

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW AUDIE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

June 20, 2013

No. 306191

Lapeer Circuit Court

LC No. 10-010499-FC

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age). The trial court sentenced defendant to 15 to 30 years' imprisonment for each conviction and ordered that he be subject to lifetime electronic monitoring. Because defendant was not denied the effective assistance of counsel, the prosecutor did not commit misconduct, and defendant waived appellate review of his claim of evidentiary error, we affirm defendant's convictions; but because the trial court erred by sentencing defendant to lifetime electronic monitoring in violation of ex post facto laws, we remand for vacation of the lifetime electronic monitoring requirement in defendant's judgment of sentence.

Defendant first argues that he was denied the effective assistance of counsel when his trial counsel failed to sufficiently cross-examine the prosecution's expert, Dr. Mischa Pollard, or call a defense expert witness to challenge her testimony. "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). We review de novo the trial court's ultimate constitutional determination whether a defendant was denied the effective assistance of counsel. *Id.* We review for clear error the trial court's findings of fact. *Id.*

It is presumed that a defendant received the effective assistance of counsel, and the defendant bears a heavy burden of proving otherwise. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id.* "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence."

People v Unger, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). A “defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *Petri*, 279 Mich App at 411. “[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy[.]” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks and citation omitted). “Further, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.*

Defense counsel testified at the *Ginther*¹ hearing that his trial strategy was to challenge the complainant’s credibility. Counsel explained that he investigated and researched Dr. Pollard’s position and consulted with another doctor. Counsel testified that he ultimately chose not to call his own expert witness because Dr. Pollard never made “a definitive finding that there was penetration” and “there was nothing really damaging in [her] report[.]” Moreover, defense counsel testified that he believed, as a matter of trial strategy, that the complainant’s story was so unbelievable that there was no need to call an expert witness.

Defense counsel’s decision not to call an expert witness was sound trial strategy and did not constitute ineffective assistance of counsel. Moreover, defense counsel thoroughly cross-examined Dr. Pollard, and her testimony in response to counsel’s questions supported defendant’s defense. Dr. Pollard never testified that the thinning of the complainant’s hymenal ring was caused by penile insertion. In fact, she testified that the thinning was not consistent with penile insertion and could have been caused by a finger or the use of a tampon. Dr. Pollard further testified on cross-examination that any penetration of a child would result in a perforated or torn hymen and that the complainant’s hymen was intact without any scarring. When asked whether her findings support that partial penetration had occurred, Dr. Pollard responded that her “findings support an inconclusive diagnosis.” Thus, Dr. Pollard’s testimony did not favor the prosecution and supported defense counsel’s trial strategy that the complainant’s story was unbelievable. Thus, counsel’s decision not to call his own expert witness to challenge Dr. Pollard’s testimony constituted sound trial strategy, and his cross-examination of Dr. Pollard did not fall below an objective standard of reasonableness.

Defendant next contends that the trial court violated the ex post facto clauses of the United States and Michigan constitutions when it sentenced defendant to lifetime electronic monitoring. Because defendant did not raise this issue below, our review of this issue is limited to plain error affecting his substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Both the United States and Michigan constitutions prohibit ex post facto laws, which are designed, in part, “to ensure fair notice that conduct is criminal[.]” *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003). Ex post facto laws include “[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.” *Id.* at 317, quoting *Carmell v Texas*, 529 US 513, 522; 120 S Ct 1620; 146 L Ed 2d 577 (2000) (additional citation omitted; emphasis in original). Defendant argues and the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

prosecution concedes that the trial court's sentencing defendant to lifetime electronic monitoring violates the above ex post facto law. In *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012), our Supreme Court held that lifetime electronic monitoring constitutes an "additional punishment" that is part of a defendant's sentence. The requirement of lifetime electronic monitoring for persons convicted under MCL 750.520b became effective on August 28, 2006. See MCL 750.520n; see also 2006 PA 171. The record reflects, and the prosecution concedes, that the last time that defendant sexually assaulted the complainant occurred, at the latest, before the complainant's tenth birthday on February 20, 2006, prior to the effective date of MCL 750.750n. Thus, the electronic monitoring requirement of defendant's sentence violates the ex post facto clauses of the United States and Michigan constitutions. Because the error was plain and affected defendant's substantial rights by increasing the severity of his sentence, we remand this case to the trial court for the ministerial correction of the judgment of sentence to vacate the lifetime electronic monitoring requirement.

Defendant next argues in his Standard 4 brief on appeal that the prosecution committed misconduct during rebuttal closing argument by stating, in reference to defendant:

[H]e's arrogant. It's because he thinks that women and children aren't going to have power over him.

Because defendant failed to object to the statement, our review is limited to plain error affecting his substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Prosecutors are generally accorded great latitude with respect to their arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.* (quotation marks, citation, and brackets omitted). The challenged statement that the prosecutor made during rebuttal closing argument tied in with the following statement that she made during closing argument:

[Defendant] said . . . in an interview he had this rageful [sic] flashback that something had happened to him as a child 40 years ago. His sister accused him. His mother accused him. It looked like maybe he has issues with women. He was furious that a little girl could take him down or get him in trouble, whether it's his sister or whether it's [the complainant]. He's the one in control. He's the powerful one[.]

The prosecutor's statements pertained to defendant's remarks made during a police interview. During the interview, defendant repeatedly stated that he "must have done something" and "that he was "guilty of something." When asked about those statements during trial, defendant testified that his discussion with the police "brought up an old memory" of when he was a teenager and his younger sister accused him of something that he did not do. His mother grounded him for two weeks as a result of the incident. Defendant testified, "It's the same thing all over again. Some little girl blaming something on me I didn't even do." Accordingly, the prosecutor's statements were reasonable inferences drawn from the evidence as it related to her theory of the case. As such, they did not amount to misconduct.

Finally, defendant argues in his Standard 4 brief on appeal that the prosecutor did not lay a proper foundation for the admission of a video recording of defendant's police interview. Defendant waived appellate review of this claim of error because defense counsel specifically stated that he did not object to the admission of the video. A defendant's express acquiescence in the trial court extinguishes any error and waives appellate review. *People v Carter*, 462 Mich 206, 215, 219-220; 612 NW2d 144 (2000).

Affirmed in part, and remanded for the ministerial correction of the judgment of sentence to vacate the lifetime electronic monitoring requirement. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Pat M. Donofrio