STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2004
v	No. 252404 Alger Circuit Court
PATRICK CECIL CLARK, Defendant-Appellant.	LC No. 03-001567-FH

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction of one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e, and four counts of furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced to nine months in jail and thirty-six months of probation for his CSC IV conviction, and thirty days in jail for his furnishing alcohol to a minor convictions. Defendant's arguments on appeal relate only to his CSC IV conviction. We affirm.

Defendant's conviction stems from an incident occurring in his home in April 2003. The victim had been invited to a sleepover at defendant's house with defendant's daughter and two other teenage friends. After drinking alcohol purchased by defendant, the victim went to sleep on the couch in the living room. She later awoke to find the defendant's hand down her pants. The victim ran upstairs to defendant's daughter's room and called a friend for help. The friend's father summoned the police.

The prosecution served notice that it intended to use evidence of two prior assaults by defendant to prove plan, scheme, motive, lack of accident, or lack of mistake. Defendant argued that the other acts should not be admitted because they were not sufficiently similar to the charged acts. The trial court allowed the evidence to come in under MRE 404(b). Defendant argues on appeal that the trial court erred by admitting this evidence. We disagree.

A trial court's decision to admit evidence of a defendant's prior other acts is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). In order to admit other-acts evidence, the evidence must satisfy the test articulated in *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994):

> 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.

Here, the prosecution stated the purpose of the admission of the evidence was to show proof of plan, scheme, motive, lack of accident, or lack of mistake. These are proper purposes under MRE 404(b). Therefore, the first requirement of the *VanderVliet* test is satisfied.

The relevance of the prior bad acts is determined in relation to the similarity with the acts charged. The degree of similarity required to prove a common plan, scheme, or motive is greater than that needed to prove intent, but less than that required to prove identity. *People v Sabin (After Remand)*, 463 Mich 43, 65; 614 NW2d 888 (2000). Here, while there are some dissimilarities, the degree of similarity between the charged act and the prior acts, is very high. In each instance, it is alleged that defendant promoted the use of alcohol by teenage girls either by supplying it or encouraging the consumption. Further, defendant waited until the girls were asleep, then in the darkness of the night put his hands on their genital areas. Thus, "[t]he charged and uncharged acts contain common features beyond the mere commission of acts of sexual abuse." *Sabin* (*After Remand*), *supra*, 463 Mich 66.

Moreover, because defendant denied that he had committed the charged act, claiming that the victim had merely mistaken his innocent action of moving her legs as sexual abuse, the evidence of the prior assaults was relevant to show that the act had in fact occurred. The evidence of the prior assaults was relevant because it made the possibility that the victim was mistaken about what had transpired objectively less probable. See *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998).

The third requirement of the *VanderVliet* test is that the probative value of the proffered evidence not be outweighed by its prejudicial effect. *VanderVliet*, *supra* at 55. This determination "requires nothing more than the balancing test described in MRE 403." *Starr*, *supra* at 498. MRE 403 provides that relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice . . . ." While the evidence of the prior assaults was prejudicial to defendant, it cannot be said that its prejudicial effect on defendant was unfair and substantially outweighed its probative value. The evidence of the prior assaults was highly probative on the issue of lack of mistake on the victim's part. Thus, it was highly probative that the act with which defendant was charged had actually occurred. See *Sabin* (*After Remand*), *supra* at 63. Further, the high degree of similarity between the charged act and prior acts supports the conclusion that the prejudice to defendant was not unfair and did not substantially outweigh the probative value of the evidence.

Additionally, the court provided a limiting instruction to the jury, thus satisfying the fourth and final prong of *VanderVliet*.

Defendant next argues that the prosecutor engaged in misconduct by vouching for the credibility of the victim and by disparaging defendant's character. We disagree. "This Court evaluates the remarks of a prosecutor in the context in which they were made to determine

whether a defendant was denied a fair and impartial trial." *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

While the prosecutor is not permitted to vouch for the credibility of the witness, "the prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed." *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983) (citation omitted). Our review of the record does not disclose any prosecutorial vouching. The prosecutor merely suggested that the jury should infer that the victim had testified honestly because she had refused to falsely state that she saw defendant's face when she awoke to find defendant touching her genitals. A prosecutor may argue that a witness is worthy of belief based on the circumstances. *People v Lannsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

We also see no merit to the assertion that reversal is required because the prosecutor improperly disparaged the character of defendant, thereby encouraging a conviction based on prejudice rather than the evidence. Defendant did not object to these comments at trial, therefore the issue is not properly raised. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Our review of the record indicates that a curative instruction would have removed any prejudice to defendant. Moreover, the court instructed the jury that the comments and arguments of the lawyers were not evidence, and that the other-acts evidence could only be used for the purposes articulated by the court. "Juries are presumed to follow their instructions." *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001). Therefore, it may be presumed that the jurors heeded the court's instructions not to consider the arguments of the lawyers as evidence and only considered the other-acts evidence for the proper purposes.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey