

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 24, 2012

v

ALEXANDER CHRISTIAN BOWERS,

Defendant-Appellant.

No. 301811
Ingham Circuit Court
LC No. 10-000560-FC

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as a matter of right from his conviction of first-degree criminal sexual conduct (“CSC1”), MCL 750.520b(2)(b), in this case involving a then 11-year-old victim following a bench trial. The primary issue is whether defendant’s rights were violated when the trial court closed the courtroom during testimony by the complainant. Because the trial court did not make sufficient factual findings for us to review, we remand for further proceedings. We reject defendant’s arguments of insufficient evidence to support conviction, prosecutorial misconduct, and ineffective assistance of counsel.

I. BACKGROUND

During the month of July of 2009, Bobby and Dawn Robinson were living with their two minor daughters, one of whom is the complainant in this case. Defendant, a cousin of the other daughter’s boyfriend, was homeless at the time, and the Robinsons allowed him to live at their home. According to the complainant, on July 4, 2009, shortly after a party at the home, defendant entered the complainant’s room and sexually assaulted her. The complainant testified that defendant initially entered her room to ask where the complainant’s sister was. She stated that she noticed defendant’s clothes and that he was carrying an alcoholic beverage in his hand and appeared to be intoxicated. After staring at the complainant for some time, defendant left the room. Some time afterwards, defendant later reentered the room; although the light was off, the complainant testified that she knew it was defendant because: (1) the ambient light from her window illuminated defendant’s face and body; (2) the person was wearing the same clothes, had the same hair, and was carrying the same drink; (3) the person had long hands and fingers, just like defendant; and (4) when the person spoke, she recognized his voice as defendant’s voice. According to the complainant, defendant put his left hand over her mouth and pulled down her pants and underwear; the complainant struggled until defendant threatened to kill her and her

family if she told anyone. The complainant testified that defendant then put his penis inside her vagina for approximately ten minutes, although she did not know whether defendant ejaculated inside her. When finished, defendant abruptly left and took his drink with him. The complainant testified that she went to the bathroom to clean herself and noticed that she was mildly bleeding after the assault; she showered and put her clothes in the dirty clothes hamper, which Dawn later washed.

Due to defendant's threats, the complainant did not report the assault to anyone until January 15, 2010, after she watched a movie that had a rape scene in it. After viewing it, she reacted and told her family what had happened. Her father immediately reported the incident to the police; Officer Chad Davis interviewed the complainant and investigated the crime. Due to the large gap in time between the date of the assault and the reporting date, Davis was unable to locate any physical evidence of the crime.¹ He scheduled a physical examination with Dr. Stephen Guertin, who forensically interviewed the complainant and also physically examined the child's hymen. Guertin testified that complainant had a torn hymen in the "7:00 o'clock" position, which only occurs in young, post-pubescent children (like the complainant) when they were either molested or had sexual intercourse. Guertin stated that—in his expert opinion—the complainant's claim that she was raped by defendant is wholly consistent with his medical findings from the physical examination.

During the bench trial, the defense attempted to discredit the prosecution's case by attacking the credibility of the witnesses and questioning the true identity of the complainant's attacker. Although defendant did not present an expert witness to counter Guertin's testimony, he did attack the credibility of the witnesses during cross-examination (based on the inconsistent testimonies between the different witnesses). The trial court found plaintiff's witnesses to be credible regarding the substantive, material facts of the crime. Accordingly, the trial court found defendant guilty of CSC1 because he sexually penetrated a person below the age of 13 years old when he was more than 17 years of age. It is from this conviction that defendant now appeals.

II. SIXTH AMENDMENT RIGHT TO PUBLIC TRIAL

Defendant argues that he was deprived of his constitutional right to a public trial when the trial court locked the courtroom to the public. The right to a public trial is a structural constitutional right, which is not subject to harmless error analysis and requires automatic reversal. *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246 (1991); *Neder v US*, 527 US 1, 7; 119 S Ct 1827 (1999). However, we must first decide how to review this issue given defense counsel's actions during trial. In order to properly preserve a matter for appellate review in a criminal hearing, the issue must be raised before the trial court. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010). This generally requires that a party timely object to the decision or action disputed on appeal. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290

¹ Since there was not much bleeding on the complainant's clothes or sheets, Dawn did not notice that anything had happened to the complainant. Accordingly, the clothes were washed; the complainant testified that she later threw the clothes away because she could not bear to wear them anymore.

(2006). Although a forfeited right may later be reviewed for plain error, a voluntary relinquishment of a known right generally creates a waiver that extinguishes the right; otherwise, this would allow a party to “harbor error as an appellate parachute.” *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007).

Before opening arguments, plaintiff moved to close the courtroom while the complainant testified. The trial court asked defendant if he had an objection to plaintiff’s motion, and defendant’s attorney responded, “No, your Honor. Thank you.” Therefore, it appears that defendant voluntarily waived his right to contest this issue. However, we note that our Supreme Court has not yet decided whether a structural constitutional right may ever be waived; that issue is currently under consideration. See *People v Vaughn*, 291 Mich App 183; 804 NW2d 764 (2010), lv gtd 490 Mich 887; 804 NW2d 118 (2011). Thus, given the current uncertainty concerning the effect of defense counsel’s actions, as well as the fact that defendant raises a concurrent claim of ineffective assistance concerning this issue, we will treat this issue as preserved. This Court reviews de novo any trial court decision that invokes constitutional questions or statutory interpretations. *People v Rose*, 289 Mich App 499, 505; ___ NW2d ___ (2010).

Criminal defendants are constitutionally entitled to a public trial; this right may only be abrogated under limited circumstances. US Const, Am 6; *Waller v Georgia*, 467 US 39, 48-49; 104 S Ct 2210; 81 L Ed 2d 31 (1984). MCL 600.2163a(15) and (16) permit a party to move for special arrangements to protect the welfare of a witness; one such arrangement is to close the courtroom and exclude unnecessary parties during the witness’s testimony. In order to do so, the trial court must make findings on the record to establish that the special arrangement is: (1) justified by the government’s substantial interest (for partial closure) or a compelling interest (for total closure); and is (2) is narrowly tailored towards protecting the welfare of the witness. MCL 600.2163(a)(16); *People v Kline*, 197 Mich App 165, 168-171; 494 NW2d 756 (1992). Specifically, the court must weigh the following factors against the right of the accused to a public trial: (1) the age of the witness; (2) the nature of the offense; and (3) the potential harm to the witness. *Id.* at 171.

Here, the trial court made no findings of fact to establish the government’s superseding interest in protecting the witness; in so doing, the trial court committed clear constitutional error. Nevertheless, where the closure order is narrowly drawn, reversal is not required prior to a determination that defendant’s right to a public trial outweighed the interest asserted by the government in protecting the complaining witness. *Kline*, 197 Mich App at 172; see also *Waller*, 467 US at 49-50 (stating that automatic reversal is not warranted for violations of the right to a public trial, and that the remedy should be proportionate to the violation). Under similar circumstances to the present case, the *Kline* court recognized “that a defendant is not required to show prejudice to obtain relief for a violation of the right to a public trial,” but held that the failure to make appropriate factual findings at the time of the closure did not require reversal. *Kline*, 197 Mich App at 172. Instead, the *Kline* court found that remanding the case for additional factual findings while retaining jurisdiction to determine whether the (in that case partial) closure was justified under the circumstances was the proper remedy for the defendant, under circumstances where the trial court’s closure order itself was narrowly drawn. *Id.* at 172.

Although the trial court in the case at bar does not specify the type of closure, it closed the courtroom only during the complainant's testimony and stated that "the courtroom will be closed then to all persons not necessary to the proceeding during the minor victim's testimony."² While it could be argued that the trial court adopted plaintiff's argument in its motion, since the court decided the issue immediately after plaintiff moved to close the courtroom, this is not explicitly set forth in the trial court's decision. Therefore, we remand for factual findings as required by *Kline*, after which we can properly review the question of whether the closure violated defendant's rights. "Remanding the case to the trial court will fully protect defendant's rights." *Kline*, 197 Mich App at 172.³

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence presented at trial was insufficient to convict defendant of CSC1 beyond a reasonable doubt. While this Court reviews the trial court's verdict de novo under a challenge based on the sufficiency of the evidence, this Court must also consider all the evidence in the light most favorable to plaintiff. *People v Kissner*, ___ Mich App ___; ___ NW2d ___ (Docket No. 296766, 2011). In so doing, this Court must determine whether a reasonable factfinder could determine that each element of the crime was proven beyond a reasonable doubt. *Id.* We defer to the factfinder's credibility determinations, reasonable inferences and factual findings from the record. *Id.* Since defendant must establish that the evidence is insufficient to support a conviction, plaintiff "need not negate every reasonable theory consistent with innocence." *Id.* [citation omitted.]

Michigan has defined the elements of CSC1 in pertinent part as follows:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age. [MCL 750.520b.]

Sexual penetration has further been defined as "sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r); *People v Szalma*, 487 Mich 708, 725; 790 NW2d 662 (2010). A person over the age of 17 years

² To the extent defendant asserts that the entire trial was closed to the public, the record does not support defendant's argument.

³ Defendant also attempts to assert that the public's First Amendment rights were violated because the court closed the trial to the press and the public. However, defendant lacks standing to assert the alleged violation of the public's right to attend the trial, since he was not injured in a "manner differently [from] the citizenry at large." *Rohde v Ann Arbor Public Schools*, 265 Mich App 702, 705; 698 NW2d 402 (2005).

who commits CSC against a person below the age of 13 years may be sentenced to prison for a term ranging from twenty five years to life. MCL 750.520b(2)(b). Since CSC is a general intent crime, no showing of sexual purpose is necessary for a conviction. *Szalma*, 487 Mich at 725.

When viewing the facts in the light most favorable to the prosecution, it is clear that the prosecutor satisfied each element of CSC1 to support defendant's conviction. It is beyond dispute that the complainant was less than 13 years old at the time of the assault and that defendant was more than 17 years old at that time. The complainant testified that she saw defendant's face and identified him by clothing, height, hair, and the drink he was carrying before defendant initiated the assault. She testified that defendant put his penis inside her vagina while threatening to kill her family if she told anyone; this act qualifies as sexual penetration under the statute. Although the timetables testified to by the witnesses concerning the events of the evening were somewhat variable, it is reasonable for a factfinder to conclude that these minor errors were based on the lapse of time between the assault and the trial date. The complainant's testimony was also consistent with Guertin's medical findings. Since a rational factfinder could determine that each element of the crime had been proven beyond a reasonable doubt, defendant's assertion that the evidence was insufficient is meritless.

IV. PROSECUTORIAL MISCONDUCT

Defendant also argues that his due process rights were violated when the prosecution knowingly presented false testimony against defendant, which rendered his trial fundamentally unfair. In order to properly preserve a matter for appellate review in a criminal hearing, the issue must be raised before the trial court. *Dupree*, 486 Mich at 703. If a party fails to timely object to prosecutorial misconduct, the matter is waived on appeal unless: (1) a jury instruction could not have cured the prejudice to defendant; or (2) "failure to consider the issue would result in a miscarriage of justice" (plain error review). *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Since defendant failed to object to any of plaintiff's alleged misconduct or to the inconsistent testimonies of the witnesses, we will not reverse unless an obvious error occurred that "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Meissner*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298780, 2011).

While a prosecutor's role is to seek justice rather than mere convictions, the prosecutor has wide latitude on arguing facts—as well as reasonable inferences extrapolated from those facts—at trial. *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973); *Dobek*, 274 Mich App at 66. A prosecutor may not argue facts not admitted into evidence during opening or closing arguments. *Meissner*, ___ Mich App at ___. The prosecution also is not allowed to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness'[s] truthfulness." *People v Bennett*, 290 Mich App 465, 476-477; 802 NW2d 627 (2010) [citation omitted.]

Additionally, the prosecution has a duty to correct any known false testimony presented on the record. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A conviction acquired through the prosecutor's known use of perjured testimony is a clear violation of a defendant's due process rights guaranteed under the US Constitution; the remedy for this violation is to vacate the conviction if there is any reasonable likelihood that the false testimony

could have affected the factfinder's decision (i.e. it is material to the decision). *Id.*, US Const, Am 14. Perjury occurs when a person willfully swears falsely while under oath by statute. MCL 750.423; *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005).

Defendant's assertion of prosecutorial misconduct is meritless. First, he fails to demonstrate how inconsistent timelines and tangential factual differences between the witnesses regarding events that occurred approximately sixteen months prior to trial prove their testimony was willfully false. Although defendant casually asserts that the witnesses had a motive to lie, he offers no evidence to support his bald assertion aside from the complainant's distaste for defendant. To the contrary, the record establishes that the witnesses (other than the complainant) got along well with defendant, up until the time the sexual assault was reported. Defendant offers no possible explanation for why Guertin would lie on the stand, let alone how Guertin lied under oath. The only testimony that could possibly rise to perjury was Bobby's statement that he did not confront the witness on January 15, 2010, after discovering the assault; however, this inaccuracy is clearly not material to defendant's conviction.⁴ Further, defendant's attorney cross-examined the witnesses regarding their inconsistencies and explored their credibility; therefore, defendant suffered no prejudice from any of this testimony because the trial court was able to weigh these matters when determining the credibility of the witnesses. Thus, the misstatements at trial, if any, are insufficient to grant defendant relief from the verdict.

Defendant's remaining arguments that plaintiff improperly vouched for the credibility of the witnesses and argued facts not in evidence are clearly false. The complainant testified during trial that she identified defendant based on his height, clothing, and hair. Further, plaintiff's assertion that people were entering and leaving the home during the night is a reasonable inference, based on the fact that: (1) a party was going on until the early evening; (2) the complainant returned home late that night; and (3) the complainant's sister returned and then left the home again. Additionally, defendant fails to point to any of plaintiff's statements in the record that improperly vouched for the credibility of the witnesses.⁵

V. INEFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of counsel is "a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error, while any constitutional determinations are reviewed de novo. *Id.* Defendant preserved these issues when he moved this Court for a remand for an evidentiary hearing. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858

⁴ This statement contradicts the information contained in Officer Davis's police report. Regardless, the conflict between these two statements merely raises a question of credibility; it does not provide the prosecution with ironclad knowledge that Bobby's statement on the record was false.

⁵ Plaintiff's statement that the witnesses have no motive to lie was a general statement that was based on the fact that the witnesses got along with defendant until after the assault was reported; this too is a reasonable inference from the testimony presented at trial.

(1994). However, because there was no *Ginther*⁶ hearing below regarding ineffective assistance of counsel, this Court's review of defendant's claim is limited to mistakes apparent in the appellate record. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Defendant bears a high burden in proving that his trial counsel was so deficient as to functionally deprive defendant of his right to effective counsel at trial. *Meissner*, ___ Mich App at ___. An attorney's actions are presumed to be the result of sound trial strategy, and this burden is difficult to overcome. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The US Supreme Court has set forth a two-prong test to determine whether counsel was ineffective in a given case. First, defendant must prove that his trial counsel failed to meet an objective standard of reasonableness. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, defendant must establish prejudice, which is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The crux of this test is to determine whether the mistakes by defendant's counsel effectively deprived defendant of the right to a fair trial. *Meissner*, ___ Mich App at ___. Since decisions involving the selection and presentation of evidence—including witnesses—at trial is a matter of trial strategy, the failure to call a witness can only rise to ineffective assistance of counsel when doing so "deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988).

Defendant argues that his counsel was ineffective because he failed to: (1) object to plaintiff's vouching for the witnesses' credibility; (2) object to plaintiff's use of facts not in evidence; (3) object to the courtroom closure; (4) voir dire Guertin regarding his credentials; and (5) call an expert witness.

As noted above, the record is absent of any evidence that plaintiff vouched for the witnesses' credibility or that plaintiff argued facts not in evidence. This issue has no merit.

Guertin's expert credentials were also lengthy and detailed; he has testified as an expert in this field (child sexual abuse and pediatrics) approximately 500 times all across the country (including Canada) since 1984. Accordingly, it would have been entirely futile to voir dire Guertin regarding his credentials, since the evidence overwhelmingly suggests that the trial court would admit Guertin as an expert witness. Defense counsel is not ineffective for failing to raise a meritless objection or advance a futile argument. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Trial counsel did not act objectively unreasonably.

Although defendant's counsel did not call an expert witness, a decision on the presentation of evidence is a matter of trial strategy. In this case, defendant's counsel attempted to prevail by challenging the credibility of plaintiff's witnesses and arguing that defendant was not the perpetrator of the crime. Defendant has not pointed to a substantial defense that was forfeited by his counsel's failure to call an expert witness.

⁶ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant also argues that counsel's failure to object to the courtroom closure amounted to ineffective assistance of counsel. Because we have not determined whether an objection to the closure would have been meritorious, we reserve resolution of this question until the remand has been completed. As discussed above, a remand is consistent with the result in *Kline* to determine whether the trial court can satisfy the elements listed in *Kline* for closure of the courtroom.

Affirmed in part and remanded for the trial court to state the factual findings upon which it concluded that the courtroom should be closed during the complainant's testimony. We retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro

Court of Appeals, State of Michigan

ORDER

People of MI v Alexander Christian Bowers

Docket No. 301811

LC No. 10-000560-FC

Jane M. Beckering
Presiding Judge

Donald S. Owens

Douglas B. Shapiro
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court is to state the factual findings upon which it concluded that the courtroom should be closed during the complainant's testimony. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of any papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JAN 24 2012

Date


Chief Clerk