STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARENCE PIPPEN,

Defendant-Appellant.

UNPUBLISHED
December 23, 1997

Nos. 192469 and 195912
Recorder's Court
LC No. 94-011951

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

In docket no. 192469, defendant appeals by leave granted from the trial court's order denying his motion to dismiss the charges filed against him.[1] In docket no. 195912, he appeals as of right from his jury convictions for eight counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of CSC II, MCL 750.520c; MSA 28.788(3), and one count of CSC III, MCL 750.520d; MSA 28.788(4). We affirm.

I

Defendant first argues that the trial court abused its discretion by admitting evidence of uncharged instances of defendant sexually abusing the complainants, and physically and emotionally abusing the complainants and their mother. We disagree. We review the trial court's admission of similar acts evidence for an abuse of discretion. *People v Humble*, 108 Mich App 777, 778; 310 NW2d 878 (1981). The evidence concerning defendant's prior sexual abuse of the complainants (his three daughters who lived in the same household) was properly admitted under *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973). There, the Supreme Court held that "the probative value [of similar acts evidence] outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *Id*., p 413. The Court further noted that limiting the victim's

> testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Common

> experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy. [*Id.*, pp 414-415.]

We find the *DerMartzex* holding to be applicable to the evidence of prior sexual acts admitted in this case.[2] All of the evidence concerned prior sexual abuse of only the complainants. Defendant and the complainants lived in the same household. See *People v Sabin*, 223 Mich App 530, 533; 566 NW2d 677 (1997). The complainants' testimony established that there were certain routines to defendant's abuse. The challenged testimony placed into context and made more credible the testimony about the incidents for which defendant was charged. *DerMartzex*, *supra*, 390 Mich 413-415. Without understanding the complainants' familiarity with defendant, the testimony concerning the charged offenses may well have appeared incredible to the jury. *Id.*

Moreover, we have reviewed the evidence under the clarified MRE 404(b) standard for admission of other acts evidence found in *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modf'd 445 Mich 1205; 520 NW2d 338 (1994), and find that the evidence was properly admitted. The evidence was admitted for the proper purposes of establishing defendant's familiarity with the complainants, and of establishing defendant's common scheme or system in perpetrating abuse on the complainants. The evidence was relevant because it placed the charged offenses into context and helped the jury to weigh the credibility of the complainants' testimony. Moreover, the evidence tended to establish defendant's scheme in doing the acts for which he was charged, and was therefore probative of whether defendant committed the charged offenses. Defendant has made no showing that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. A limiting instruction was given.

We also find that evidence of defendant's physical and emotional abuse of the complainants and their mother was properly admitted under *VanderVliet*, *supra*. The evidence was admitted for the proper purpose of explaining why the on-going sexual abuse was not reported. This evidence was relevant because the failure to report the sexual abuse was an issue at trial, and because two of the complainants testified that they did not report the sexual abuse because they feared for their safety. Defendant had physically assaulted the complainants' mother when she had tried to intervene on her daughters' behalf. Again, defendant has made no showing that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Under the *VanderVliet* analysis, therefore, the trial court did not abuse its discretion in admitting testimony concerning defendant's prior acts.

II

Defendant next argues that the trial court erred in instructing the jury on the law of flight because there was not a sufficient evidentiary basis to support that instruction. Defendant failed to preserve this issue below by objecting to that instruction. *People v Maleski*, 220 Mich App 518, 520-521; 560 NW2d 71 (1996). In any event, our review of the record indicates that there was a sufficient evidentiary basis to support the instruction. Defendant had been told that the police were looking for him, and was told the nature of the allegations for which he was being sought. Defendant was later found to be living at a motel registered under a false name and address. We believe that these facts

establish a sufficient evidentiary basis for the instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

III

Defendant argues that he was denied a fair trial by statements made by the prosecutor during closing argument in which the prosecutor allegedly vouched for the credibility of the complainants. We disagree. Because defendant failed to preserve this issue by objecting or requesting a curative instruction, we will not review this issue "unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

We are satisfied from our review of the prosecutor's closing argument that defendant was not denied a fair trial. It is true that a "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, however, there is nothing in the comments made by the prosecutor to indicate that he had special knowledge concerning the witnesses' truthfulness. *People v Fisher*, 220 Mich App 133, 158; 559 Mich App 318 (1996). Moreover, the remarks viewed in context indicate that the prosecutor was properly arguing the evidence and reasonable inferences therefrom as it related to his theory of the case. *Id*., p 156. Finally, to the extent that the remarks may have been improper, any prejudice was dispelled by the trial court's instruction to the jury that the lawyers' statements and arguments are not evidence. See *People v Turner*, 213 Mich App 558, 585; 540 NW2d 728 (1995).

IV

Defendant's fourth argument on appeal is that manifest injustice resulted from the trial court's failure to instruct the jury regarding character evidence and regarding defendant's right to testify and to have his testimony considered just as any other witness' testimony would be considered. We disagree. At trial, the defense presented testimony from defendant and from a character witness. Defendant did not request, and the trial court did not provide, instructions to the jury regarding defendant's right to testify nor regarding the character evidence. Our review is therefore limited to determining whether manifest injustice resulted. MCL 768.29; MSA 28.1052. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Here, the instructions viewed as a whole adequately protected defendant's right to have his testimony considered by the jury. The court instructed the jury that evidence included the sworn testimony of witnesses, and that the jury should base its decision "on all of the evidence regardless of which party produced it." Defendant has offered no reason to believe that the jury disobeyed the court's instruction and refused to consider the testimony of any witness, including defendant or his character witness. herefore, manifest injustice has not been shown.[3]

V

Defendant next argues that the trial court abused its discretion by admitting evidence that two of the complainants had undergone abortions. We disagree. Our review is limited to examining the record for plain error because defendant did not object below. MRE 103. The evidence of the complainants' pregnancies and abortions was relevant because it tended to establish that the complainants had been sexually penetrated. MRE 401. Sexual penetration is not only an element of the charged offenses, MCL 750.520b; MSA 28.788(2), but is relevant to establishing the similar, uncharged sexual acts committed against the complainants in this case. See *People v Borowski*, 330 Mich 120, 125-126; 47 NW2d 42 (1951) (evidence that the complainant became pregnant and gave birth was admissible as evidence of intercourse). Moreover, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Defendant has made no showing that evidence of pregnancy and abortion, apart from the act of sexual penetration which that evidence tends to prove, is so prejudicial as to substantially outweigh the probative value of that evidence. We find persuasive the reasoning contained in *North Carolina v Stanton*, 319 NC 180; 353 SE2d 385, 389 (1987). (Trial court did not abuse its discretion in admitting evidence of the complainant's pregnancy and abortion: evidence of the abortion corroborated the fact that the penetration and the pregnancy occurred, and the "mere fact that an abortion took place is not so inflammatory as to render it inadmissible"). Finally, defendant's reliance upon MRE 404(b) is misplaced. Although some of the evidence at trial indicated that defendant aided the complainants in obtaining abortions by taking them to the clinic and encouraging them to have the abortions, this evidence was admitted for the proper purposes of showing that the acts of penetration occurred, and that defendant was the person who committed the crimes. *VanderVliet, supra*, 444 Mich 74. To the extent that MRE 404(b) is applicable, we find that the evidence was properly admitted under *VanderVliet*. The trial court did not abuse its discretion in admitting evidence that the complainants underwent abortions.

VI

Defendant's sixth argument is that he received ineffective assistance of counsel when his counsel failed to request an instruction on character evidence and on defendant's testimony, failed to object to the prosecutor's closing argument, and failed to object to the trial court's instruction on the law of flight. We disagree. Because defendant failed to move for a new trial or an evidentiary hearing on this basis below, appellate review is foreclosed "unless the record contains sufficient detail to support defendant's claims, and, if so, review is limited to the record." *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). A defendant claiming ineffective assistance of counsel based upon defective performance has

> the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. [*People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997).]

None of defendant's claims of ineffective assistance are supported by the record. Trial counsel's failure to object to the court's instruction on flight was not improper because the instruction was supported by the evidence. "Defense counsel was not required to raise a meritless objection." *People v Torres (On Rem)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Counsel's failure to

request an instruction on character evidence and on defendant's right to testify, even if error, has not been shown to have prejudiced defendant. Since there is no reason to believe that the jury disobeyed the trial court's instruction to consider all of the evidence and failed to consider the testimony of defendant and his character witness, defendant has failed to show that the outcome of the trial would have been different even if the additional instructions had been given. Finally, counsel's failure to object to the prosecutor's closing argument did not constitute defective performance since the prosecutor's argument was not improper. We find no basis in the record for defendant's claims.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski

[1] Defendant raises no issues in docket no. 192469.

[2] The *DerMartzex* exception survived the adoption of the Michigan Rules of Evidence. *People v Dreyer*, 177 Mich App 735, 737; 442 NW2d 764 (1989).

[3] We also note that failure to sua sponte instruct on character evidence is not error requiring reversal. *People v Duff*, 165 Mich App 530, 542; 419 NW2d 600 (1987).