

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Edwin Cardona,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 21, 2022

Court of Appeals Case No.
21A-CR-1150

Appeal from the Marion Superior
Court

The Honorable Cynthia L. Oetjen,
Judge

The Honorable Lisa F. Borges,
Senior Judge

Trial Court Cause No.
49D30-1811-F1-38728

Mathias, Judge.

[1] Edwin Cardona (“Cardona”) was convicted in Marion Superior Court of Level 1 felony child molesting, and the trial court imposed a thirty-year sentence.

Cardona appeals and raises two issues, which we restate as:

I. Whether the trial court erred when it denied Cardona’s permission for surrebuttal during closing arguments;

II. Whether the trial court abused its discretion by considering improper aggravating circumstances when the court imposed a thirty-year sentence.

[2] We affirm.

Facts and Procedural History

[3] On November 4, 2018, Cardona and his roommate visited Cardona’s cousin’s home in Indianapolis. Cardona’s cousin, Maria, resided in the home with her husband and her four children. Maria and Cardona both grew up in Guatemala, but they did not meet until November 2017.

[4] During his visit on November 4, Cardona told Maria that he needed to go to the gas station and asked Maria if her nine-year-old daughter, H.R.H, could accompany him. Maria said no and explained that she never let H.R.H. go anywhere without her or her father. Cardona repeatedly asked Maria to change her mind, and Maria finally agreed that Cardona could take H.R.H. with him. Maria told Cardona he needed to return quickly.

[5] Cardona drove H.R.H to the gas station and offered to buy her something. H.R.H. responded she did not want anything from the gas station. Cardona then drove to his home and took H.R.H. to his bedroom. Cardona began

kissing H.R.H. and laid her on his bed. Cardona removed his pants and instructed H.R.H. to remove her pants. He then inserted his penis into H.R.H.'s vagina causing her pain.

[6] Cardona stopped molesting H.R.H. after his phone rang multiple times. Cardona finally answered the call, which was from Maria. She wanted to know why Cardona had not returned to her house. Cardona told Maria that he and H.R.H. would return shortly and that there were a lot of people at the gas station. After the call ended, Cardona told H.R.H. to put her pants back on. He then drove them back to Maria's house. During the drive, he told H.R.H. not to tell her mom what had happened and sprayed her legs with an unknown substance.

[7] When they returned to Maria's house, H.R.H. was crying and acting nervous. She went straight to her bedroom. Maria asked Cardona why they were gone so long, and he replied that he took H.R.H. for a drive downtown. Shortly thereafter, Cardona and his roommate left Maria's home.

[8] After Cardona left, Maria asked H.R.H. why she was upset. H.R.H. told her mother that Cardona had sex with her at his house. Maria confronted Cardona about H.R.H.'s allegation, and Cardona initially told Maria that H.R.H. was lying. However, he later admitted that he tried to rape H.R.H. and begged Maria not to call the police. Tr. Vol. 3 pp. 124-25.

[9] Maria contacted the police and H.R.H. was questioned by a forensic interviewer. H.R.H. was also examined by a nurse who observed a hematoma

on H.R.H.'s hymen. The reviewing doctor concluded that the injury was caused by penetration of the genital organ and painful blunt force trauma. Tr. Vol. III, pp. 233, 237.

[10] The next day, the police interviewed Cardona via a certified translator. At one point, the officer asked Cardona "if a mistake was made yesterday." Tr. Vol. 3 pp. 166-67. Cardona replied, "yes." *Id.* at 167.

[11] The State charged Cardona with Level 1 felony and Level 4 felony child molesting. His two-day jury trial commenced on May 10, 2021. During its closing argument, the State described Cardona's statements to Maria admitting that he tried to rape H.R.H. but did not reference his admission to the police. During its rebuttal argument, the State described Cardona's statement to the police and claimed that Cardona told the police that he "made a mistake." Tr. Vol. IV pp. 11-13. Thereafter, Cardona requested surrebuttal because the State had not mentioned Cardona's statement to law enforcement in its initial closing statement. He also argued that the State mischaracterized the evidence. *Id.* at 14. The trial court denied Cardona's request. The court also denied Cardona's request for a mistrial, which motion was based on the court's denial of his request for surrebuttal.

[12] The jury found Cardona guilty as charged, but the trial court vacated the Level 4 felony citing double jeopardy concerns. During Cardona's sentencing hearing, the court considered the following aggravating circumstances: 1) The harm suffered by H.R.H. was significant and greater than that necessary to prove the

offense; 2) that H.R.H. was less than twelve years old, and 3) Cardona was in a position of trust and control with H.R.H. and used his family relationship to gain access to the child. The court found that the following factors were mitigating: 1) Cardona has no prior criminal history, 2) he was relatively young when the crime occurred, and 3) his imprisonment will cause a hardship on his dependent child. The trial court then imposed the advisory sentence of thirty years.

[13] Cardona now appeals.

I. Surrebuttal

[14] During its rebuttal argument, the State argued that Cardona told the investigating police officer, “I made a mistake.” Tr. Vol. 4, p. 12. The State did not discuss this evidence in its initial closing argument and its argument mischaracterized the evidence. At trial, the investigating officer testified that he had asked Cardona if he made a mistake, and Cardona had replied “yes” to his question. Tr. Vol. 3 pp. 166-67.

[15] However, Cardona did not object to the State’s argument or mischaracterization of the evidence. “Failure to object to prosecutorial comments in a timely fashion results in waiver.” *Jones v. State*, 825 N.E.2d 926, 932 (Ind Ct. App. 2005) (quoting *Cox v. State*, 696 N.E.2d 853, 860 (Ind. 1998)), *trans. denied*. “An objection to prosecutorial comments is untimely when raised after the State has concluded its final argument.” *Id.* (explaining that the defendant waived his claim because he failed to request surrebuttal until after

the State had concluded its closing argument). Because Cardona did not object to the State's argument or request surrebuttal until after the State concluded its rebuttal argument, his claim is waived.

[16] Waiver notwithstanding, Cardona cannot establish that the trial court should have granted his request for surrebuttal under [Jury Rule 27](#), which provides, in pertinent part:

If the parties argue the case to the jury, the party with the burden of going forward shall open and close the argument. The party which opens the argument must disclose in the opening all the points relied on in the case. If, in the closing, the party which closes refers to any new point or fact not disclosed in the opening, the adverse party has the right to reply to the new point or fact. The adverse party's reply then closes the argument in the case.

This language closely tracks the following language of [Indiana Code section 35-37-2-2\(4\)](#):

[T]he prosecuting attorney shall disclose in the opening all the points relied on in the case, and if in the closing he refers to any new point or fact not disclosed in the opening, the defendant or his counsel may reply to that point or fact, and that reply shall close the argument of the case.

[17] In [Inman v. State](#), 4 N.E.3d 190, 202 (Ind. 2014), during trial the parties disputed whether the victim was standing or on his knees when he was shot. During its closing argument, the State did not specifically discuss this evidence but argued that there was no evidence to suggest that the victim had attacked the

defendant, Inman. *Id.* In his closing, Inman argued that he had acted in self-defense and there was no evidence to prove beyond a reasonable doubt that Inman intended to rob the victim before the victim pulled his own gun on Inman. *Id.* On rebuttal, to refute Inman’s claim of self-defense, the State argued that there was no evidence of a struggle in the area where the victim was shot and the blood splatter evidence established that the victim was on his knees when he was shot. *Id.*

[18] After the State concluded its rebuttal, Inman made a motion under [Jury Rule 27](#) to respond to the evidence the State had discussed for the first time in its rebuttal argument. *Id.* The trial court denied the motion. On appeal, our supreme court noted that it had previously relied on [Indiana Code section 25-27-2-2\(4\)](#) to hold that, ““when the State’s rebuttal is invited by comments made by defense counsel during closing arguments, the defense has no right under the statute to respond to the rebuttal.”” *Id.* at 203 (quoting *Goodman v. State*, 588 N.E.2d 507, 508 (Ind. 1992)). The court concluded that the same reasoning applied under [Jury Rule 27](#), and “the State was entitled to rebut his argument by calling the jury’s attention to the location of the blood splatter and inferring that [the victim] was on his knees when he was shot.” *Id.*

[19] Here, in his closing statement, Cardona attacked H.R.H.’s and Maria’s credibility. Cardona argued that H.R.H.’s and Maria’s testimonies were inconsistent and neither could be believed. In response, the State argued that H.R.H.’s and Maria’s were credible, and in support of that argument, discussed Cardona’s statement to the police, which was consistent with Maria’s testimony

that Cardona admitted that he raped H.R.H. Tr. Vol. 4 pp 11-12. The State was entitled to rebut Cardona's attack on H.R.H.'s and Maria's credibility by calling the jury's attention to Cardona's admission to the police that he had made a mistake.

[20] Finally, while the jury deliberated, Cardona moved for a mistrial and argued that the trial court had denied him the right to a fair trial by not allowing surrebuttal. The court denied that motion as well.

[21] Cardona argues that the "prejudice arising from the trial court's denial of surrebuttal arguments was so great that it affected his substantial rights and placed him in grave peril, necessitating a mistrial." Appellant's Br. at 13. "Because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury, the trial court's determination of whether to grant a mistrial is afforded great deference on appeal." *Booher v. State*, 773 N.E.2d 814, 820 (Ind. 2002). "A mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify a situation." *Woods v. State*, 98 N.E.3d 656, 670 (Ind. Ct. App. 2018), *trans. denied*. "To prevail on appeal from the denial of a motion for mistrial, the appellant must establish that the questioned conduct 'was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected.'" *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001) (quoting *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989)).

- [22] The State’s mischaracterization of Cardona’s admission to the investigating police officer did not place Cardona in a position of grave peril. Cardona did not tell the officer that he made a mistake, but he did respond in the affirmative when the officer asked him if he made a mistake. This evidence also is cumulative of Maria’s testimony concerning Cardona’s admission that he “tried to rape” H.R.H., and H.R.H.’s testimony that Cardona molested her, which was corroborated by the findings of H.R.H.’s vaginal exam. Tr. Vol. 3 pp. 69-72, 124-25, 233, 237.
- [23] Moreover, the trial court instructed the jury that it was the exclusive judge of the evidence, the verdict should be based on the evidence, and the statements of the attorneys are not evidence. Appellant’s App. pp. 201, 203-04, 206. “Our court presumes that a jury follows the instructions that it is given.” *Thrash v. State*, 88 N.E.3d 198, 205 (Ind. Ct. App. 2017).
- [24] In sum, Cardona waived his request for surrebuttal. Waiver notwithstanding, the State appropriately relied on Cardona’s statement to the police to rebut Cardona’s attack on Maria’s and H.R.H.’s credibility during his closing statement. And the State’s mischaracterization of the evidence did not place Cardona in a position of grave peril. Therefore, the trial court did not abuse its discretion by denying Cardona’s motion for a mistrial on the basis that the court erred when it refused his request for surrebuttal.

II. Sentencing

[25] Sentencing decisions lie within the trial court’s sound discretion. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008); *Howell v. State*, 97 N.E.3d 253, 270 (Ind. Ct. App. 2018). An abuse of discretion occurs if the decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*.

[26] A trial court abuses its discretion in sentencing if it does any of the following:

- (1) fails “to enter a sentencing statement at all;”
- (2) enters “a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons;”
- (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration;” or
- (4) considers reasons that “are improper as a matter of law.”

Id. (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490–91 (Ind.), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007)).

[27] The statutory sentencing range for Level 1 felony child molesting committed by a person at least twenty-one years of age against a victim less than twelve years of age is between twenty and fifty years, with the advisory sentence being thirty years. *Ind. Code* § 35-50-2-4(c). Here, after considering the aggravating and mitigating circumstances, the trial court imposed the thirty-year advisory sentence. Cardona challenges two of the three aggravating circumstances considered at sentencing.

[28] First, we address his argument that the record does not support the court's finding that Cardona was in a position of trust and control with H.R.H. Cardona acknowledges that "position of trust" can be a valid aggravating circumstance but argues that his relationship with H.R.H. and her family was minimal. He claims that he did not know H.R.H. well and had not spent any significant amount of time with her. Even though he is H.R.H.'s mother's cousin, he did not meet the family until Thanksgiving 2017. He also argues that H.R.H.'s mother's initial refusals when he asked to take H.R.H. to the gas station indicated that she did not trust him. Appellant's Br. at 15.

[29] The trial court specifically found that Cardona had "control" over H.R.H. and that "part and parcel of having control is the position of trust." Tr. Vol. 4, p. 36. It is undisputed that Cardona had control over H.R.H. when he took her to his home and molested her. And H.R.H.'s well-being was entrusted to Cardona when her mother allowed him to take her from her home. This evidence supports the trial court's consideration of this aggravating factor.

[30] Cardona also argues that the trial court's finding that the harm H.R.H. suffered was significant and greater than the elements necessary to prove the commission of the offense is not supported by the record. The trial court observed that Cardona's molestation of H.R.H. has caused significant, long lasting mental harm. At the sentencing hearing, the trial court heard evidence that H.R.H. was still frightened and feared that when Cardona is released from jail, he will hurt her or her family again. H.R.H. also had a bruise on her hymen caused by blunt force trauma, which rarely occurs in child molestation cases.

And H.R.H. testified that she suffered pain when Cardona inserted his penis into her vagina. This evidence supports the trial court's consideration of the challenged aggravating circumstances.

[31] For these reasons, the trial court acted within its discretion when it considered the challenged aggravating circumstances in imposing the advisory, thirty-year sentence for Cardona's Level 1 felony child molesting conviction.¹

Conclusion

[32] Cardona has not persuaded us that the trial court erred when it denied his request for surrebuttal and his ensuing motion for a mistrial. Cardona has also not established that the trial court abused its discretion in its consideration of the aggravating circumstance in deciding to impose the advisory, thirty-year sentence.

[33] Affirmed.

Bailey, J., and Altice, J., concur.

¹ The trial court also properly considered the challenged aggravating circumstances as a matter of law. *See Ind. Code § 35-38-1-7.1 (a)(1), (8).*