STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VAN ORION SNYDER,

Defendant-Appellant.

UNPUBLISHED
October 26, 1999

No. 210802
Schoolcraft Circuit Court
LC No. 97-006129 FC

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), against his twelve-year-old stepdaughter. He now appeals as of right. We affirm.

Defendant first contends that the trial court erred when it permitted the complainant to testify regarding defendant's prior uncharged acts of sexual abuse against her. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996).

As a general matter, a trial court may admit other-acts evidence that reveals a defendant's character through his prior acts as long as it is not introduced to prove his guilt on the basis of that character but for a proper purpose. MRE 404(b)(1); see *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts. *People v Engelman*, 434 Mich 204, 211; 453 NW2d 656 (1990). Other-acts evidence is admissible under MRE 404(b) if: (1) the prosecutor offers it to prove something other than character; (2) the evidence fits the relevancy test articulated in MRE 402, as enforced by MRE 104(b); and (3) the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is being offered. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Additionally, a party may request a limiting instruction under MRE 105 to limit the prejudice that may flow from a court's decision to admit other-acts evidence. *Id*. at 75.

People v DerMartzex, 390 Mich 410; 213 NW2d 97 (1973), provides a special rule that dovetails with the first prong in *VanderVliet*, *supra* at 74-75. That is, a trial court has the discretion to admit evidence of prior acts of "sexual intimacy" between members of the same household because the prior acts have a proper purpose of helping to explain an otherwise incredible charge; this evidence is intended to corroborate, not merely to show that the defendant must be guilty of the charged offense because he or she is a bad person. See *People v Sabin*, 223 Mich App 530, 533; 566 NW2d 677 (1997), remanded 459 Mich 920 (1998), on remand 236 Mich App 1; ___ NW2d ___ (1999). See also *Starr*, *supra* at 496; *People v Jones*, 417 Mich 285, 286-287; 335 NW2d 465 (1983).

That defendant and the complainant, his stepdaughter, were members of the same household is undisputed. Although five people – the complainant's brothers, two friends, and her mother – saw her in bed with defendant, credibility was still at issue because none of these witnesses observed any sexual activity and the defense theory was that none occurred. Even though defense counsel did not aggressively challenge the complainant's testimony, he raised the inference that she was not telling the truth by asking her a number of questions regarding whether the prosecutor ever corroborated her allegations. Those questions then triggered a number of direct questions by the prosecutor and follow-up questions by the defense about whether she was lying or had a motive to lie. This heightened the prosecutor's need to show that her testimony regarding the sex acts was credible, meeting the *DerMartzex* threshold.

This testimony was also relevant to an issue in the trial. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The complainant testified that when defendant called her into their home prior to the offense he told her, "You know what to do," without saying anything else. Her testimony regarding defendant's alleged prior acts of sexual abuse, which included acts similar to those charged in this case, helped to clarify how she knew to perform the specific sex acts defendant reportedly desired. The history of abuse, including threats to kill the complainant or her mother if she told anyone about the sexual assaults, also helped to explain her failure to scream or run away from defendant. Given the probative value of the evidence, we are satisfied that it was not substantially outweighed by unfair prejudice. *Starr*, *supra; VanderVliet*, *supra* at 74-75. Furthermore, the trial court twice instructed the jury regarding the limited purpose of the testimony. *Id*. These instructions limited the impact of the other-acts testimony and properly informed the jury of its limited purpose. *Crawford*, *supra* at 385. Under these circumstances, the trial court did not abuse its discretion by admitting the evidence.

Defendant also suggests that the manner in which the trial court decided to admit the testimony, which defendant characterizes as an abrupt turnaround from the court's pretrial stance, was prejudicial. In essence, defendant argues that he had no opportunity to prepare to defend against the evidence. However, the prosecutor gave notice of the proposed evidence approximately five months before trial. And, at the hearing on defendant's motion in limine almost four months before trial, the court indicated that it would be prepared to admit the evidence based on whether the examination at trial challenged the complainant's credibility. Under these circumstances, we find no error.

Next, defendant argues that there was insufficient evidence to convict him of vaginal penetration. When reviewing the sufficiency of the evidence presented at trial, this Court looks at the evidence in the light most favorable to the prosecutor. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563

(1995). The evidence is sufficient when a rational trier of fact could determine that the prosecutor proved every element of the charged crime beyond a reasonable doubt. See *People v Acosta*, 153 Mich App 504, 510; 396 NW2d 463 (1986), citing *People v Hollis*, 140 Mich App 589, 592; 366 NW2d 29 (1985). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). First-degree criminal sexual conduct requires the prosecutor to prove "sexual penetration." MCL 750.520b(1); MSA 28.788(2)(1). See also *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). "Sexual penetration" is defined in MCL 750.520a(l); MSA 28.788(1)(l) to mean "any. . .intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." See also *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995); *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981).

Here, the prosecutor asked the complainant to describe the alleged penetration. The complainant originally reported to investigating police officers that defendant's penis "entered" her vagina. At trial, she testified that defendant's penis "wouldn't go in" because it "wasn't hard," that his penis "touched her vagina" and that "he tried to stick it up my vagina but it wouldn't go." Upon further questioning, she stated that defendant's penis had contact with "the outer lips part" of her genitals and that it did not go into the "vaginal tunnel," as the prosecutor called it. The young complainant was unable to articulate the physical contact in more specific anatomical terms. The examining physician testified that the complainant's broken hymen was consistent with some sort of penetration, however, he could not point to any element of his physical examination that would prove penetration on the specific date in question. The physician did testify that upon questioning the complainant during the examination, she volunteered that defendant "put his things between her legs" "by her vagina."

We conclude that, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence of "intrusion, *however slight*, * * *into the genital * * *openings" to sustain defendant's conviction for vaginal penetration within the meaning of the MCL 750.520(a)(1); MSA 28.788(1)(1) (emphasis added). Minimally, evidence was presented from which an intrusion of the labia majora, part of the genital opening, could be found. As this Court held in *Bristol, supra*, at 238,

> One object of the Legislature in providing for degrees of criminal sexual conduct was to differentiate between sexual acts which affected only the body surfaces of the victim and those which involved intrusion into the body cavities, in the instant case the female "genital opening." In view of the fact that the penetration of the labia majora is beyond the body surface, a definition of the female genital opening that excluded the labia would be inconsistent with the ordinary meaning of female genital openings. The fact that the Legislature used "genital opening" rather than "vagina" indicates an intent to include the labia. Such a definition is also consistent with that in most other jurisdictions. See 76 ALR3d 163, § 3, p 178.

In this case, sufficient evidence was presented from which the jury could infer that there was intrusion of the labia major and hence, penetration. We therefore decline to reverse defendant's conviction on count II.

Defendant's final argument is that the prosecutor committed misconduct in his closing remarks and the trial court erred by failing to grant the defense motion for a mistrial as a remedy for that misconduct. We examine defendant's allegation of misconduct in light of the pertinent portion of the record and evaluate the prosecutor's remarks in context in order to determine whether defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Similarly, we review a ruling denying a motion for a mistrial for an abuse of discretion, which only occurs where the trial court's ruling deprived the defendant of a fair and impartial trial. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). Reversal on this basis is not required. The prosecutor commented on the quality of the evidence defense counsel elicited on cross-examination and not defendant's failure to testify at trial, as defendant claims on appeal. See *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995); MCL 600.2159; MSA 27A.2159. Furthermore, the prosecutor restrained his argument to facts in evidence, carefully avoiding testimony stricken at trial. See *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Accordingly, there was no misconduct in this case and no error in the trial court's denial of the motion for a mistrial.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski