

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 14, 2014

v

STEVEN PATRICK ATKINSON,  
Defendant-Appellant.

No. 311626  
Emmet Circuit Court  
LC No. 11-003571-FH

---

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (sexual contact with a victim under 13 years old), for fondling the then 12-year-old daughter, MR, of his live-in girlfriend, KH. The jury acquitted defendant of a CSC-II charge filed in relation to his girlfriend's then 15-year-old daughter, HR. The court sentenced defendant to 3 to 15 years' imprisonment and ordered lifetime electronic monitoring under MCL 750.520n.

Defendant challenges defense counsel's failure to insist that a video recording of MR's forensic interview be shown to the jury and to call three defense witnesses at trial. We discern no prejudice to defendant from the absence of this evidence, and defense counsel adequately explained her strategy at a posttrial hearing. Defendant complains that the lifetime electronic monitoring provision of his sentence is cruel and unusual punishment. Lifetime electronic monitoring, however, is not a punishment and therefore US Const, Am 8 and Const 1963, art 1, § 16 are inapplicable. Defendant further asserts that the monitoring provision amounts to an unreasonable search. Although a search will occur when the monitoring begins, it is not constitutionally unreasonable. We therefore affirm defendant's convictions and sentences.

**I. BACKGROUND**

Defendant and KH lived together from July 2009, through defendant's conviction in March 2012. Defendant's teenage daughter, HA, and KH's two daughters, HR and MR, resided with the couple. In late November or early December 2011, the three girls reported that defendant had sexually touched MR. During this time period, MR was suffering from chronic back pain and would often climb into defendant and her mother's bed in search of a back rub. MR claimed that the inappropriate touching occurred as a result of such a massage. The girls' stories were inconsistent about dates and whether defendant had previously molested MR, and

their stories changed over time. MR was inconsistent about what body parts defendant touched, where she was lying at the time, and whether defendant was actually awake during the incident. HR added her accusation of sexual touching after the fact. Following the accusations, HR and MR moved in with their father and HA also left the residence.

Defense counsel's strategy was to attack the girls' credibility in order to show that they fabricated their claims against defendant in retaliation for his strict discipline. Despite the attack on the witnesses' veracity, the jury convicted defendant of sexually touching MR.

## II. ASSISTANCE OF COUNSEL

Following his convictions, defendant filed a motion for a new trial, contending that defense counsel, Mary Beth Kur, provided deficient representation. The court granted defendant's motion for a *Ginther*<sup>1</sup> hearing, which was conducted over two days. The court thereafter denied defendant's motion for a new trial. Contrary to defendant's challenges, we discern no error in counsel's performance requiring a new trial.

"Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "A judge must first find the facts, then must decide whether those facts establish a violation of defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review for clear error the circuit court's factual findings and de novo the court's constitutional rulings. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). We review for an abuse of discretion the circuit court's denial of defendant's motion for a new trial. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

"[T]he right to counsel is the right to the effective assistance of counsel." *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). A defendant's claim of ineffective assistance includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 U.S. 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the deficiency prong, a defendant must show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664.

The defendant also must overcome the strong presumptions that his "counsel's conduct [fell] within the wide range of reasonable professional assistance," and that counsel's actions were sound trial strategy. *Strickland*, 466 US at 689. Defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial

---

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 992 (1973).

strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted).

#### A. Video Recording of MR's Interview

Following the report of sexual touching, a Child Protective Services Worker, Melissa Reedy, travelled to MR's school to interview her. Reedy was joined by Emmet County Sheriff's Deputy Matthew Leirstein. Reedy conducted the interview and Leirstein asked follow-up questions. The interview was video recorded. Attorney Kur questioned Reedy at length during cross-examination regarding inconsistent statements made by MR during the interview and leading questions asked by Leirstein. Reedy did not recall all statements referenced by Kur and admitted that she did not watch the recorded interview in preparation for trial. Midway through the cross-examination, Kur stated, "I guess to refresh the witness's recollection, I would like to play that tape at some point." While the DVD recording was in the courtroom, the equipment to play it was not connected. Kur therefore indicated that she would "wait until we take a break." At the end of the cross-examination, Kur indicated that she did not have the necessary equipment present and asserted, "I can use it at a different time, so rather than waste time, let's do it tomorrow, unless you want to do it." The court proceeded with the prosecutor's redirect examination and left the video issue until later. Kur did not return to the issue the following day.

Defendant challenges Kur's "failure to show the DVD of the . . . interview with [MR] that highlighted the inconsistencies and that showed that [MR] was coached in violation of the forensic protocol, an error that was especially prejudicial given her indication to the jury that she would show the DVD the next day[.]" At the *Ginther* hearing, defendant's replacement counsel, Janet Napp, elicited Kur's testimony that she did not return to the issue of having the recorded interview played to the jury "[b]ecause [she] got all of that out of people who were there, got in [sic] on the record. Nobody disputed" the inconsistencies. Kur also opined that she had adequately challenged the breach of child forensic interview protocol during cross-examination of Reedy and Leirstein.

On cross-examination, the prosecutor asked Kur, "Did you make a decision whether or not any extrinsic evidence would have been permitted such as statements made to third parties, things of that nature during trial?" Kur responded:

Everything that I knew of that would have been inconsistent was covered on either direct or cross-examination. None of it was denied, so there was no basis whatsoever to use any of those extrinsic – use anything else to impeach such as the CD, etcetera. And my understanding of the law is that extrinsic evidence is not permitted to refute something that a witness says.

On redirect, attorney Napp engaged in the following colloquy with Kur:

*Q.* Ms. Kur, you indicated you made a strategic decision not to present the DVD?

\* \* \*

A. I didn't say it was a strategic decision. I didn't think that I could introduce it because nobody denied that [sic] the inconsistencies that were in it.

Q. And why did you say that you would present it the next day?

A. I don't know.

In denying defendant's motion for a new trial, the court reasoned:

This Court has carefully reviewed the videotape of the interview of [MR]. It does establish that some leading questions were employed by Deputy Leirstein. However, this was admitted by Ms. Reedy in her testimony . . . . The videotaped interview also records [MR] making certain statements about Defendant being asleep or half asleep or snoring, but she also states clearly her belief that he knew what he was doing.

While playing the tape to the jury would have further highlighted some inconsistencies in [MR's] testimony, playing the video would also have given the jury another opportunity to hear her repeat her damaging testimony about how Defendant molested her. It is pure speculation to say the defense would have been helped more than it would have been hurt by having the jury see and hear [MR] once again tell about how Defendant molested her.

Defendant argues that the video showed that [MR] was coached. . . . The leading questions by Deputy Leirstein come towards the end of the interview, and after [MR] had already described the key details of Defendant's conduct. This Court did not come away with the impression that words were put in her mouth or that the video cast significant doubt on [MR's] credibility.

Regardless of Ms. Kur's reason for not showing the video, it was a reasonable strategic decision to choose not to play this video, given the fact that the point about [MR's] inconsistencies had already been supported by other evidence. Likewise, the argument that she was "coached" was supported by the admissions from Ms. Reedy that leading questions were used, and that this was contrary to the forensic protocol. Ms. Kur's failure to play the videotape does not establish ineffective assistance of counsel.

We first note that the record does not support that Kur made an actual strategic decision to refrain from presenting the videotaped interview at trial. At the time, Kur's decision was apparently based on the lack of audiovisual equipment. At the *Ginther* hearing, Kur initially asserted that the video became unnecessary as the witness testimony revealed all pertinent information. She then changed gears and stated her belief that the video would have been inadmissible. Despite the lack of strategy in this regard, we discern no prejudice to defendant.

As noted by the circuit court, the inconsistencies between MR's trial testimony and her statements during her interview, and between her various answers given during the interview, were covered at length at trial. Both Leirstein and Reedy testified that MR vacillated between claiming defendant was asleep and snoring, half asleep and awake during the incident. Even HR

and HA testified that MR told them that defendant was half asleep or potentially asleep. Therefore, the jury was on guard that MR had provided inconsistent statements directly impacting defendant's ability to form the necessary criminal intent for the offense.

The testimony at trial also sufficiently revealed MR's inconsistencies relating to the date and details of the incident and whether this was an isolated event. At trial, MR, HR and HA could not pinpoint the actual dates between November 28 and December 2, 2011, on which the touching occurred and reports were made to various individuals. MR added new details at trial, including that defendant had touched her breast. Leirstein identified those details at trial, however, and informed the jury that MR had not mentioned them during her interview. Testimony revealed that MR changed her story from the interview that she was lying between defendant and KH on the bed to asserting at trial that defendant called her over for a hug and she lay on the edge of the bed next to him. And just as during her interview, MR inconsistently testified on the stand that defendant had touched her four, five, or six times in the past.<sup>2</sup>

While defendant argues that the actual video would have been the best evidence of the witnesses' incredibility, the failure to present the best evidence is not the test to determine if counsel's performance was constitutionally deficient. The decision regarding what evidence to present is a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to present evidence only amounts to deficient performance if the defendant is denied a substantial defense. *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). Defendant does not contend that he was deprived of a substantial defense; indeed, Kur did present the defense that MR was incredible because her story changed during the interview and between the interview and trial. That counsel's chosen method to prove that defense was unsuccessful is not grounds for finding her performance constitutionally deficient. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). And as noted by the circuit court, the video likely would have shown MR in an emotional state, something that could have further damaged the defense.

Moreover, defendant suffered no prejudice as a result of Kur's indication before the jury that she intended to present the video. Kur's stated intent at trial for presenting the video was to refresh Reedy's memory. The jury was not necessarily left with the impression that Kur decided not to present the video because it contained information harmful to the defense. Rather, the jury could have believed that Kur no longer saw the need to refresh Reedy's memory. Equally true, the jury may have perceived that the court still had no equipment to play the video. That defendant was prejudiced in this regard is pure speculation.

---

<sup>2</sup> Defendant makes much of MR's inability to clearly state whether she was seeing a doctor about her chronic back pain. MR's inconsistency in this regard had no bearing on the issues before the jury. Defendant also argues that the video would have shown MR smiling as she left the interview, evidencing that she was lying. The circuit court and this Court could only speculate about how the jury would have viewed that evidence and could not determine that this piece of evidence would have affected the outcome of the trial.

Defendant also was not prejudiced by the absence of the video evidence that Leirstein and Reedy asked certain leading questions during the interview. Defendant claims that the video would have shown that Reedy and Leirstein suggested that defendant touched MR six times in total and that he touched her on her “pubic region.” MR then parroted the term “pubic region” at trial. Whether Reedy or Leirstein planted the idea in MR that she had been molested six times is unimportant as MR actually provided highly inconsistent testimony on that issue at trial. Moreover, Leirstein admitted at trial that he did not use child forensic interviewing techniques when speaking to MR. Kur also elicited testimony from Reedy that Leirstein’s statements would constitute “leading questions” and could be viewed as a “big taint” to the interview of a young child. And the evidence revealed that MR told HR and HA that defendant touched her on the buttocks and on her front groin area before her forensic interview. Therefore, even if Reedy and Leirstein suggested the term “pubic region,” that term was consistent with MR’s story. Absent any prejudice to defendant, the circuit court acted within its discretion in denying defendant’s motion for a new trial.

#### B. Failure to Present Defense Witnesses

At trial, Kur presented four witnesses on behalf of the defense. At the posttrial hearing, defendant complained of Kur’s failure to interview or present a long list of additional defense witnesses. On appeal, defendant has narrowed his challenge to only three: defendant claims that Kur should have recalled KH, whose testimony was presented by the prosecution, as a defense witness. Defendant further asserts that Kur should have presented the testimony of his mother and KH’s friend, Teri Nestor.

“Decisions regarding . . . whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Such decisions may constitute ineffective assistance if they deprive the defendant of a substantial defense. *Payne*, 285 Mich App at 190. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Marshall*, 298 Mich App 607, 612; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013). Ineffective assistance can also be established where counsel fails to reasonably investigate a case, as a decision is “reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 US at 691.

We discern no error in Kur’s decision not to call defendant’s mother as a witness. Defendant argues that his mother would have testified about HA’s reputation for causing trouble and that HA told her “[s]omething big’s gonna go down,” shortly before MR’s accusations were reported. Kur did speak to defendant’s mother while preparing the defense. Kur found both of defendant’s parents to be “very emotional,” and described them as “extremely volatile witnesses, volatile people, angry.” Defendant’s siblings described their parents as “[h]ot headed, maybe not a good idea to call them as witnesses.” As evidence that Kur’s impressions were accurate, defendant’s father became angry when the trial judge asked him to step into the hallway because his cell phone repeatedly made noises during the trial. Defendant’s father instead threw his phone into the hallway and returned to his seat “making all kinds of face and gestures,” requiring the court to threaten him with contempt. In any event, the evidence about HA’s reputation actually reached the jury. KH testified that HA is a “compulsive liar” and became a serious discipline problem after her 18<sup>th</sup> birthday.

In relation to KH, defendant claims that, had she been called as a defense witness, she could have testified further regarding the family dynamics, providing support for the defense theory that MR, HR and HA fabricated the accusations against defendant. Kur spoke with KH several times before trial and considered the idea of calling her as a defense witness. During her testimony as a prosecution witness, KH clearly expressed her belief that the three girls were fabricating their claims against defendant. KH testified regarding HR's motive to fabricate the accusations and the sway she held over MR to convince her to go along with the story. KH further informed the jury that prior to MR's current accusations, MR had always been very affectionate and had a good relationship with defendant. Kur focused on this information during opening statement and closing argument to ensure the jury understood its import. As noted by Kur at the posttrial hearing, she "got everything out of [KH] that we needed to get, and the Prosecutor did, too." Accordingly, counsel reasonably deemed it unnecessary to recall her.

Defendant argues that Nestor could have corroborated KH's testimony regarding HR's ability to manipulate MR. Kur did not recall speaking with Nestor before trial. KH testified that she sent Kur an email explaining Nestor's potential testimony, and that Kur told her that she did not think Nestor's information was relevant. It is evident from the record that the failure to call Nestor, as well as defendant's mother and KH, did not deprive defendant of a substantial defense. As the circuit court found, the defense was "supported with considerable evidence" at trial. Additional testimony by witnesses presumed friendly toward defendant was unlikely to change the outcome of the trial. And as Kur explained, she did not think it would be an effective strategy "to parade relative after relative in front of a jury to testify to the exact same thing over and over again" because "sometimes it has the reverse affect [sic] with the jury." As the circuit court noted, these decisions composed "a classic example of trial strategy which is presumed to have been reasonable."

### III. CONSTITUTIONALITY OF LIFETIME MONITORING PROVISION

Defendant contends that the imposition of lifetime electronic monitoring under MCL 750.520n constitutes cruel and/or unusual punishment under the Michigan and United States Constitutions. Defendant did not preserve this issue below, and this Court denied his motion to remand on the matter. *People v Atkinson*, unpublished order of the Court of Appeals, entered September 4, 2013 (Docket No. 311626). Under *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), this Court may review unpreserved constitutional issues for plain error affecting the defendant's substantial rights. Further, defendant's unpreserved claim is a purely legal issue and "the facts necessary for its resolution have been presented." *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999).

Under MCL 750.520n(1),

A person convicted under [MCL 750.520b] or [MCL 750.520c] for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under . . . MCL 791.285.

MCL 791.285, in turn, provides:

(1) The lifetime electronic monitoring program is established in the department. The lifetime electronic monitoring program shall implement a system of monitoring individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring. The lifetime electronic monitoring program shall accomplish all of the following:

(a) By electronic means, track the movement and location of each individual from the time the individual is released on parole or from prison until the time of the individual's death.

(b) Develop methods by which the individual's movement and location may be determined, both in real time and recorded time, and recorded information retrieved upon request by the court or a law enforcement agency.

(2) An individual who is sentenced to lifetime electronic monitoring shall wear or otherwise carry an electronic monitoring device as determined by the department under the lifetime electronic monitoring program in the manner prescribed by that program and shall reimburse the department or its agent for the actual cost of electronically monitoring the individual.

(3) As used in this section, "electronic monitoring" means a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded.

"We review de novo . . . questions concerning the constitutionality of a statute." *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011), quoting *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003).

US Const, Am 8 provides: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." Const 1963, art 1, § 16 similarly states: "[e]xcessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Our Supreme Court has found that our state constitution's prohibition against cruel or unusual punishment is more broadly interpreted than its federal counterpart. *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992). Therefore, if a punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

In considering defendant's challenge to the electronic monitoring statutes, this Court must first determine whether such monitoring is a "punishment" as contemplated by the constitution. Only then may we consider the comparative severity of any penalty. *People v Dipiazza*, 286 Mich App 137, 147; 778 NW2d 264 (2009). "[P]unishment, generally, is the deliberate imposition, by some agency of the state, of some measure intended to chastise, deter

or discipline an offender.” *Id.* (quotation marks and citation omitted). When considering whether governmental action imposes a “punishment,” we must consider “the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation.” *Id.* (quotation marks and citations omitted).

Considering the statutes and nature of electronic monitoring of sex offenders, we conclude that such monitoring is not a “punishment.” MCL 750.520c(2) requires a court “[i]n addition to the penalty” imposed by statute, to “sentence” a defendant convicted of CSC-II “to lifetime electronic monitoring under [MCL 750.520n]” if the defendant is over 17 and the victim is less than 13 years old. If electronic monitoring was part of the “punishment” for CSC-II, then the language “[i]n addition to the penalty” would be superfluous. We must avoid a statutory construction that would render part of the statute surplusage or nugatory. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

Second, the electronic monitoring provision is akin to the reporting and registry requirements of the sex offender registration act (SORA). This Court has held that the purpose of the SORA is not punitive but protective of society—it “protect[s] public safety and monitor[s] those persons who pose a potential danger to children.” *People v Fonville*, 291 Mich App 363, 380; 804 NW2d 878 (2011). A legislative action incident to the government’s power to protect the public is generally deemed regulatory, rather than punitive. *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003). The SORA is “a remedial regulatory scheme furthering a legitimate state interest,” i.e. keeping track of the whereabouts of sexual offenders. *People v Golba*, 273 Mich App 603, 617; 729 NW2d 916 (2007). The electronic monitoring provision serves the same purpose. We discern no reason to treat a monitoring requirement differently than a registration mandate in this regard.

Even if the electronic monitoring requirement were deemed a “punishment,” it would not be cruel or unusual. A punishment is cruel or unusual if it “is so excessive that it is completely unsuitable to the crime.” *People v Coles*, 417 Mich 523, 530; 339 NW2d 440 (1983), citing *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972). In making this consideration, we may look to the law of other states to determine if our requirements are out of the legal mainstream. *Id.* A punishment may also be deemed unconstitutionally excessive “if it thwarts the rehabilitative potential of the individual offender and does not contribute toward society’s efforts to deter others from engaging in similar prohibited behavior.” *Id.*

Clearly, sexual assault of a minor is a serious offense and of grave concern. Defendant fails to explain how Michigan’s electronic monitoring requirement is comparatively excessive, and even acknowledges that Michigan is not alone in requiring mandatory lifetime electronic monitoring for sex offenders. See, e.g., CA Penal Code § 3004(b); GA Code Ann § 42-1-14(e) (2011); KS Statutes Ann, § 21-6604(r); LA RS 15:560.4; MD Code Ann, Crim Proc § 11-723; MO Rev Stat § 217.735; MT Code Ann, 46-23-1010; NC Gen Stat § 14-208.40, 208.40A(c); RI Gen Laws § 11-37-8.2.1; Wis Stat § 301.48.

Furthermore, defendant fails to address concerns of rehabilitation and recidivism. As the United States Supreme Court has noted, “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’” *Smith*, 538 US at 103 (citation omitted). See also *McKune v Lile*, 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002) (“When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”). And as the United States Court of Appeals for the Sixth Circuit has stated, “the monitoring system has a deterrent effect on would-be re-offenders” and “the ability to constantly monitor an offender’s location allows law enforcement to ensure that the offender does not enter a school zone, playground, or similar prohibited locale.” *Doe v Bredesen*, 507 F3d 998, 1008 (CA 6, 2007). Accordingly, defendant has failed to present any authority sufficient to overcome the presumption that his lifetime-electronic-monitoring requirement is neither cruel nor unusual.

Defendant also argues that lifetime electronic monitoring constitutes an unreasonable search and seizure under the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. The prosecutor does not contest that electronic monitoring constitutes a “search.” Defendant relies on *United States v Jones*, \_\_\_ US \_\_\_; 132 S Ct 945; 181 L Ed 2d 991 (2012) (involving the warrantless use of GPS tracking devices on vehicles), and contends that the monitoring will invade his reasonable expectation of privacy in his home. “Whether a search is reasonable ‘is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” *Samson v California*, 547 US 843, 848; 126 S Ct 2193; 165 L Ed 2d 250 (2006), quoting *United States v Knights*, 534 US 112, 118-119; 122 S Ct 587; 151 L Ed 2d 497 (2001).

In *United States v Karo*, 468 US 705, 708; 104 S Ct 3296; 82 L Ed 2d 530 (1984), the Court held that “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant,” and that “[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.” *Id.* at 714-715. However, prisoners, parolees and probationers have a lower expectation of privacy, even in the comfort of their own homes. *Samson*, 547 US at 848-852; *Knights*, 534 US at 114, 119-120; *Hudson v Palmer*, 468 US 517, 530; 104 S Ct 3194; 82 L Ed 2d 393 (1984).

Defendant concedes that his expectation of privacy is lower than that of the law-abiding public until his sentence and parole have been served, and that the State may monitor his whereabouts during that time, but he argues that, “[a]t some point, . . . after probation or parole is concluded, a convicted person re-gains their Fourth Amendment rights.” This argument fails to address the concern with recidivism embodied in the statute. As *Samson* noted, “this Court has repeatedly acknowledged that a State’s interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.” *Samson*, 547 US at 853. See also *Smith*, 538 US at 103. “This Court has acknowledged the grave safety concerns

that attend recidivism,” *Samson* continues, and that “the Fourth Amendment does not render the States powerless to address these concerns *effectively*.” *Samson*, 547 US at 854 (emphasis in original). Accordingly, we reject defendant’s challenge to the continuing search.

We affirm.

/s/ Donald S. Owens  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher