

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
April 17, 2014

v

TERRELL DION LEWIS,  
Defendant-Appellant.

No. 313451  
Wayne Circuit Court  
LC No. 12-004087-FC

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Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(e) (use of an object believed to be a weapon), and kidnapping, MCL 750.349. Defendant was sentenced to 17 to 35 years' imprisonment for both convictions and to lifetime monitoring, MCL 750.520n(1). Because we conclude that defendant has failed to demonstrate that he received ineffective assistance of counsel and because we find no error in defendant's sentence, we affirm.

On appeal, defendant first argues that he received ineffective assistance of counsel. Specifically, defendant argues that defense counsel was ineffective because he failed to object or move for a mistrial "based on unfairly prejudicial similar acts evidence and violation of [defendant's] Sixth Amendment confrontation rights where a police officer testified that 'the gentleman we were looking for was a serial rapist' and the officer in charge testified that he took over the case because there were 'some other cases with similar methods of operations.'"

The right to counsel during a criminal trial is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right is not merely to any assistance of counsel, but to effective assistance of counsel. *US v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). Effective assistance of counsel is presumed and the challenging defendant bears the heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). In order to show ineffectiveness of counsel, a defendant generally must show that: (1) counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's errors, the results of the proceeding would be different; and (3) the result that did occur was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). This Court

will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Further, declining to raise objections to arguments can be sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant’s first ineffective assistance of counsel argument is premised on the testimony of Officer William Brewster. The prosecution asked Officer Brewster if he was involved in any type of investigation regarding defendant, and Officer Brewster indicated that he was assisting Officer Jose Ortiz with a canvass of a neighborhood. The prosecution then asked Officer Brewster what he and Officer Ortiz were canvassing the neighborhood for, and Officer Brewster replied, “we were canvassing the neighborhood for a serial rapist.” On redirect, Officer Brewster again stated that Officer Ortiz told him that “the gentleman we were looking for was a serial rapist that was preying on women through Mocospace.” Defense counsel did not object to either statement. Defendant argues on appeal that this failure to object constituted ineffective assistance of counsel. We disagree.

First, Officer Brewster’s testimony that they were looking for a “serial rapist” is not inconsistent with the evidence presented to the jury. The jury heard testimony from the victim in this case as well as testimony, admitted under MRE 404(b), from another woman who claimed to have been sexually assaulted by defendant in a very similar manner as the victim. Thus, the jury was aware that defendant was accused of two sexual assaults, and the comment by Officer Brewster regarding the search for a “serial rapist” was not inaccurate. Thus, any objection by defense counsel would have been futile, and “[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *Ericksen*, 288 Mich App at 201. Moreover, defense counsel may have determined that objecting to Brewster’s fleeting characterizations of what the officers were looking for during their canvassing would only have placed greater emphasis on those characterizations, and simply allowing them to pass was the better trial strategy. This Court will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight. *Payne*, 285 Mich App at 190. Finally, because the jury was already aware of the fact that defendant was accused of more than one sexual assault, the reference to him as a “serial rapist” did not suggest anything new to the jury. Thus, defendant cannot demonstrate any prejudice as a result of the reference.

Defendant also argues that defense counsel should have moved for mistrial in response to Officer Brewster’s testimony. However, unresponsive, volunteered testimony in response to a proper question is not grounds for a mistrial. *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009). Here, Officer Brewster’s statement that police were looking for a “serial rapist” was in response to two separate and proper questions from the prosecution regarding what the officers were looking for when they were canvassing the neighborhood. In neither instance did the prosecution elicit further information or testimony regarding the “serial rapist” title that Officer Brewster attributed to defendant. Nor did the prosecution make any argument to the jury that would suggest defendant engaged in the sexual assault of victims other than the victim in this case and the 404(b) witness. Therefore, the isolated statements from Officer Brewster did not merit a mistrial and defense counsel was not ineffective for failing to request one because,

again, the failure to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *Ericksen*, 288 Mich App at 201.

Further, defendant argues that Officer Brewster's statements violated the Confrontation Clause because the statements amounted to the testimonial statements of citizens obtained during a criminal investigation. We find defendant's argument unavailing. Even assuming the statements were testimonial, the protections afforded by the Confrontation Clause apply only to statements used as substantive evidence, *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012), specifically out-of-court statements of witnesses who bear testimony against a defendant, *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). Brewster's statements regarding his search for a "serial rapist" were in response to questions surrounding the canvassing of the neighborhood, and the purported identity of the suspect. These statements were made to explain the purpose and context of the officers' search of the neighborhood and were not proffered to prove that defendant actually was a "serial rapist." *Nunley*, 491 Mich at 697. Further, Brewster's testimony was in regard to his own motivations and was not meant to relay information elicited from out-of-court witnesses. *Fackelman*, 489 Mich at 528. Therefore, because these statements were not offered as substantive evidence, the protections of the Confrontation Clause do not apply. Accordingly, defense counsel was not ineffective for failing to raise a Confrontation Clause objection because such an objection would have been meritless. *Ericksen*, 288 Mich App at 201.

Defendant also argues that defense counsel was ineffective in regard to the testimony of Officer Ortiz. The prosecution asked Officer Ortiz when he took over the investigation of the case, and Ortiz responded that he could not remember the date, but that "there were some other cases with similar methods of operations." Defense counsel objected immediately to the reference to the "alleged other cases," and the trial court noted that it recalled the question being about when Officer Ortiz took over the case, and asked "is that the question that was asked?" The prosecution affirmed that was the question, and asked Officer Ortiz again whether he recalled the date he took over the case. Officer Ortiz replied that he took over in "early April." There was no further reference to other cases.

We conclude that defense counsel was not ineffective in his handling of Ortiz's testimony. First, we note that contrary to defendant's argument, defense counsel did object to Ortiz's testimony that there were "some other cases with similar methods of operations." Moreover, while defense counsel could have requested a curative instruction, it was reasonable trial strategy not to in order to avoid calling additional attention to the comment. Further, defendant cannot demonstrate any prejudice from the statement because it was nonresponsive, and there is no evidence to indicate that the prosecution argued that there were multiple victims beyond the testimony that was presented to the jury.

We also reject defendant's argument that defense counsel was ineffective for failing to move for a mistrial in response to Officer Ortiz's testimony. As noted, this Court has held that unresponsive, volunteered testimony in response to a proper question is not grounds for a mistrial. *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009). Officer Ortiz's comment that there were "some other cases with similar methods of operations" was clearly nonresponsive to the prosecution's question about what date Officer Ortiz took over the case.

Thus, any motion for a mistrial would have been meritless, and defense counsel is not ineffective for failing to make one. *Ericksen*, 288 Mich App at 201.

Similarly, we also reject defendant's argument that defense counsel was ineffective for failing to object to Officer Ortiz's testimony on Confrontation Clause grounds. The protections afforded by the Confrontation Clause apply only to statements used as substantive evidence. *Nunley*, 491 Mich at 697. Officer Ortiz's statement was clearly not offered as substantive evidence because it was nonresponsive, had to do with the reasons he took the actions that he took, and did not concern out-of-court statements of witnesses who bear testimony against defendant. *Id.*; *Fackelman*, 489 Mich at 528. Thus, defendant has failed to demonstrate that defense counsel was ineffective for failing to raise a Confrontation Clause objection. *Ericksen*, 288 Mich App at 201.

Finally, defendant raises two issues on appeal that he concedes are controlled by binding caselaw, but notes that the issues are raised for purposes of preservation. First, defendant contends that his Sixth Amendment rights were violated when his sentence was increased as a result of judicial fact-finding, based upon facts not determined by the jury, under *Alleyne v United States*, \_\_\_ US \_\_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013). As acknowledged by defendant, this issue is controlled by *People v Herron*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (issued December 12, 2013), wherein this Court held that Michigan's sentencing guidelines do not establish a mandatory minimum, and thus, judicial fact-finding when scoring the offense variables does not violate due process or the defendant's Sixth Amendment right to a jury trial. Defendant also challenges the trial court's imposition of lifetime electronic monitoring on appeal; however he concedes that *People v Brantley*, 296 Mich App 546, 557-558; 823 NW2d 290 (2012) controls this issue. We agree that *Brantley* controls, and accordingly, defendant is not entitled to any relief on appeal.<sup>1</sup>

Affirmed.

/s/ Joel P. Hoekstra  
/s/ David H. Sawyer  
/s/ Elizabeth L. Gleicher

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<sup>1</sup> We note that our Supreme Court denied leave to appeal on October 24, 2012, in *People v Brantley*, 493 Mich 877; 821 NW2d 574 (2012), and denied reconsideration of that decision on March 4, 2013, in *People v Brantley*, 493 Mich 943; 826 NW2d 716 (2013).