# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL WILLIE SCHUCK,

Defendant-Appellant.

UNPUBLISHED
April 26, 1996

No. 180075
LC No. 92-121785

Before: Holbrook, P.J., and Taylor and Nykamp,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct. MCL 750.520e(1)(a); MSA 28.788(5)(1)(a) (sexual contact using force or coercion). Defendant was sentenced to two years probation with the first six months in jail. Defendant appeals as of right and we affirm.

Defendant argues on appeal that he was denied a fair trial as a result of prosecutorial misconduct. In particular, defendant argues that the prosecutor improperly introduced evidence showing he had engaged in improper sexual activity with others. We initially note that the admission of the challenged testimony cannot properly be considered prosecutorial misconduct because defendant objected to the evidence and the court overruled the objection. Therefore, any error would be that of the trial court and not of the prosecutor. In any event, we find that the trial court did not abuse its discretion in admitting the similar acts evidence against defendant. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 77, 87 508 NW2d 114 (1993); MCL 768.27; MSA 28.1050. The challenged testimony was relevant in establishing defendant's intent. We also note that the court gave the jury a specific limiting instruction regarding this testimony.

Defendant also contends that the prosecutor, in closing argument, improperly urged the jury to convict him because he was a bad person. Defendant did not object to the alleged misconduct at trial. Appellate review of improper prosecutorial remarks is generally precluded absent an objection because

* Circuit judge, sitting on the Court of Appeals by assignment.

it deprives the trial court of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id*. After a careful review of the record, we conclude that no miscarriage of justice will result from our refusal to consider this issue and that a cautionary instruction could have cured any impropriety in the remark. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). We are also satisfied that the court's instruction to the jury that the arguments of counsel were not evidence dispelled any potential prejudice. *Bahoda*, *supra* at 281.

Defendant further claims that the fourth degree criminal sexual conduct statute and related jury instructions are unconstitutional because they: (1) allow a jury to convict on evidence short of reasonable doubt of a sexual purpose; (2) "irrebuttably" presume a sexual purpose based on evidence that may not prove such a purpose; and (3) confer unfettered discretion to the factfinder as a result of vagueness. Defendant did not challenge this portion of the jury instructions or challenge the constitutionality of the statute below and, thus, the issue is not preserved for appeal. *Booth v University of Michigan Board of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993); *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 869 (1987). Nevertheless, we are satisfied that defendant's arguments are without merit. While proof of an intentional touching of the victim's intimate parts or clothing covering those parts is required, the statute does not require proof beyond a reasonable doubt of a sexual purpose. Rather, it suffices if the intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. *People v Fisher*, 77 Mich App 6, 13; 257 NW2d 250 (1977). Sexual purpose is not an element of fourth-degree criminal sexual conduct. We also reject defendant's claim that the fourth-degree criminal sexual conduct statute is unconstitutionally vague on the grounds of lack of notice. The statute provides guidelines to ascertain what conduct is prohibited. *People v Gregg*, 206 Mich App 208, 211; 520 NW2d 690 (1994). Every person has notice pursuant to MCL 750.520e; MSA 28.788(5) that, if an intentional touching could reasonably be construed as being for a sexual purpose, it is illegal. We further note that a similar argument was rejected in *People v Duenaz*, 148 Mich App 60, 68; 394 NW2d 79 (1985). The statute provided sufficient notice. *People v Cavaiani*, 172 Mich App 706, 711-714; 432 NW2d 409 (1988). Vagueness challenges which do not involve first amendment freedoms, such as here, must be examined in the light of the case at hand. *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994). In no event can it be said that the statute is vague as applied to defendant's conduct in the case at bar. The statute put defendant on notice that his conduct toward the victim was proscribed. Finally, we reject defendant's contention that the statute failed to provide notice of proscribed conduct because he did not use force. The victim's testimony established that a coercive atmosphere existed. *People v McGill*, 131 Mich App 465, 473; 346 NW2d 572 (1984); *People v Cowley*, 174 Mich App 76; 435 NW2d 458 (1989).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Clifford W. Taylor
/s/ Wesley J. Nykamp