STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY L. MORRIS,

Defendant-Appellant.

UNPUBLISHED
August 28, 1998

Nos. 196087; 197471
Oakland Circuit Court
LC Nos. 94-133674 FC;
94-133675 FC; 94-133676 FC

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Defendant was charged with four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and two counts of second degree CSC, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), in three consolidated cases. Following a jury trial, defendant was convicted of three counts of first-degree CSC, and three counts of second-degree CSC.[1] Defendant appeals by leave granted, and we affirm.

I

Defendant first argues that the trial court erred by admitting testimony regarding other uncharged misconduct without making the required legal determinations under *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), mod on other grounds, 445 Mich 1205 (1994).

At trial, defendant objected to the testimony of the complainant's mother, who is defendant's daughter, that she was sexually abused by defendant as a child and young woman, and that this abuse resulted in her having a child at seventeen, who died shortly after birth. On appeal, defendant argues that the trial court erred by allowing the testimony without applying the test for admissibility of other acts evidence as set forth by the Supreme Court in *VanderVliet, supra*, 444 Mich 74-75.[2] Defendant further contends that under *VanderVliet*, the mother's testimony was inadmissible because it pertained only to defendant's character, and that the court's error unfairly prejudiced defendant. We agree with defendant that the trial court erred in not applying the *VanderVliet* test.[3] We conclude, however, that the evidence was admissible, and therefore reversal is not required.

We first observe that had the trial court conducted the inquiry required by *VanderVliet* and determined that the evidence was admissible, we would conclude that there was no abuse of discretion under the Supreme Court's recent decision in *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998).[4]

We recognize, however, that the prosecutor did not use the evidence for the purpose permitted by *Starr*.[5] Nonetheless, we are persuaded that under the particular circumstances presented, the testimony was admissible. The four-prong analysis under *VanderVliet* first requires a finding that the evidence is offered for a proper purpose under MRE 404(b)(1). The evidence must be relevant to an issue other than defendant's character. *VanderVliet, supra,* 444 Mich 74. In the instant case, the prosecutor offered the testimony to show defendant had a plan, scheme, or system. This is a permissible purpose under MRE 404(b)(1). Further, defendant relied on a general denial of the charges and thereby put all elements of the offense at issue. *VanderVliet, supra*, 444 Mich 78-79, *citing* MCR 6.301(A) and *People v Eddington*, 387 Mich 551; 198 NW2d 297 (1972). Under these circumstances, the existence of a plan, scheme or system of sexual abuse is an acceptable intermediate reference to non-character evidence that is relevant to show the actus reus of the crime. *People v Engelman*, 434 Mich 204, 220-222; 453 NW2d 656 (1990), citing 2 Wigmore (Chadbourn rev) Evidence, Sec 304, p 249.

However, evidence of a plan, scheme or system in doing an act must establish that the defendant had formed a "true plan" that included the other acts and the charged crime as stages in the plan's execution. *Engelman, supra,* 434 Mich 221. Similarity between the acts is unnecessary where the other acts evidence is proffered to establish motive, consciousness of wrongdoing, knowledge, or a true plan, rather than identity. *VanderVliet, supra,* at 66-67, 69-70. Further, there is no rule limiting the admissibility of other acts evidence to the specific exceptions set forth in Rule 404(b). Relevant other acts evidence does not violate the rule unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *Id.* at 65.

In the instant case, defendant was accused of sexually molesting his granddaughter beginning when she was ten years old. The complainant's mother testified that defendant sexually abused her from the time she was ten years old until she was eighteen and moved out of defendant's house. She also testified that her first pregnancy at the age of seventeen was the result of this sexual abuse by defendant. Similarly, the complainant testified that the defendant began his sexual abuse of her when she was ten years old and also testified that defendant told her that when she was seventeen, he wanted her to have his baby. The testimony regarding the actual (mother) and intended (complainant) pregnancies tips the scale in favor of admissibility. Without this aspect of the testimony, the evidence appears to be character evidence offered for the impermissible purpose of establishing character and propensity. *Engelman, supra.* However, taken as a whole, the challenged testimony tended to establish that the charged acts had occurred (the actus reus) through an intermediate inference other than to character. *VanderVliet,* at 67, n 18: *Engelman,*215-218.

The complainant's credibility was at issue. The complainant testified that defendant told her that he wanted her to have his baby when she turned seventeen. This is not a statement one would commonly expect an adult relative to say to a young girl in the course of sexually abusing her. When this

testimony is viewed in isolation, it is bizarre. When viewed in light of the mother's testimony that defendant had gotten her pregnant at that age, it is highly probative (provided the jury believes the mother's testimony and believes that defendant, in fact, made the statement.) The intermediate inference involved is not that defendant has a propensity to sexually abuse young female relatives, but that he had a plan or scheme to impregnate them,[6] and that the complainant's testimony that defendant expressed this intent to her, viewed in light of the mother's testimony that defendant had gotten her pregnant at seventeen, made it more probable that the complainant's account was truthful. Thus, we conclude the testimony was admissible, and that the probative value was not outweighed by the prejudicial impact.[7]

II

Defendant also argues that the trial court abused its discretion in admitting testimony regarding dead grandchildren of defendant because the evidence was more prejudicial than probative. The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995).

The complainant testified that defendant threatened her by saying that defendant would put her and her mom "down with the rest of them" if she told anyone about the alleged sexual abuse. At trial, the prosecutor attempted to elicit testimony from the complainant that "the rest of them" referred to the complainant's dead baby cousins. The prosecutor asked the complainant whether she thought defendant was referring to her dead baby cousins when defendant threatened to "put her down with the rest of them." The complainant had so stated at a bond hearing. At trial, however, the complainant responded that she did not think defendant had been referring to her cousins but rather believed, "[m]aybe he'd put me down there with the liars or something."

Later in the trial, the prosecutor elicited testimony from the complainant's mother that her first baby, whom she testified had been fathered by defendant, had died. The complainant's mother also testified that three of her sisters' babies had died. In response to defendant's objection, the prosecutor argued that the testimony about the dead nieces and nephews was relevant and probative because it explained why she had previously questioned the complainant about other dead infant cousins when she was asking about threats defendant had made. On that basis, the trial court allowed the testimony.

Defendant argues that the testimony had marginal relevance in light of the complainant's testimony that she did not understand defendant's threat to be a reference to her cousins, and that it was extremely prejudicial "because the obvious inference the prosecutor wants the jury to draw is that these other nieces and nephews were products of incestuous relationships between defendant … and his other daughters and died because they were congenitally defective." We agree that after the complainant testified that she understood the threat to mean something other than a reference to her cousins, there was no basis to admit the mother's testimony as relevant to the threats, as argued by the prosecution. However, the mother's testimony was cumulative to the complainant's, and the prosecutor did not refer to this testimony in closing. Moreover, defendant's complaint that the evidence was used

as evidence of other bad acts of defendant involving incest and congenitally defective offspring was not articulated at trial. In sum, we find no error requiring reversal.

III

Defendant also argues that he was denied his right to effective assistance of counsel. Because defendant failed to file a motion for a new trial or for a *Ginther*[8] hearing, we limit our review to deficiencies in defendant's trial counsel's performance that are apparent from the lower court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a denial of effective assistance of counsel that justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation was so prejudicial as to deprive him of a fair trial. *People v Price*, *supra* at 547. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant claims that he suffered prejudice from counsel's negligent failure to object pretrial to the prosecutor's notice of intent to introduce similar acts testimony through a number of specifically listed witnesses. Defendant argues that although his objection to one of the witnesses was sustained when her testimony was offered at trial, the jury still heard references to her testimony during the prosecutor's opening statement. Assuming counsel was ineffective in failing to raise the issue pretrial, the required prejudice is not present. There is no reason to believe that a pretrial objection would have resulted in a different verdict. We reach a similar conclusion regarding defense counsel's failure to argue to the court that *VanderVliet* expresses a preference for, but does not require, a pretrial objection. Further, we conclude that the remainder of defendant's arguments asserting ineffective assistance of counsel, raised in a supplemental brief filed in propria persona, are unpersuasive as lacking in support.

IV

In his supplemental brief, defendant additionally claims that the trial judge erred by not permitting all defendant's witnesses to testify. However, defendant has not explained the circumstances under which the witnesses' testimony was disallowed, (except for a general reference to the law regarding late endorsement of witnesses), and has not addressed the testimony they were expected to give and how it would have affected the verdict. A defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). As this issue has not been properly presented for review, we will not address it further.

V

Defendant further argues that he was prejudiced by the prosecutor's failure to produce Dr. Charfoos, a res gestae witness. We disagree.

Defendant failed to preserve this issue for appellate review because he did not object at trial to the witness' failure to appear, and stipulated to what the nature of her testimony would have been.[9] Further, defendant failed to raise the issue below in a motion for a post-trial evidentiary hearing or in a

motion for a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Moreover, defendant was not prejudiced by the witness' absence. The essence of the testimony of the doctor that defendant complains was not admitted into evidence was contained in the stipulation and the medical records that the jury was allowed to examine. Therefore, the defendant was not prejudiced by the prosecution's failure to produce Dr. Charfoos.

VI

Defendant also claims he was denied a fair and impartial jury trial because the prosecutor bolstered the credibility of Dr. Charfoos, a non-testifying witness. In the absence of a timely objection to improper prosecutorial remarks, this court may reverse only if a curative instruction could not have avoided prejudice to the defendant or a miscarriage of justice would result. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). A prosecutor is free to relate the facts adduced at trial to her theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), but cannot make a statement of fact to the jury that is unsupported by the evidence, *Stanaway*, *supra* at 686. The prosecution need not state the inferences that can be drawn from the evidence in the blandest possible terms. *Ullah*, *supra*, at 678. A prosecutor may not vouch for the credibility of a witness by implying that the prosecutor has some special knowledge that the witness is testifying truthfully. *Bahoda*, *supra*, 448 Mich 276.

In the instant case, the prosecutor merely related the facts to her theory of the case. She properly advised the jury of the meaning of the parties' stipulation with respect to Dr. Charfoos and the inferences that a reasonable jury could draw from the stipulation and medical records. We find no impropriety in the prosecutor's closing remarks regarding Dr. Charfoos.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Robert P. Young, Jr.

[1] In lower court no. 94-133674-FC, defendant was sentenced to ten to fifteen years' imprisonment for the conviction of one count of second-degree CSC. In lower court no. 94-133675, defendant was sentenced to twenty to forty years' imprisonment for the conviction of one count of first-degree CSC and to ten to fifteen years' imprisonment for the convictions of two counts of second-degree CSC. In lower court no. 94-133676, defendant was sentenced to twenty to forty years' imprisonment for the conviction of two counts of first-degree CSC.

[2] In *VanderVliet*, 444 Mich at 74-75, the Supreme Court set forth a four-pronged analysis for the admission of other acts evidence: (1) the evidence must be relevant to an issue other than propensity under MRE 404(b) to protect against the introduction of extrinsic act evidence for the sole purpose of proving character; (2) the evidence must be relevant under MRE 402; (3) the trial court should conduct the balancing test of MRE 403, which states that the probative value of the evidence must not be substantially outweighed by unfair prejudice; and (4) the trial court shall, upon request, instruct the jury that similar acts evidence is to be considered only for the proper purpose underlying its admission pursuant to MRE 105. *People v Basinger*, 203 Mich App 603, 606; 513 NW2d 828 (1994).

[3] The prosecution filed a pretrial notice of intent to introduce evidence of similar acts through the testimony of several witnesses, including the complainant's mother. Defendant did not object to the introduction of this evidence prior to trial, but did object at trial. Although *VanderVliet* does not require a pre-trial objection, see *VanderVliet, supra*, at 89, the trial court ruled that defendant had waived objection by not objecting pretrial, and allowed the evidence to be admitted without engaging in the four-pronged analysis of *VanderVliet*.

[4] In *Starr*, the defendant was charged with sexually abusing his minor adopted daughter. A majority of the Supreme Court concluded that the testimony of the defendant's younger half-sister that he had sexually abused her for over thirteen years was admissible to rebut the defendant's claim that the charges regarding his daughter were fabricated. The child victim in *Starr* told her mother about the alleged abuse two years after it occured, during a time when the mother and father were engaged in a visitation dispute. One of the defendant father's theories of defense was that the victim's mother fabricated the allegations to prevent the defendant from having any future contact with his adopted daughter. The victim revealed the abuse after specific questioning by the mother.

A majority of the Court concluded that the testimony was admissible and necessary to explain why the mother specifically questioned the victim about her relationship with the defendant. The half-sister testified that she had revealed to the mother that the defendant had abused her from the age of four until she was approximately eighteen. The mother questioned the victim in response to this revelation. The Court concluded:

> . . . . Absent the half-sister's testimony, the prosecutor could not effectively rebut defendant's claim that the charges were groundless and fabricated by her mother. As in *People v VanderVliet,* we find that "[w]ithout such evidence, the fact finder would be left with a chronological and conceptual void regarding the events . . . ." *Id.* at 81, citing *United States v Ostrowsky*, 501 F2d 318, 322 (CA 7, 1974). Thus we find the proffered evidence to be probative to refute the defendant's allegations of fabrication of charges.
>
> Further, we find this evidence survives the third prong of *VanderVliet* as being substantially more probative than prejudicial. Because the charges were filed two years after the abuse occurred, there was no medical evidence to substantiate the victim's claims. Indeed, in this case the half-sister's testimony is the only evidence that

> effectively refutes the claim of fabrication and explains the delay in reporting the crime. Moreover, the half-sister's testimony revealed a striking similarity between the half-sister's age, living arrangement, and relationship with defendant at the time the abuse of the half-sister began, to that of the victim. This similarity explains why the mother became so concerned with her daughter's relationship with defendant, and makes more plausible the proposition that the mother's questions were prompted by concern for her daughter's safety rather than spite and a desire to prevent defendant from getting custody of the victim. [*Starr, supra*, 457 Mich at 502-503.]

In the instant case, defendant was charged with first- and second-degree CSC involving his granddaughter. The sexual abuse was alleged to have occurred from the time the complainant was ten to the time she was thirteen. There was a nine-month interval between the last alleged incident of abuse and the time the complainant reported it to her mother. The mother testified it was her own experience of being sexually abused by defendant, together with the complainant's reaction to a television show the family was watching about sexual abuse, that prompted her to question the complainant on the subject. The complainant refused to answer initially, and several days later, when the mother continued to question her regarding why she refused to watch the show, she wrote her reason on a piece of paper.

As in *Starr*, the medical evidence neither supported nor refuted the allegations, and defendant relied on a general denial, claiming the charges against him were fabricated by the complainant and her mother. Defendant was the mother's landlord and had served her with a notice to quit. Defendant's theory was that since the notice to quit stated that the mother had to vacate the premises by June 10, the mother and complainant fabricated the allegations of sexual abuse and reported them to the police on June 9, in retaliation. As in *Starr*, the challenged testimony would explain the mother's questioning of her daughter about sexual abuse and the reason the abuse was reported when it was, after a significant period of delay.

[5] In closing argument, the prosecutor stated:

> But ladies and gentlemen, there is other evidence. There is some other evidence as it lies in the form of testimony from her mother. And we know that [the complainant] was not the only victim of Gary Morris because we know that the Defendant's daughter . . . was also a victim.
>
> She was a victim of sexual abuse from the age of ten, the same age that the Defendant started perpetrating upon [the complainant.] We know that she was a victim from the time that she was in fourth grade, the same grade that the Defendant chose to being [sic] upon [the complainant.]
>
> We know that [complainant's mother] has told you that the Defendant was responsible for her first pregnancy and we know that the Defendant made the same threat to his granddaughter, that when she turned 17 he's going to have –make her have his baby, too.

[6] On this basis, the instant case differs from those cases in which our Supreme Court rejected the invitation to extend its decision in *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973), allowing evidence of other acts of sexual intercourse between the defendant and the victim to corroborate the victim's testimony, to cases involving prior acts between the defendant and persons other than the complainant. *VanderVliet, supra,* at 222; *People v Jones*, 417 Mich 285; 335 NW2d 465 (1983).

[7] The trial judge gave a cautionary instruction.

[8] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[9] The prosecutor subpoenaed Dr. Charfoos, who responded with a motion to quash the subpoena. Thereafter, the parties stipulated that the doctor would testify that the medical evidence did not establish or rule out sexual assault.