STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN WARREN WISMER,

Defendant-Appellant.

UNPUBLISHED
February 10, 1998

No. 198857
Livingston Circuit
LC No. 96-009353

Before: Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). He was sentenced as a third-offense habitual offender, MCL 769.11; MSA 28.1083, to thirty-two to forty-eight months' imprisonment, and appeals as of right. We affirm the conviction and sentence but remand to the trial court for completion of a sentence information report.

I.

Defendant argues that the trial court erred in admitting similar-acts testimony pursuant to MRE 404(b) because the prosecutor failed to identify a proper purpose for admission of the evidence; the evidence was not relevant to any element of the charged offense; and the probative value of the evidence was substantially outweighed by its prejudicial value. We disagree. The testimony at issue was that of a previous minor victim of defendant's. This prior victim testified that in 1987 defendant asked him to come into his apartment. Defendant then showed him pornographic materials, unzipped his pants and fondled his penis. This victim was eight years old at the time.

MRE 404(b) governs the admission of evidence of similar acts:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of

> mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence must be relevant to an issue other than propensity; must be relevant to an issue or fact of consequence at trial; and its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Additionally, the trial court may, on request, provide a limiting instruction. *Id*.

First, defendant argues that both the prosecution and the trial court erred by not specifically identifying which of the exceptions stated in MRE 404(b) provided the basis for admitting the similar acts testimony. As developed, the record does not support this claim. In *People v Devine*, 168 Mich App 56, 60; 423 NW2d 594 (1988), this Court indicated that the prosecution must specifically identify the applicable exception and make a showing that the exception is at issue in the case. Here, the prosecution filed the required notice of intent listing several potential exceptions under the rule. Defendant thereafter moved the trial court to exclude the similar acts evidence. The prosecution, in opposing the motion, asserted that the evidence was relevant to the issues of intent, absence of mistake and common plan or scheme. The trial court denied defendant's motion, finding that there were proper purposes for the evidence: to show motive, intent, sexual purpose, scheme, plan or system and absence of mistake, the exceptions listed by the prosecution in its notice of intent. At trial, in his opening statement, defendant placed his intent and purpose at issue by stating that the prosecution could not prove that he touched the victim "with the intent and for the purpose of sexual gratification." Where the MRE 404(b) exceptions of intent and purpose were identified and at issue, the testimony was properly admitted. *Devine, supra* at 60-61. We note that the trial court specifically limited the use of the similar acts evidence to show intent and purpose.

Next, defendant argues that the prior acts testimony was not relevant to show that defendant acted purposely or that he touched the victim in this case for sexual gratification. He argues that the evidence should not have been admitted for even the limited purposes specified by the trial court in its instructions to the jury. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

A defendant is guilty of fourth-degree criminal sexual conduct if he engages in sexual contact with a person who is between the ages of 13 and 16 years old and defendant is five or more years older than that person. MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). Sexual contact is defined as:

> . . . the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. [MCL 750.520a(k); MSA 28.788(1)(k).]

In this case, the similar-acts testimony, if believed, showed that the defendant had touched the genitals of another boy in the past. This is relevant to show that the defendant intentionally touched the victim in this case for the purpose of sexual gratification. *People v Sorscher*, 151 Mich App 122, 136; 391 NW2d 365 (1986); *People v Vesnaugh*, 128 Mich App 440, 445-446, 448; 340 NW2d 651 (1983).

Finally, defendant argues that the probative value of the similar acts testimony was substantially outweighed by unfair prejudice and that the victim's testifying in person contributed to the unfair prejudice. He claims that "[t]he government could have offered police reports or copies of Mr. Wismer's convictions instead of [the prior victim's] testimony, without as great a danger of emotional prejudice with the jury." These arguments are without merit. Although the evidence was prejudicial, we find that there has been no showing that the unfair prejudice substantially outweighed the probative value in showing intent and purpose. *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995). Unfair prejudice does not simply mean damaging. *Id.* at 75. Moreover, the prosecution was not required to use the least prejudicial evidence available to establish the fact at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). There was no requirement that it should have used past police reports instead of calling the prior victim as a witness.

Since the "similar act" evidence was used for a proper purpose, was relevant, was not more prejudicial than probative and was not used to prove the character of defendant in order to show that he acted in conformity therewith, it was properly admitted and there is no error requiring reversal.

II.

Defendant's second argument is that insufficient evidence was presented at trial to prove that defendant touched the victim for the purpose of sexual gratification or arousal. We disagree.

In determining the sufficiency of the evidence, we should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). Further, the question is not whether there was conflicting evidence, but whether there was evidence that a jury could believe, which would justify convicting the defendant. *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), aff'd sub nom *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). The victim testified that defendant touched his inner thigh, buttock and genital area. These are "intimate parts". MCL 750.520a(c); MSA 28.788(1)(c). The victim also testified that defendant asked him about his sexual experiences before touching him. The victim's testimony, coupled with the prior victim's testimony, was sufficient evidence from which a jury could reasonably infer or construe that the touching was intentional and was done for sexual gratification. Therefore, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to sustain a conviction of CSC IV, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a).

III.

Defendant next argues that the trial court improperly instructed the jury with regard to the element of "sexual purpose". He argues that the given instruction failed to adequately inform the jury that in order to convict, it had to find that the touching was for the purpose of "sexual arousal or gratification." Further, defendant complains that, in its closing argument, the prosecution improperly stated and argued the law.

As was previously stated, MCL 750.520a(k); MSA 28.788(1)(k) defines "sexual contact" as an intentional touching of intimate parts "if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." The trial court instructed the jury, using the language of the standard jury instruction, as follows:

> The Defendant is charged with the crime of fourth degree criminal sexual conduct. To prove this charge, the Prosecution must prove each of the following elements beyond a reasonable doubt. First, that the Defendant intentionally touched [the victim's] genital area, groin, or buttock, or the clothing covering that area.
>
> Second, that this touching was done for sexual purposes or could reasonably be construed as having been done for sexual purposes. [CJI2d 20.13.]

Defendant did not object to the given instruction.

Although the trial court did not instruct the jury that the touching had to be for the purpose of sexual "arousal or gratification," it instructed the jury that the touching must be for a sexual purpose. Defendant cites no authority for the proposition that the words "sexual arousal or gratification" must be

used when instructing the jury or that the phrase "sexual purpose" is inadequate to explain that the contact must be sexual in nature. Reading the jury instructions as a whole, we conclude that the jury was fully and properly apprised of the applicable law and the essential elements of CSC IV. The jury was informed that it could not convict for the charged offense unless it determined that there was touching of intimate parts with a sexual, not accidental or nonsexual, purpose. Further, we note that even if the instruction was imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights, which they did in this case. *People v Davis,* 216 Mich App 47, 54; 549 NW2d 1 (1996).

We also note that although the prosecutor misstated the law in his closing argument, the law was subsequently, accurately stated by the trial court. Moreover, defendant never objected to the prosecutor's closing argument. Appellate review is foreclosed absent objection. *People v Ullah,* 216 Mich App 669, 679; 550 NW2d 568 (1989). In addition, any prejudicial effect the prosecutor's statements or improper remarks may have had could have been cured by an objection and timely instruction. Therefore, our failure to review this issue will not result in a miscarriage of justice. *Id.*

IV.

Finally, defendant contends that he is entitled to resentencing because his sentence violates the principle of proportionality and because the trial court failed to complete a sentence information report. The evidence showed that defendant engaged in improper sexual conduct with the fifteen year old victim. Defendant was sentenced as an habitual offender, third offense. His prior convictions were for similar conduct and he apparently had been diagnosed as a pedophile. Under the circumstances, we find that the sentences imposed were proportionate to the offenses and the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990).

We also find defendant's claim that he is entitled to resentencing because the trial court failed to complete a written sentence information report (SIR) to be without merit. While sentencing guidelines do not apply to habitual offenders, a trial court is still obligated to fill out an SIR for the underlying offense. *People v Derbeck*, 202 Mich App 443, 446; 509 NW2d 534 (1993). Review of the record indicates that the trial court did not fill out the required SIR. However, where the trial court has failed to fill out an SIR, the proper remedy is not resentencing Rather, we remand to the trial court "solely for the administrative task of completing a written SIR." *People v Zinn*, 217 Mich App 340, 350; 551 NW2d 704 (1996).

Affirmed. Remanded to trial court for the completion of an SIR. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Michael J. Kelly
/s/ Roman S. Gribbs