STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 8, 2004
v	No. 247395 Macomb Circuit Court
GLENN B. GREEN, Defendant-Appellant.	LC No. 02-022070-FH

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for witness intimidation, MCL 750.122(7)(c). Defendant was sentenced to 38-180 months in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The victim and defendant were engaged to be married, but the relationship ended after a domestic violence incident occurred, in which defendant attacked the victim and fractured her face. Defendant was charged with aggravated domestic assault, MCL 750.81(a). The victim was subpoenaed to testify against him at trial. However, beginning at 5:00 a.m. on the morning of trial, the victim received three or four phone calls from defendant, threatening to kill her if she testified. Despite these threats, the victim appeared for court to testify that morning. Defendant never appeared, and a bench warrant was issued for his arrest. A bench trial was ultimately conducted, and defendant was convicted of aggravated domestic assault.

On the date of the initial assault trial, the victim received additional threatening phone calls after returning home from court. Defendant remarked to her that he was "going to get her," and that "couldn't nobody stop him." The victim became scared and reported these threatening calls to the police. Defendant was charged with witness intimidation under MCL 750.122(7)(c) for making the threatening phone calls. A preliminary examination was conducted, and a jury convicted him of the offense. This appeal follows.

On appeal, defendant argues that the trial court abused its discretion in allowing both the victim and a police detective, as well as defendant himself to testify about the nature of the prior assault conviction. The decision to admit certain other acts 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).[1] "An abuse of discretion occurs when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002), citing *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

Defendant asserts that the prosecutor failed to provide adequate notice of his intent to introduce the prior acts evidence at trial, as required by MRE 404(b)(2). Defense counsel was presumptively aware before trial that information pertaining to the prior assault would be presented at trial because evidence concerning the charge was used against defendant in the preliminary examination, and is contained in the police report. Thus, the prosecutor's disclosure at trial of his intent to use the prior acts evidence satisfies the reasonableness requirement of MRE 404(b).

Whether the trial court abused its discretion by admitting the prior acts evidence is determined by applying MRE 404(b)(1). The trial court admitted evidence of the assault as an exception to MRE 404(b)(1) because it was related to defendant's state of mind, motive, and intent, as well as the victim's perception or ability to interpret defendant's acts as a threat. We find that this admission was proper based on an application of the *VanderVliet* test, which delineates four factors to be met before prior acts evidence is admissible. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

First, the prosecutor did not rely on a character or propensity theory, but rather a theory of motive and common plan. Secondly, the relevance of the prior acts evidence is "demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Knox, supra*, 469 Mich 509, quoting *Crawford, supra*, 458 Mich 387. Evidence of the underlying assault charge allowed the factfinder to draw a reasonable inference with respect to why defendant might have made the threatening phone calls, namely to prevent the victim from testifying against him.

The evidence is further relevant because the charged act of witness intimidation is sufficiently similar to the prior assault conviction, thus manifesting a "common plan, scheme or system." *People v Sabin (After Remand)*, 463 Mich 43, 62; 614 NW2d 888 (2000). Defendant displayed a scheme of violence towards the victim by threatening her life on several occasions. Defendant remarked to her that she would not get away with leaving him after his "big investment" in their relationship. These facts indicate that defendant conceived a plan to threaten the victim and cause her great bodily harm. We find that the threatening phone calls were made in furtherance of this plan.

---

[1] Defendant urges this court to adopt the three-part standard of review used by the United Sates Court of Appeals for the Sixth Circuit in reviewing a trial court's decision to admit other acts evidence. However, it is established that this Court reviews such decisions for an abuse of discretion. *Crawford, supra*, 458 Mich 383; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002).

Third, the probative value of the evidence regarding the prior assault was not substantially outweighed by unfair prejudice. Unfair prejudice occurs "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *Taylor*, *supra*, 252 Mich App 521-522. The prosecutor asked the victim to briefly describe the assault "without going into any great detail." Defendant was not unfairly prejudiced by admission of this evidence. Conversely, the probative value of the evidence is great. Without the evidence, defendant's motive becomes far less apparent, and the seriousness of his threats becomes diminished. In turn, the factfinder would be left with a "chronological and conceptual void" regarding the events leading up to the phone calls. *VanderVliet, supra,* 444 Mich 55. The jury was entitled to know the nature of the underlying assault against the victim in order to fully appreciate the gravity of defendant's threats. Since defendant had assaulted her once before, the victim had every reason to fear for her life when defendant stated on the phone, "if you go to court you are a dead B."

Finally, also in accord with *VanderVliet*, the trial court allowed only a limiting instruction on the assault charge to keep out information that may bias the jury. The trial court instructed the jury on the evidence of other offenses pursuant to CJI2d 4.11.

Because the *VanderVliet* factors have been met, and an unprejudiced person considering the facts on which the court acted would be unable to find that there was no justification or excuse for the court's ruling, the trial court did not err in admitting the prior acts evidence. *Taylor, supra,* 252 Mich App 521.

Next, defendant argues that the trial court denied him his constitutional right to a fair trial when it permitted his two brothers to be called as witnesses, even though they were never listed on the prosecutor's witness list. Defendant cites MCL 767.40a(3), which states: "not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." Although the prosecutor omitted the brothers from his witness list, this is not dispositive of the issue because MCL 767.40a(4) provides "the prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties. Indeed, this Court has commented "the statute clearly vests the trial courts of this state with the discretion to permit the prosecution to amend its witness list at any time." *Callon*, *supra*, 256 Mich App 327, citing *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995).

Defendant argues that the prosecutor did not establish good cause for calling the brothers. The prosecutor argued below that the testimony of the brothers would be relevant and contain information favorable to his case. This was sufficient to establish good cause to support the late addition, and the trial court properly permitted both witnesses to be called. Because defendant had notice of the potential witness, the technical violation of MCL 767.40a(3) does not bar admission of the relevant evidence. *Callon, supra,* 256 Mich App 327. Notice of the brothers' testimonies is imputed to defense counsel because both brothers were included on his witness list. Indeed, defense counsel even spoke to the witnesses before deciding not to call them at trial.

To establish that the trial court abused its discretion, defendant must demonstrate that the court's ruling resulted in prejudice. *Callon, supra,* 256 Mich App 328. In their testimony, the brothers claimed not to have made any threatening phone calls to the victim on the date of the

trial. They also denied having any knowledge of defendant's whereabouts at the time those calls were placed. However, there is simply no evidence to suggest that this testimony affected the outcome of the case. Irrespective of their testimony, the victim testified unequivocally that she recognized defendant's voice on the other end of the phone. Thus, it cannot be said that allowing the brothers to testify prejudiced defendant. The trial court's decision to allow the prosecutor to call the brothers was not "so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Callon, supra*, 256 Mich App 326. Nor would "an unprejudiced person, considering the facts on which the trial court acted . . . say that there was no justification or excuse for the ruling." *Id.* In terms of MCL 769.26, it does not **"**affirmatively appear that the error complained of has resulted in a miscarriage of justice."

Defendant also argues that the trial court abused its discretion in scoring OV 10 at fifteen instead of zero, and that the current sentence departs from the correct guidelines range. Whether the sentencing guideline variables have been properly scored is reviewed for abuse of discretion. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentence that is within the guidelines range must be affirmed, except where there is an error in scoring or inaccurate information is relied on to determine the sentence. MCL 769.34(10); see also *People v Babcock*, 469 Mich 247, 261; 666 NW 2d 231 (2003).

The trial court did not abuse its discretion because the aggravated domestic assault falls squarely within the statutory definition of "predatory conduct," warranting a score of 15 points for OV 10. MCL 777.40(3)(a) defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." Defendant waited for the victim at a bus stop on her way to work for the primary purpose of injuring her. In *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003), this Court found similar conduct to be predatory within the meaning of the statute.

The guidelines minimum range is 19 to 38 months based on a total of 25 OV points and 20 PRV points. MCL 777.64. The trial court imposed a sentence of 38 to 180 months in accord with the appropriate minimum sentencing guidelines range. Resentencing is not warranted because the sentence imposed is within the statutory sentencing guidelines.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens