, we find no miscarriage of justice and that any errors could have been eliminated by cautionary instructions. *Stanaway, supra*. Indeed, we note that the court cautioned the jury that counsels' arguments were not evidence.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert A. Young, Jr.
/s/ Harry A. Beach

[1] Defense counsel made the motion at this time because he claimed that he was not apprised that the prosecution had these materials, and he also challenged the manner in which the materials were obtained. The court conducted a hearing to determine the manner in which the materials were obtained, and concluded that the police had legally acquired the materials. Defendant does not challenge this ruling on appeal.