STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAIRE GORDON SLICK,

Defendant-Appellant.

UNPUBLISHED
June 18, 1999

No. 192709
Kalkaska Circuit Court
LC No. 95-001494 FH

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), arising from alleged conduct with an eight-year-old neighbor girl. Defendant was sentenced to concurrent terms of 7 ½ to 15 years and appeals as of right. We affirm.

Defendant and his wife sold their home to the complainant's family in 1993 and moved to a trailer on an adjoining lot. The homes were near each other and the two families became friendly, to the point that defendant at times baby-sat for the complainant and her brother, who was ten or eleven at the time. The two children were urged by defendant or his wife to call them "grandma" and "grandpa." Defendant's wife was bed-ridden most of the time and died in 1994. The complainant and her brother were frequently in defendant's trailer and would go on errands with him in his truck. They testified that when they were together with defendant, defendant would often send the brother away to perform some task and would then fondle the complainant. The complainant testified that defendant told her something "really bad" would happen if she told about the incidents.

The complainant was allowed to testify that defendant had touched her vaginal area on many occasions other than the two incidents charged.

The trial court also admitted similar acts testimony of defendant's granddaughter and the step-sister of defendant's granddaughter. Defendant's granddaughter, aged twenty-two at trial, testified that when she was between eight and ten years old, defendant stuck his hand down her shorts, through her underwear, and played with her vagina many times, (she estimated fifty or more times). She testified that defendant would find ways to isolate her from the other children in order to be alone with her and

commit the sexual acts, and that defendant threatened that bad things would happen to her mother and brother if she did not do what he wanted. Defendant's granddaughter's step-sister testified that she referred to defendant as "grandpa," and that defendant touched her vagina in 1983 when she was ten years old. The incident occurred when she, defendant's granddaughter, and a number of other children went on a camping trip with defendant. When bedtime came, defendant changed the sleeping arrangements so that the girls were closer to him. She testified that during the night she awoke to discover defendant touching and rubbing her vagina, and that it continued for a while, despite her protestations. She testified that she reported the incident soon after. The trial court gave limiting instructions before each of these witnesses testified.

I

Defendant challenges on a number of grounds the trial court's admission of other acts testimony. We review the trial court's determination to admit prior similar acts evidence for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts. MRE 404; *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b)(1) contains a list of nonexclusive "noncharacter" grounds on which other acts evidence may be admitted, permitting such admission "on any ground that does not risk impermissible inferences of character to conduct." *Starr, supra* at 496. To guard against such impermissible inferences, the trial court must insure before admitting other acts evidence that the four-part test of *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), is met:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Starr, supra* at 496, quoting *VanderVliet, supra* at 55.]

A

Defendant argues that the testimony of the granddaughter and granddaughter's step-sister was not admissible to show scheme, plan or system; and, further, was not admissible to show purposefulness and absence of mistake because defendant did not offer the defense of mistake or accident or lack of intent, and intent was not materially at issue.

The first prong of *VanderVliet* is not at issue, as defendant does not argue that the prosecution proffered the evidence for purposes that were improper under MRE 404(b). That the evidence is offered for a proper purpose does not make it relevant, however. *Crawford, supra* at 390.

> In the context of prior acts evidence. . . MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking

> the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. [*Crawford, supra* at 390.]

Evidence is relevant if it is material and has probative value. *Crawford, supra* at 388.

> Materiality is the requirement that the proffered evidence be related to "any fact that is of consequence" to the action. "In other words, is the fact to be proven truly in issue?" Wade & Strom, Michigan Courtroom Evidence (rev ed), Rule 401, p 71. A fact that is "of consequence" to the action is a material fact. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." 1 McCormick, Evidence (4th ed), § 185, p 773. [*Crawford, supra* at 388-389.]

While we agree with defendant that the prosecution may not invoke the rule that a general denial places all elements of the offense in issue, see *Crawford, supra* at 389; *VanderVliet, supra* at 78, to introduce evidence that is not truly relevant to a material issue in the context of the case actually being tried, we do not agree that defendant's posture at trial—that there was no touching at all, as distinguished from innocent touching without sexual intent—renders all questions relating to motive or intent immaterial. Here, there was testimony that defendant repeatedly separated the complainant from her brother. The intent with which defendant did so was relevant to the jury's assessment of the evidence. The other acts evidence regarding defendant's separating his granddaughter from the other children in order to enable sexual contact was therefore relevant. The issues of preparation, scheme, system or plan were also implicated.

The other acts evidence was probative to show that defendant had a system in sexually abusing young girls; he would place himself in the position of caring for or supervising children, and then isolate the victims, who were approximately the same age, from the company of the other children and, once alone, he touched all the victims in the same place, the vaginal area, without further sexual acts. *People v Gibson,* 219 Mich App 530, 533-534; 557 NW2d 141 (1996). The second prong of *VanderVliet* is thus met.

Defendant next argues that the other acts evidence should have been excluded on the basis of unfair prejudice. The question is whether the evidence's probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Starr, supra* at 498.

Defendant argues that the legitimate probative value of the similar acts evidence was weak because intent was not a contested issue, while the evidence was devastatingly prejudicial under the circumstances that the complainant was a young girl, the charged offense was criminal sexual conduct, and there was testimony from others that when they were girls he had committed similar acts with them. The *Starr* Court noted in this regard:

> . . . while we would agree that the acts described in the proffered testimony are certainly "depraved" and of "monstrous repugnance," such characteristics were inherent in the underlying crime of which defendant stood accused. The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of he crime itself. [457 Mich at 499-500.]

We conclude that the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice.

B

Defendant also argues that the jury could only have viewed the trial court's instruction at the conclusion of trial as an invitation to infer that because defendant had a propensity to commit such crimes, he was more likely to be guilty of the conduct charged.[1]

The instruction the trial court read was submitted by both parties as a proposed jury instruction, and approved of by both counsel after being read. Absent an objection, relief is available only in case of manifest injustice. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). The challenged instruction was CJI2d 4.11, read almost verbatim. We fail to see how manifest injustice could result under these circumstances.

II

Defendant next claims that the trial court erred in allowing the complainant to testify that defendant had touched her vaginal area on many occasions other than the two incidents for which he stood trial.

The trial court admitted the testimony under the *Jenness-DerMartzex* exception to the general rule that other acts evidence is inadmissible. In *People v Jenness*, 5 Mich 305 (1858), the defendant was charged with incest with his niece. The trial court admitted evidence of previous acts of intercourse, "not as evidence of substantive offenses, but in explanation and corroboration of the evidence of the act charged in the information." 5 Mich at 319. The Supreme Court noted in *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973), in which the defendant was convicted of assault with intent to commit rape:

> . . . it has been held that the probative value outweighs the disadvantage [of diverting the trier of fact from an objective appraisal of the defendant's guilt or innocence] where the crime charged is a sexual offense and the other acts tend to show familiarity between the defendant and the person with whom he allegedly committed the charged offense. The rationale of this exception to the general rule is well expressed by Mr. Justice Christiancy in an appeal from a conviction of the offense of incest:
>
> > "[W]here a witness has testified to a fact or transaction which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself,

> without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural and probable; *such* previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction—a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction." (Emphasis by the Court.) *People v Jenness*, 5 Mich 305, 323-324 (1858). [*DerMartzex, supra* at 413-414.]

We conclude that the trial court did not abuse its discretion in admitting the complainant's testimony regarding other acts by defendant under the *Jenness-DerMartzex* exception. Without this evidence, the jury might have questioned why defendant would suddenly touch the complainant on these two occasions when he had regular and close contacts with her over a considerable time period. Defendant's argume nt that the *Jenness-DerMartzex* exception did not survive the adoption of the Michigan Rules of Evidence, has been rejected. *People v Dreyer*, 177 Mich App 735, 737; 442 NW2d 764 (1989).

III

Defendant next claims that the complainant's delay in reporting the alleged assaults precluded the trial court from allowing the complainant's mother to testify regarding her daughter's report of the incidents. MRE 803A allows the introduction of hearsay testimony corroborating the complainant's testimony at the same proceeding in cases of sexual misconduct where (1) the victim is under the age of ten; (2) the statement was made spontaneously; and (3) the victim made the statement immediately following the incident, or any delay in telling was due to fear. Defendant's claim of error involves the third requirement. The complainant in this case testified that she delayed reporting that defendant had touched her inappropriately because he threatened her. Because the trial court did not abuse its discretion in determining that the complainant's delay was due to fear, we find no error.

IV

Defendant next claims that the trial court erred in failing to instruct the jury that to convict on Count I, it must unanimously agree on the particular act found to support the charge. Defendant did not object to the challenged jury instructions at trial. Objections to jury instructions must be timely made at trial, *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987), and must ordinarily be accompanied by a request for a curative instruction. *People v Harris*, 158 Mich App 463, 466; 404 NW2d 779 (1987). Absent an objection below our review is for manifest injustice. *VanDorsten*, *supra* at 545.

A general unanimity instruction is sufficient where more than one act is presented to a jury unless there has been materially distinct evidence presented with respect to one or more of the acts, or unless there is reason to believe that there may be juror confusion or disagreement regarding the facts. *People v Cooks*, 446 Mich 503, 530; 521 NW2d 275 (1994). Applying *Cooks*, we find no manifest injustice.

V

Defendant last argues the sentencing guidelines were incorrectly scored. He argues that the trial court erred in imposing twenty-five points for OV 2 for terrorism. Terrorism is defined as "conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." Michigan Sentencing Guidelines, 1988, p 44. Defendant asserts that the complainant's testimony showed that only one threat was made and that it was made *after* an assault; therefore, it could not have been designed to increase the fear and anxiety she suffered *during* the offense. However, there was also testimony that defendant touched the complainant many times and that, because of defendant's threat, she was afraid to report the incidents.

Claims of miscalculation or misapplication of the sentencing guidelines are cognizable on appeal only where "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Given the testimony, defendant's argument that a factual predicate is wholly unsupported is without merit.

Defendant also argues his sentence is disproportionate, without regard to whether the guidelines were properly scored. Based on a prior record level B (one concurrent conviction), and an offense severity level three, the guidelines range was twenty-four to sixty months. Michigan Sentencing Guidelines, 1988, p 47. The court imposed a sentence of 90 to 180 months. A court may sentence outside the guidelines when it finds that the range imposed by the guidelines is disproportionate to a defendant's prior record and the seriousness of the crime. MCR 6.425(D)(1); *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). The court considered defendant's history, his previous assaults against children, the effect of the crime on the victim, and the need to protect the victim from future assaults during her childhood. These are permissible factors to consider at sentencing. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987); *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991); *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Defendant also suggests that the trial court had other, less restrictive methods of protecting the victim. The trial court was under no duty to impose the least restrictive sentence.

We conclude that the sentence was proportionate to the crime, defendant's history, the effect of the crime on the victim, and the need for the victim to feel safe again. We find no abuse of discretion.

Affirmed.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White

[1] The trial court instructed the jury:

> You have heard evidence that was introduced to show that the Defendant committed improper acts with third parties for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that in this case, the Defendant acted purposefully: that is, not by accident or mistake, or because he misjudged a situation, or in this case that the Defendant used a plan, system, or characteristic scheme that he has used before, or since.
>
> You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person, or that he's likely to commit crimes. You must not convict the Defendant here, because you think he's guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt, that the Defendant committed the alleged crime that we are here to try, or you must find him not guilty.