

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE LEE ILVES,

Defendant-Appellant.

UNPUBLISHED

May 27, 2004

No. 247388

Marquette Circuit Court

LC No. 02-039442-FH

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant was sentenced to 4½ to 15 years' imprisonment. This case arose when defendant stuck his hand down the pants of the victim and penetrated her vagina while she stood next to him as he was driving the school bus. We affirm.

Defendant first argues that the prosecutor presented insufficient evidence that touching the victim could reasonably be construed as touching for the purpose of sexual arousal or gratification. We disagree.

An appeal based on a claim of insufficient evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "A court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). To prove CSC II, the prosecutor must prove beyond a reasonable doubt that the defendant intentionally touched the victim's intimate parts or the clothing covering the victim's intimate parts, the victim was under the age of thirteen, and that this touching could reasonably be construed as being for the purpose of sexual arousal or gratification. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997).

In the instant case, two police officers testified that defendant admitted he might have touched the victim in the groin area three times and his hand possibly went down her pants. Two officers testified that defendant admitted in a second interview that he touched the victim two or three times between the legs as she was leaving the bus. The victim testified that on three separate occasions defendant put his hand down her pants and digitally penetrated her vagina. Five other witnesses testified that defendant touched them inappropriately.

Although defendant presented evidence that the touching was accidental, conflicts in evidence must be resolved in the prosecutor's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This Court does not weigh competing evidence; that is the jury's function. *People v Hardiman*, 466 Mich 417, 430; 646 NW2d 158 (2002). Instead, the standard of review is deferential, with all reasonable inferences and credibility choices made in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman*, *supra* at 428. Here, a rational trier of fact could have found that the touching was intentional.

Defendant next argues that the trial court abused its discretion by admitting other-acts evidence against him. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to admit evidence of prior acts. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Before other-acts evidence may be introduced, the prosecution must satisfy a three-part test: (a) the prosecutor must offer the evidence for a proper purpose, not to establish character or a propensity to act in conformity with one's character, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh the evidence's probative value, especially where there are other means of proof. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

In the case at hand, the prosecutor presented the evidence involving the other girls to rebut defendant's claim that the touching was accidental – a purpose specifically provided for in MRE 404b(1). Other acts are relevant and probative of a defendant's intent because they "negate the otherwise reasonable assumption that the contact . . . was accidental [rather than] for the purpose of sexual gratification." *People v VanderVliet*, 444 Mich 52, 80-81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant. *Id.* The charged incident was similar to the prior acts for several reasons. First, defendant targeted girls under the age of thirteen. Second, with two exceptions, defendant's mode of contact with the girls was through school. Third, defendant inappropriately touched the girls.

The third criterion is whether the danger of undue prejudice from the other-acts evidence substantially outweighed its probative value. Unfair prejudice exists when there is a tendency that the evidence will be given too much weight by the jury. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). Here, the trial court properly weighed the prejudicial effect of the prior acts evidence against its probative value. Moreover, the court limited any prejudicial effect by giving a cautionary instruction.

Defendant next claims that several instances of prosecutorial misconduct during closing argument warrant reversal. We disagree.

This issue was not preserved. Therefore, we review for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Review is precluded unless the error could not have been cured by an objection or failure to review would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A prosecutor may argue the evidence and draw reasonable inferences from testimony during closing arguments. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). To the extent any prosecutorial comments could be construed as civic duty arguments, any prejudice was cured by the court's instruction to only consider properly admitted evidence, which did not include counsel's arguments. *People v Schutte*, 240 Mich App 713, 721-722; 613 NW2d 370 (2000). Prejudice caused by closing remarks about a defendant's character may be eliminated by a curative instruction, so unpreserved challenges preclude appellate review. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). A prosecutor may argue that a witness should be believed, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), and may properly respond to defense counsel's arguments, *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Moreover, a prosecutor may argue from the facts that a defendant should not be believed, *Schutte, supra* at 721. Since the comments were either permissible commentary on the evidence, or could have been cured with an instruction to the jury, defendant is not entitled to relief.

Defendant next argues that the trial court erred by attributing fifty points rather than no points to OV 11. Assuming arguendo that the court erred, the error was harmless.

A trial court's imposition of a sentence within the legislative guidelines range must be affirmed absent an error in scoring or reliance on inaccurate information. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), citing MCL 769.34(10). MCL 777.22(1) provides that OV 11 should be scored for all crimes against a person. Where two or more criminal sexual penetrations occurred, and the penetrations arose out of the sentencing offense, fifty points must be assigned to OV 11. MCL 777.41(1)(a), (2)(a). Where one penetration arose out of the sentencing offense, twenty-five points must be assigned, MCL 777.41(1)(b), and where no penetrations occurred, no points are assigned, MCL 777.41(1)(c).

Accepting defendant's scoring argument, one penetration arising out of the sentencing offense results in a score of twenty-five points. MCL 777.41(1)(b). This reduction in the OV score will not alter the guidelines range, and, therefore, the alleged erroneous scoring of the OV is harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello