STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2004
v	No. 242711 Grand Traverse Circuit Court
JARED JAY BUCHNER, Defendant-Appellant.	LC No. 01-008656-FC

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). The trial court sentenced defendant to 3 to 15 years in prison. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in admitting evidence of defendant's other acts against the victim. According to defendant, the trial court should have excluded evidence that he had inappropriate sexual contact with the victim in the summer of 2001 on three occasions other than the charged offense. The decision to admit evidence under MRE 404(b) is "within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *Crawford*, *supra* at 383, quoting MRE 404(b)(1). The purpose of the limitation on the admissibility of bad acts evidence is to avoid convicting a defendant based upon his bad character rather than upon evidence that he committed the crime charged. *Id.* at 384.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court held that evidence of other acts is admissible if (1) it is offered for a proper purpose; (2) it is relevant under MRE 402 to something meaningful in the case; (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403; and (4) upon request, the trial court provides a limiting instruction under MRE 105.

Defendant contends that the other acts evidence was not relevant to showing defendant's scheme, plan, or system in doing an act because the other acts were not sufficiently similar to the

charged act as required by *People v Sabin (After Remand),* 463 Mich 43; 614 NW2d 888 (2000). In *Sabin, supra* at 63, our Supreme Court held "that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system."

In this case, the victim testified about three other instances in which defendant had inappropriate sexual contact with her. On one occasion, defendant touched the victim's upper thigh and tried to kiss her in the kitchen while she was babysitting for defendant's girlfriend's son. A few weeks later, the victim was again babysitting when defendant began kissing her face, neck, and lips and then attempted to digitally penetrate her vagina. In the third uncharged incident, the victim was again babysitting when defendant began kissing her and put his mouth on her vagina in an attempt to perform oral sex on her.

The trial court did not abuse its discretion here, because the factual similarities between the charged and uncharged acts strongly indicated that defendant was implementing a scheme that culminated in sexual intercourse with the victim. In every incident, defendant had illicit and progressively intense sexual contact with the victim. The incidents occurred within a two-month period of each other, and they all occurred in defendant's home when the victim came over to babysit. Given these similarities and the scheme they reflect, we do not find an abuse of discretion. While derived through the relatively new analysis found in *Sabin*, this holding consistently follows the traditional approach of allowing other acts evidence to show progressive sexual familiarity between a child molester and his victim. *People v DerMartzex,* 390 Mich 410; 213 NW2d 97 (1973). Because of the evidence's tendency to show that the victim credibly testified about the events and defendant committed the crime as part of a naturally progressing scheme, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, the evidence was admissible under *VanderVliet, supra*.

Defendant next argues that the evidence was insufficient to sustain his conviction. The test for determining whether the prosecution presented sufficient evidence to sustain a conviction is whether, viewing the evidence in a light most favorable to the prosecution, "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Specifically, defendant contends that the victim's testimony alone should not be sufficient to sustain his conviction. According to defendant, the victim's testimony and allegations were "shaky" and not credible. However, the uncorroborated testimony of a victim is sufficient to sustain a conviction for criminal sexual conduct. MCL 750.520h; *People v Lemmon,* 456 Mich 625, 642, n 22; 576 NW2d 129 (1998). Moreover, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id*., at 642. Therefore, because the victim's testimony alone was sufficient to establish that defendant sexually penetrated her, we do not disturb the jury's verdict on this ground.

Finally, defendant argues that he is entitled to be resentenced because the trial court erred in scoring offense variable (OV) 10 at fifteen points and OV 13 at twenty-five points. Appellate review of guidelines calculations is very limited. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1991). A court does not clearly err if *any* evidence supports the score it assigns the defendant. *People v Witherspoon*, 257 Mich App 329, 335; ___ NW2d ___ (2003).

Under MCL 777.40(1)(a), the trial court must assign fifteen points to OV 10 if "[p]redatory conduct was involved." The statute defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In this case, there was evidence that on three separate occasions in the summer of 2001, defendant engaged in intimate, preoffense conduct for the primary purpose of grooming her for sexual intercourse. Accordingly, the evidence strongly supports the trial court's score of fifteen points for OV 10.

Also, a trial court should score twenty-five points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person . . . ." MCL 777.43(1)(b). According to MCL 777.43(2)(a), "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." In this case, the victim testified about three uncharged instances when defendant initiated inappropriate sexual contact with her. Including the sentencing offense, defendant's actions demonstrate a pattern of four crimes against the victim. MCL 777.43(1)(b). The three other instances of inappropriate sexual contact and the sentencing offense all occurred in the summer of 2001, so they were well within the five-year period. MCL 777.43(2)(a). Because evidence existed to support the score, the trial court did not err in assessing defendant twenty-five points for OV 13.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray