STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2000
v	No. 213131 Oakland Circuit Court
DANIEL R. BOBCHIK, Defendant-Appellant.	LC No. 96-149290-FC 96-149291-FC

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of seven counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(a) and (b)(ii); MSA 28.788(2)(1)(a) and (b)(ii), twelve counts of second-degree CSC, MCL 750.520c(1)(a) and (b)(ii); MSA 28.788(3)(1)(a) and (b)(ii), and one count of fourth-degree CSC, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a), arising out of the sexual assault of his five children. He was sentenced to thirty-five to sixty years' imprisonment for the first-degree CSC convictions, ten to fifteen years' imprisonment for the second-degree CSC convictions, and 599 days' imprisonment for the fourth-degree CSC conviction, with all sentences to be served concurrently. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in admitting prior bad acts evidence when the danger of unfair prejudice substantially outweighed any probative value. We disagree. The decision to admit prior bad acts evidence is within the trial court's discretion, and we will not reverse absent a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion occurs when the decision is so grossly violative of fact and logic that it evidences a perversity of will, defiance of judgment, and the exercise of passion or bias. *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998). In the present case, the prosecutor alleged that the molesting of the children began at the age of four or five and continued until the incidents were reported in August 1996. Defendant was only charged with the most recent offenses. The prosecutor sought to admit prior bad acts to show intent, lack of mistake, accident, or common plan or scheme. The trial court held that the lengthy history was prejudicial, and therefore, the questioning would be limited to when the abuse commenced and when the information was shared with others. Review of the trial transcript reveals that the prosecutor followed this evidentiary ruling, and the testimony concerning multiple acts correlated

to the acts charged. In any event, admission of the prior similar bad acts would have been proper. *People v Sabin*, 463 Mich 43, 63-67; 614 NW2d 888 (2000)

Defendant next argues that his constitutional rights were violated when two witnesses, a protective services worker and a police officer, testified regarding defendant's right to remain silent. We disagree. An officer's obligation to give *Miranda*[1] warnings to a person attaches only when the person is in custody. *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). In the present case, the protective services worker had no obligation to give *Miranda* warnings, and the officer did not testify regarding an occasion where defendant was in custody. Accordingly, defendant's claim of error is without merit.

Defendant next argues that the trial court violated his due process rights when evidence of threats and violation of a visitation order, that resulted in a restraining order, was presented to the jury. We disagree. Defendant failed to preserve these issues because he did not object to the evidence below. *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). In any event, we cannot conclude that the trial court abused its discretion in admitting this evidence. Evidence of a defendant's subsequent efforts to influence or coerce the complainants against him is admissible when the activity demonstrates a consciousness of guilt on the part of the defendant. *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). Furthermore, it appears that the failure to object to the violation of the visitation order was purposeful. On direct examination, defendant explained that he had never been served with any order modifying or terminating the visitation schedule.

Defendant next argues that his due process rights were violated when the protective services worker testified regarding the hearsay statements made by the children. We disagree. This issue is not preserved because there was no objection to the testimony below. *Grant, supra*. Furthermore, defendant has made a broad statement that hearsay evidence was introduced, but failed to identify the testimony in the record. In any event, the testimony provided by the protective services worker was cumulative evidence that did not prejudice defendant. *People v Rodriquez*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Defendant next argues that his due process rights were violated when the trial court failed to instruct on lesser included offenses. We disagree. Defendant waived review of the jury instructions by failing to object at trial. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). In any event, defendant's theory of the case was that his children had been "brainwashed" or lied about the abuse due to recent problems in the family. Defendant never alleged or argued that the evidence supported lesser included offenses. In this case, there was no plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

Defendant next argues that his due process rights were violated when he was precluded from discovery to examine the background of the complaining "witness." We disagree. We review a trial court's decision to grant or deny discovery for an abuse of discretion. *People v*

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Graham, 173 Mich App 473, 477; 434 NW2d 165 (1988). Discovery should be granted where the information is necessary for a fair trial and preparation of a proper defense, not to sanction a fishing expedition. *Id*. In deciding whether to grant pretrial discovery, the trial court must determine whether the defendant's rights can be fully protected by cross-examination. *Id*. In a criminal sexual conduct case, a psychological examination of a complaining witness may be ordered when there is a compelling reason to do so. *Id*. at 478. In the present case, defendant failed to identify a compelling reason for the examination. Defendant's concerns could be addressed through cross-examination. Furthermore, to the extent that defendant requested the examination for purposes of evaluating veracity, such testimony would not have been permitted at trial. Expert testimony regarding the credibility of a witness is improper because the jury is the sole adjudicator of the credibility of the witness. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999); See also *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Accordingly, the trial court did not abuse its discretion in denying defendant's motion. *Graham, supra*.

Defendant next argues that he was denied his right to the effective assistance of counsel when trial counsel failed to request lesser included instructions or funds to retain an expert witness. We disagree. When alleging a claim of ineffective assistance of counsel, defendant must establish deficient performance by trial counsel and a reasonable probability that, but for, the deficient performance the result of the proceeding would have been different. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). We presume that the challenged action might be considered sound trial strategy and that defendant has received effective assistance of counsel. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Defendant has failed to meet his burden. The failure to request lesser included instructions could clearly be a matter of trial strategy designed to preclude the jury from entering into a compromise verdict in lieu of assessing the credibility of the witnesses on the highest charged offenses. Defendant's argument that ineffective assistance occurred because trial counsel failed to seek "funds" to have an expert impeach the testimony of the protective services worker and defendant's children is without merit. Defendant fails to present any underlying foundation to establish what type of permissible impeachment evidence could be offered by an expert. Accordingly, we reject defendant's claim of ineffective assistance of counsel because he has failed to meet his burden. *Cooper, supra*.

Lastly, defendant argues that the trial court erred in failing to sua sponte award funds for appointment of an expert witness. This argument is without merit for the reason stated above.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Gary R. McDonald