

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETER B. VLCKO, D.O.,

Defendant-Appellant.

UNPUBLISHED

November 22, 1996

No. 174813

LC No. 93-122923

Before: Holbrook, Jr., P.J., and Saad and W. J. Giovan,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and was sentenced to serve concurrent terms of three to fifteen years in prison on each conviction. He appeals as of right and we affirm.

Defendant's argument that MCL 750.520b(1)(f)(iv); MSA 28.788(2)(1)(f)(iv) is void for vagueness was addressed and resolved in *People v Capriccioso*, 207 Mich App 100, 102; 523 NW2d 846 (1994). We agree with the *Capriccioso* panel's analysis and therefore find no basis for defendant's vagueness challenge.

Defendant next argues that the Legislature improperly delegated to the medical profession in general the authority to define "force or coercion" under the criminal sexual conduct statute. See MCL 750.520b(1)(f)(iv); MSA 28.788(2)(1)(f)(iv). We disagree. The statute establishes the elements of the offense that must be proven beyond a reasonable doubt by the prosecution. This Court has recognized that medical testimony is necessary to aid the trier of fact in determining whether a defendant's conduct was medically unethical or unacceptable. *Capriccioso, supra; People v Thangavelu*, 96 Mich App 442, 450; 292 NW2d 227 (1980). Contrary to defendant's argument, it is not medical ethics in general that determines whether the sexual conduct involved force or coercion, but rather the ultimate determination is vested in the trier of fact, after hearing the necessary medical testimony. Thus, the statutory scheme does not constitute an improper delegation of legislative authority.

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

Defendant next argues that the trial court abused its discretion in admitting testimony regarding defendant's other medical practices surrounding the offenses. Defendant argues that this evidence should have been excluded as improper character evidence under MRE 404(b). Although evidence of other bad acts is inadmissible merely to show a defendant's action in conformity with his character, *People v VanderVliet*, 444 Mich 52, 61; 508 NW2d 114 (1993), the evidence that defendant complains of in this case was admissible as part of the *res gestae* of the offense, given that those incidental acts were "so blended or connected with the charged offense" that proof of one incidentally involved the other or explained the circumstances of the crime. *People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923); *People v Medina*, 100 Mich App 358; 298 NW2d 648 (1980). See also *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (the trier of fact is generally entitled to hear the complete story of the offense). Accordingly, we find no abuse of discretion by the trial court in admitting this evidence.

Defendant next argues that the trial court abused its discretion in permitting improper character evidence through the testimony of another of defendant's patients. We find no abuse of discretion. Evidence of similar bad acts may be admitted provided that (1) the evidence is offered for a proper purpose under 404(b); (2) the evidence is relevant under MRE 402 as enforced through 104(b); and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *VanderVliet, supra*. Here, the patient's testimony was admitted for a proper purpose, i.e., to show a common scheme or plan, or absence of mistake. See *People v Miller (On Rem)*, 186 Mich App 660, 664; 465 NW2d 47 (1991). Because defendant acted in a similar manner toward this patient, it is less probable that defendant acted inadvertently toward the complainants. See *VanderVliet, supra* at 79. Evidence of defendant's conduct toward this patient was highly probative in light of defendant's denial that he performed the charged conduct and his assertion of inadvertence. Finally, the trial court gave a limiting instruction to the jury instructing them to consider the other bad acts testimony with regard to whether the charged conduct was an accident or a mistake and whether defendant engaged in a common scheme or plan. *Id.* Accordingly, the trial court did not abuse its discretion in admitting the testimony.

Defendant's final argument raises several claims of prosecutorial misconduct. While we agree with defendant that the prosecutor's question regarding whether defendant stole a patient list from his former employer was improper, we find the error to be harmless, given its "slight or negligible influence" on the jury's verdict. *People v Mezy*, 453 Mich 269, 285-286; ___ NW2d ___ (1996). Defendant's failure to object to the other cited instances of prosecutorial misconduct precludes further appellate review unless a miscarriage of justice would result. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 527 (1994). Because any possible prejudice could have been cured by a timely instruction by the court, we find no miscarriage of justice. *Id.*

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Henry W. Saad
/s/ William J. Giovan

