STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ROBERT UMBARGER,

Defendant-Appellant.

UNPUBLISHED
August 13, 1999

Nos. 197818; 197819
Kent Circuit Court
LC Nos. 95-003388 FC;
95-003419 FC

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of three counts of criminal sexual conduct, first degree (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of criminal sexual conduct, second degree (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The court sentenced defendant to fifteen to forty-five years' imprisonment on the CSC I convictions and ten to fifteen years' imprisonment on the CSC II conviction. We affirm.

Defendant's convictions stem from allegations that he sexually assaulted two boys, James O and Jonathan F, when both were under the age of thirteen. Defendant was friendly with both boys' families. At one point, defendant had lived with James O's family and worked with James F's mother. Prior to the filing of charges, defendant, who had risen to a supervisory position at his place of work, had to inform James F's mother that she was being laid off. A third boy, Steven B, testified at trial that when he was under the age of thirteen and around the same time the other assaults were occurring, he was also sexually assaulted by defendant. Two separate cases involving James O and Jonathan F were consolidated for trial.

I

Defendant contends the trial court abused its discretion in denying his motion for remand for purposes of conducting preliminary examinations. Specifically, defendant argues that the trial court abused its discretion given that defendant waived his preliminary examinations on the expectation that the three CSC I charges pending would be reduced to CSC II. We disagree. Defendant waived preliminary examination in these cases approximately seven months before trial in two separate hearings

conducted in November 1995. He made his motion for remand six months later, and approximately one month before trial. Initially, we note that the record on appeal does not contain a transcript from the second hearing, in which defendant presumably waived his right to a preliminary examination in one of the two cases. It was at this hearing that the prosecution apparently withdrew the offer to reduce the charges. Without a complete record, nothing is left for us to review. *People v Coons*, 158 Mich App 735, 740; 405 NW2d 123 (1987).

In any event, we find defendant's claim to be without merit. Once a defendant waives his right to a preliminary examination, his right to withdraw the waiver is not absolute. *People v Skowronek*, 57 Mich App 110, 114; 226 NW2d 74 (1974). While a defendant may be able to withdraw a waiver of a preliminary examination made in expectation that the charges pending would be reduced, defendant still must move to withdraw his waiver in a timely fashion. Defendant's delay of six months from the time the prosecution's offer was withdrawn rendered his request untimely.

As for defendant's assertion that he was entitled to specific performance of the agreement, we decline to address this argument given that it was not raised below and lacks merit. *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989); *People v Hunter*, 209 Mich App 280, 286; 530 NW2d 174 (1995).

Defendant also argues that he was denied effective assistance of counsel because counsel failed to file an interlocutory appeal, so that this Court could determine whether defendant was entitled to either a preliminary examination or specific performance of the agreement. This argument was not included in the list of questions presented and, as a result, is not properly before us for review. MCR 7.212(C)(5); *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).[1]

II

Next, defendant contends the trial court erred in allowing Steven B's testimony. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). In order for bad acts evidence to be admissible, the trial court must apply the following four part standard:

> 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. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

Under the first prong of the *VanderVliet* standard, a prosecutor seeking to introduce other acts evidence under MRE 404(b) must articulate a proper noncharacter ground for the admission of other acts evidence at trial. *Id*. at 74; *People v Crawford*, 458 Mich 376, 386; 582 NW2d 785 (1998); *People v Sabin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 187226, issued 06/04/99)(Whitbeck, J., dissenting), slip op at 3. The prosecutor argued below that Steven B's testimony could be brought in under the following rationales: (1) because the events described were so

inextricably linked to the abuse suffered by James O, the evidence should be allowed in under *People v Delgado*, 404 Mich 76; 273 NW2d 395 (1978); (2) because the evidence shows the existence of a defendant's pattern for committing the abuse (i.e., using one victim to recruit other victims); (3) because the doctrine unlikely coincidence applied. We conclude that each of these rationales is a proper noncharacter ground for admission of Steven B's testimony. Thus, the first prong of the *VanderVliet* standard was satisfied.

Turning now to the second prong of the *VanderVliet* standard, with respect to the first two articulated rationales, we do not believe that the prosecutor sustained her burden of establishing her theory of logical and legal relevance. *VanderVliet, supra* at 61-62. Under *Delgado*, other acts evidence may be admitted if it is "so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Delgado, supra* at 83. In the case before us, the crimes charged do not involve Steven B. Further, we do not believe that evidence of abuse by defendant of Steven B is so inextricably linked to the abuse of James O and Jonathan F, that proof of the crimes charged incidentally implicates Steven B's testimony. We also do not believe this testimony explains the circumstances of the crimes charged. If the evidence had shown that Steven B had been the recruiter and not the recruit, then his testimony would have helped to explain the subsequent abuse. *People v Lucas*, 188 Mich App 554, 579; 470 NW2d 460 (1991). But this was not the case.

The prosecutor also failed to articulate a proper theory of relevance for her second rationale (i.e., pattern of recruitment). *Crawford, supra* at 387. While the evidence does establish that defendant used James O to recruit Steven B, there was no evidence that Jonathan F was either a recruiter or recruit. Rather, the evidence establishes that defendant came into contact with James O and Jonathan F after befriending their families.

However, with respect to the third articulated rationale for admission of Steven B's testimony, we conclude that the prosecutor did establish that the evidence was relevant. Before trial, defendant entered a plea of not guilty. Then, when directly asked by the prosecutor during discussions on the admissibility of the testimony to state the nature of defendant's defense, defense counsel stated that defendant intended to argue that he "simply did not commit these offenses and that they are simply untrue."

Although defendant's general denial placed all elements of the two CSC charges at issue, *Starr, supra* at 501; *VanderVliet, supra* at 78, counsel's cryptic statement did not make it clear whether he was intending to assert that the acts never took place (the actus reus element), or if they did, that defendant had acted innocently or accidentally (the mens rea element). Defendant's failure to make this clear at this point in the trial, however, did not handcuff the court with respect to the issue of the admissibility of Steven B's testimony. As the *VanderVliet* Court observed, "Where the trial court can reliably determine that a fact will be in issue before trial, it may determine admissibility." *VanderVliet, supra* at 70. Defendant's blanket denial makes it clear that either the actus reus or mens rea elements of the crimes charged would be at issue. Under current Michigan law, other acts evidence can legitimately be used to help establish both the mens rea, *id.* at 78-79, and the actus reus elements, *Starr, supra* at 500-501, of a crime.

Further, we believe that given the unequivocal and stark tenor of the denial, defendant was indicating that he would be arguing that the acts charged did not occur. Put another way, following counsel's statement it could be reliably determined that defendant would argue at trial that James O's and Jonathan F's charges were a complete fabrication. See *Starr, supra* at 500. The soundness of this conclusion is borne out by defendant's opening and closing statements, in which he argued that he had been "set up" by James O's and Jonathan F's mothers. Asserting that both woman had romantic "designs" on him, and that Jonathan F's mother was also mad at him for firing her, defendant argued that the charges had been fabricated by the woman in order to get revenge.

Given defendant's argument, we believe Steven B's testimony is relevant and admissible under the doctrine of chances, because the testimony tends to make it objectively less probable that James O's and Jonathan F's charges were the result of collusion among the boys' mothers.[2] See *Starr, supra* at 501-502; *VanderVliet, supra* at 79. That is, the testimony allows the prosecutor to counter defendant's argument that the common cause underlying James O's and Jonathan F's accusations is the animus of the boys' mothers toward defendant.

We acknowledge and are mindful that employing the doctrine of chances in circumstances such as are presented in the case at hand is fraught with the potential for abuse. However, we believe that the similarity between the events testified to by all three boys is sufficiently strong to justify the application of the doctrine. *Crawford, supra* at 395. Indeed, it is the strength of this similarity that leads us to also conclude that the probative value of the evidence is not substantially outweighed by the real danger of unfair prejudice. See *id.* at 398-399; *Starr, supra* at 503.[3] Furthermore, these similarities dispel the risk that Steven B's testimony is the result of an independent invention. Finally, we believe that the limiting instruction given by the trial court sufficiently apprised the jury of the strictly limited use to which Steven B's testimony could be put.[4]

Moreover, assuming arguendo that the *VanderVliet* standard was not satisfied, we would nonetheless find that given the strength of the untainted evidence adduced at trial, defendant has not established that "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, ___ Mich ___; ___ NW2d ___ (Docket No. 110737, issued 07/13/99), slip op at 13.

III

Defendant also claims the trial court abused its discretion when it ruled that he could not cross-examine James O about a claim the boy had made approximately one year prior that his father and uncle had sexually abused him. While it is true that the trial court initially ruled that James O could not be questioned about this prior abuse, it is also true the trial court reconsidered its ruling after evidence had come in that made the prior abuse evidence relevant. Because he was given the opportunity to question James O on the subject, we find defendant's argument to be without merit.

IV

Finally, defendant claims the trial court abused its discretion in allowing the prosecution to introduce rebuttal testimony from two witnesses. Again, we disagree. Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the opposing party. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *Id*. at 398. In this case, defendant introduced five witnesses who testified as to his relationship with one of the victims, describing it alternately as a father-son relationship, loving, and protective. In rebuttal, the prosecution introduced the testimony of Thomas Cottrel, a counselor who worked with child victims of sexual abuse. Cottrel testified that children who are victims of sexual abuse committed by a person they trust often appear to have an affectionate, trusting relationship with the abuser. Because this evidence went to explain the behavior defendant's witnesses had described, we see no abuse of discretion in its admission.

We also reject defendant's unsubstantiated assertion that reversal is required because the rebuttal testimony of Terri Page was erroneously admitted. Not only is this issue unpreserved because it was not raised below, *Hamacher, supra* at 168, but defendant makes no argument on appeal as to why Page's testimony should not have been admitted. MCR 7.212(C)(7).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] Even were we to reach this issue, with find it to be without merit.

[2] In this way, the other acts evidence is similar to corroborative evidence.

[3] In arguing that the third prong of the *VanderVliet* standard was not satisfied, defendant claims he was not allowed to elicit evidence that Steven B's claims had been resolved. However, the record shows that two witnesses testified about defendant entering a plea in the Steven B case.

[4] The trial court gave the following instruction regarding Steven B's testimony:

If you believe this evidence, you must be very careful to consider it only for the one limited purpose, and that is to help . . . judge the credibility of the testimony regarding the acts which the defendant is now on trial.

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 the defendant is likely to commit crimes.