STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2003
V	Nos. 232957; 236729 Macomb Circuit Court
EDWARD M. SHAIEB, Defendant-Appellant.	LC Nos. 99-000729-FC 99-000730-FC

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court originally sentenced him to concurrent terms of nine to twenty years' imprisonment for the first-degree CSC conviction and five to fifteen years each for the second-degree CSC convictions, but subsequently resentenced him to concurrent terms of eight to twenty years' imprisonment for the first-degree CSC conviction and five to fifteen years each for the second-degree CSC convictions. Defendant appeals as of right. In Docket No. 232957, he challenges the convictions. In Docket No. 236729, he challenges his sentences. We affirm.

I. Facts and Proceedings

Defendant's convictions arise out of allegations that, on four occasions, defendant sexually assaulted two of his youngest daughter's friends during sleepovers at defendant's family's home in 1993 and 1994. The victims, M.S. and N.J., were both under thirteen years old when these incidents occurred. M.S. testified that on October 15, 1993, defendant entered the bedroom where she and defendant's youngest daughter were sleeping, pulled the covers off of M.S., reached inside her boxer shorts and underwear, and "rubbed" her buttocks. When she stirred, defendant left the room. M.S. further testified that during another sleepover in the spring of 1994, defendant entered the bedroom where M.S. and defendant's daughter were sleeping, touched M.S.'s breasts, and reached under her boxer shorts and underwear and digitally penetrated her. Defendant again left the room when M.S. stirred.

N.J. testified that between October 1993 and February 1994, during a sleepover with defendant's youngest daughter, N.J. awakened when defendant entered the bedroom where she and his daughter were sleeping. She pretended to be sleeping while defendant walked over to the bed and "caressed" her buttocks. When she stirred, defendant left the room. Approximately one

month later, a similar series of events occurred. Defendant's daughter slept through each of these four incidents.

Among the other witnesses at trial were Detective Linda Deprez, a police officer with the Sterling Heights Police Department who conducted interviews with the complainants in March 1998 after another officer filed the initial police report. Detective Deprez testified that on March 23, 1998, she went to defendant's home as part of her investigation and found defendant's wife and daughter at home. Detective Deprez first spoke to defendant's wife and informed her of the allegations against defendant. Defendant arrived while Detective Deprez and his wife were talking and he learned of the allegations against him. Defendant denied that the allegations were true and indicated to Detective Deprez that he wanted to "clear things up." Detective Deprez left her business card with defendant, but neither defendant nor his family members contacted her. Defendant's wife testified that defendant's attorney instructed them not to contact the police. Defense counsel did not object to this line of questioning.

During closing argument, the prosecutor emphasized that defendant, his wife, and his daughter did not contact the police after Detective Deprez left her business card with them. Defendant objected to this argument, claiming it violated defendant's Fifth Amendment right. Outside the jury's presence, defendant more specifically argued that the prosecutor's statements violated his Fifth Amendment right to remain silent. After hearing arguments on the issue, the trial court sustained defendant's objection.[1] In an effort to cure the error, the trial court instructed the jury as follows in its final instructions:

> You are not to consider the fact that defendant, defendant's wife or defendant's daughter failed to contact the police or prosecutor's office after Detective Deprez' initial investigation. The defendant and his family have an absolute right not to do anything with regard to the People's investigation.

Subsequently, defendant moved for a mistrial on the same basis. The trial court denied defendant's motion, opining that the curative instruction remedied the violation. Defendant raised the issue again after the conclusion of the trial in a second motion for mistrial. The trial court again denied defendant's motion and explained its conclusion that the cautionary instruction provided adequate relief:

> I gave a curative instruction. I feel that that curative instruction was sufficient enough to inform the jury that he [defendant] did not have to do anything, and that he should not be held responsible. I am satisfied in my find [*sic*] that curative instruction was significant enough to place in that jury's mind the fact that he didn't have to do any[thing].

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[1] Although the trial court did not identify the legal basis for its decision, it is apparent from the record that the trial court concluded that the prosecutor's comments violated defendant's Fifth Amendment rights.

II. Standards of Review

We review the trial court's decision to grant or deny a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). We review issues of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Our review of unpreserved claims of error is limited to determining whether plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

III. Analysis

Defendant first argues that the prosecutor violated his Fifth Amendment rights by improperly commenting on his failure to volunteer information to the police. We disagree.

The prosecutor stated during closing argument:

> The detective also tells you that the defendant came into the house while she was there, and she indicated to him, you know, "This is why I'm here. I'd like to sit down and I'd like to meet with you." And at that time he seemed like he wanted to sit and meet with her, and she gave the card to at least one of them, if not both of them [defendant and his wife], saying ["]this is my card with my number on it, please contact me," and that was back on March 23rd of 1998 and here we are today and that card has never been used by [defendant's daughter], not by [defendant's wife], not by [defendant].
>
> And if the defendant has an attorney and wants to communicate through his attorney, and that's what happened within days, the attorney contacted the detective and said, "I represent Ed Shaieb," at that point we are on notice that police officers, prosecutors, any contact that's to be made to the defendant is through his attorney.
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> However, and, you know, argument will be made, "Well, no, I'm the attorney for Ed Shaieb, not for Mary Shaieb or Lindsey Shaieb." So they certainly could have come forward and said, "We want to give this—[.]" [W]e certainly appreciate them coming here yesterday at the eleventh hour and say[ing], "These girls have always had problems and they are easily led and that's why this happened." That's very nice that they share that with us today. I wish they had shared that with the detective in the two and a half years that the case has been pending.
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> And certainly if the defendant had an attorney representing him, he could have certainly had that attorney with him and come into the police station and met with the detective. That never happened.

At this point, defense counsel interjected: "Your Honor, at this time I feel compelled to raise an objection. This jury has to know that my client has an absolute has an fifth amendment [sic] here and this has crossed the line."

Outside the jury's presence, the prosecutor argued to the trial court that she was free to tell the jury that defendant could have come in for an interview and that her job was to tell the jury that defendant was "guilty because he didn't sit with that detective and talk to her."

In part, we determine whether the prosecutor's use of defendant's silence violates the constitution by examining when the referenced silence occurred. See *People v Hackett*, 460 Mich 202, 209-210; 596 NW2d 107 (1999). In the instant case, the prosecutor referenced defendant's silence extending from the time Detective Deprez left his home until the time of trial.[2] Because defendant's silence prior to his arrest is not constitutionally protected, *People v Schollaert*, 194 Mich App 158, 167; 486 NW2d 312 (1992), to the extent the prosecutor referred to the time period before defendant's arrest, the prosecutor's comment did not violate defendant's Fifth Amendment rights.[3] Rather than raising constitutional issues, the use of pre-arrest silence presents evidentiary issues. *Id.*; *Hackett, supra* at 213-214. Defendant, however, did not raise an evidentiary objection in the trial court and does not assert one in his statement of questions presented. Thus, we do not need to consider the evidentiary issue. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

We also find that the reference to defendant's silence from the time of his arrest until trial did not violate defendant's Fifth Amendment right against self-incrimination.[4] Contrary to defendant's argument, *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973), does not require a different result. Our Supreme Court has severely limited *Bobo*, stating that *Bobo* is "viable only to the extent that it precluded 'impeachment for and comment on silence at the time

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[2] Because the prosecutor referred to defendant's failure to "come into the police station and [meet] with the detective," it is evident that the prosecutor's reference to the "two and a half years that the case has been pending" did not include defendant's decision to stand mute *at trial*. Use of defendant's silence at trial would have violated defendant's Fifth Amendment right against self-incrimination. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995), citing *Griffin v California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

[3] Defendant relies on *Combs v Coyle*, 205 F3d 269 (CA 6, 2000), and cases from other federal and state courts for the proposition that a defendant's pre-arrest silence cannot be used as substantive evidence of guilt. The Court in *Schollaert, supra*, reached the opposite conclusion, relying heavily on Justice Stevens' concurrence in *Jenkins v Anderson*, 447 US 231, 243-244; 100 S Ct 2124; 65 L Ed 2d 86 (1980). As Justice Stevens stated,

> "When a citizen is under no official compulsion whatever, either to speak or remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether [defendant] was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment." [*Schollaert, supra* at 316, quoting *Jenkins, supra.*]

[4] The record does not indicate when defendant was arrested or for what length of time he was in custody. We refer to the time of his arrest, however, in light of its importance to our analysis. *Hackett, supra.*

of arrest in the face of accusation.'" *Hackett, supra* at 215 n 6, quoting *People v Collier*, 426 Mich 23, 39; 393 NW2d 346 (1986); *People v Cetlinski*, 435 Mich 742, 759; 460 NW2d 534 (1990) ("[I]n light of both pre- and post-*Bobo* decisions of the United States Supreme Court, it is clear that the Fifth Amendment rationale no longer supports the *Bobo* rationale."). Additionally, the Court has said that *Bobo* is coextensive with federal precedent, and the Michigan constitution is consistent with federal Fifth Amendment and Fourteenth Amendment jurisprudence. *Schollaert, supra* at 162, citing *People v Sutton (After Remand)*, 436 Mich 575, 579; 464 NW2d 276 (1990); *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990); and *Cetlinski*, *supra* at 759.

Although defendant's right to remain silent in the face of accusation arises under the Fifth Amendment, the prohibition on use of defendant's silence after arrest and receiving *Miranda*[5] warnings[6] arises out of the due process clause of the Fourteenth Amendment.[7] See *McReavy, supra* at 218 & n 21, citing *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976) (stating that "it would be fundamentally unfair and a violation of due process" to inform a defendant that he has a right to remain silent and then use his silence against him at trial); and *Wainwright v Greenfield*, 474 US 294; 106 S Ct 634; 88 L Ed 2d 623 (1986) (stating that use of post-arrest, post-*Miranda* silence as substantive evidence of sanity violates due process). Defendant briefly mentions that the prosecutor's argument also violated *Doyle*, but does not request relief on this basis. Additionally, defendant did not raise an objection on due process grounds in the trial court. An objection on one ground does not preserve an appeal on another ground. *City of Westland v Okopski*, 208 Mich App 66, 72-73; 527 NW2d 780 (1994). Defendant has not cited any viable authority that supports his contention that use of his post-arrest silence also violates the Fifth Amendment. A party may not leave it to this Court to search for authority to support its position. *People v Harlan (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 237281, issued 8/14/03) slip op at 1-2, citing *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

In any event, we would find that the trial court did not abuse its discretion by denying defendant's motion for a mistrial. The trial court properly concluded that its instruction to the jury cured any error by the prosecution. Unless there is an "'overwhelming probability' that the jury will be unable to follow the court's instructions . . . and a strong likelihood that the effect of

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

[6] Despite that the record does not address whether or when defendant received *Miranda* warnings, in the absence of any assertion from defendant to the contrary, we assume for purposes of this analysis that defendant properly received *Miranda* warnings upon his arrest.

[7] Although the issue whether use of post-arrest post-*Miranda* silence also violates the Fifth Amendment right against self-incrimination was presented to the United States Supreme Court in *Doyle*, the Court did not address the issue. *Doyle, supra* at 616, 626 (Stevens, J., dissenting). The Court in *Wainwright*, in its analysis of substantive use of post-arrest silence, specifically noted that *Doyle* did not rest on a Fifth Amendment analysis, unlike *Griffin. Wainright, supra* at 291 n 7. See also *Dennis*, *supra* at 573.

the evidence would be 'devastating' to the defendant . . . ," we presume that the jury complied with the trial court's curative instruction. *Dennis, supra* at 581, quoting *Greer v Miller*, 483 US 756, 767 n 8; 107 S Ct 3102; 97 L Ed 2d 618 (1987) (citations omitted). Because defendant's post-arrest silence was "at most 'insolubly ambiguous,'" *Greer*, *supra* at 767 n 8, quoting *Doyle*, *supra* at 617, the effect of defendant's post-arrest silence was not devastating. Accordingly, the trial court reasonably concluded that its instruction cured any error and that declaring a mistrial was not necessary. *Dennis*, *supra* at 582.

Next, defendant argues that his first-degree CSC conviction is contrary to the great weight of the evidence because the complainant was at least thirteen years old at the time of the offense. Defendant argues that the complainant's description of the bedroom where the offense occurred is inconsistent with the arrangement of that room before the complainant turned thirteen. Testimony in defendant's case-in-chief showed that the room was renovated in 1995, and receipts for painting supplies and room accessories were admitted to support defendant's contention that the room had been renovated in 1995. By that time, defendant argues, M.S. would have been at least thirteen years old.

Because defendant failed to preserve this issue by raising it in a motion for a new trial, *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), our review is limited to plain error affecting defendant's substantial rights, *Carines*, *supra* at 763-764. A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

We find no plain error. Although the complainant's credibility was challenged by the defense, the jury was in a better position to judge credibility of the witnesses. We cannot say that the complainant's testimony was deprived of all probative value or that the jury could not have believed it. *Id.* at 642.

In a related argument, defendant asserts that his trial attorney was ineffective for failing to move for a new trial on the basis that the great weight of the evidence did not support his conviction. Defendant also argues that his appellate attorneys were similarly ineffective for failing to raise the issue in an appropriate motion.

To prove ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that the defendant was so prejudiced that he was deprived of a fair trial. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Because defendant did not move for a *Ginther*[8] hearing, our review of this issue is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

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[8] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The record does not indicate why defendant's attorneys failed to contest the weight of the evidence in an appropriate motion. Furthermore, as we have already determined, the jury was in a better position to judge the credibility of the trial witnesses. The trial judge may not sit as a "thirteenth juror" to veto the jury's verdict. *Lemmon*, *supra* at 636. Considering the trial court's limited role in reviewing the jury's determination of credibility, we cannot say that a motion for new trial on this ground would have been successful. Therefore, defendant has not established that he was prejudiced by his attorneys' failures to raise this issue.

Finally, defendant argues that the sentences for his second-degree CSC convictions involving N.J. are invalid because the trial court did not prepare a Sentencing Information Report ("SIR") for those two convictions. An SIR was prepared for the highest offense of which the jury convicted defendant, first-degree CSC. Defendant argues that an additional SIR for the two convictions involving N.J. would show a recommended minimum sentence for second-degree CSC between one and three years. On this basis, defendant argues that the trial court failed to sentence him within the appropriate range and failed to articulate reasons for departing from the appropriate range. He also argues that the sentences imposed are disproportionate.

Defendant did not object in the trial court to the absence of an SIR for the convictions involving N.J. Accordingly, the scope of our review is governed by *Carines*, *supra*. *People v Kimble*, 252 Mich App 269, 275; 651 NW2d 798 (2002). We find no plain error affecting defendant's substantial rights.

Because the offenses were committed before January 1, 1999, the former judicial sentencing guidelines apply. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). In instances of multiple convictions, the judicial sentencing guidelines require the preparation of an SIR only for the highest convicted offense. Michigan Sentencing Guidelines, 2d ed (1988), p 1, general instruction B(4). The instructions do not require a different procedure for multiple convictions that arise from separate complaints that were joined for trial. Accordingly, the trial court did not err by preparing an SIR for only the first-degree CSC conviction.

We need not address defendant's claim that his second-degree CSC sentences involving N.J. are disproportionate. See *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Those sentences are to be served concurrent to the eight to twenty year sentence for first-degree CSC. Accordingly, the sentences do not affect defendant's substantial rights. *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

I concur in result only.

/s/ E. Thomas Fitzgerald